REPORTS

OF

CASES IN LAW AND EQUITY

DETERMINED BY THE

SUPREME JUDICIAL COURT

OF

MAINE.

By JOSEPH WHITMAN SPAULDING,
REPORTER TO THE STATE.

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JUDGES

OF THE

SUPREME JUDICIAL COURT,

DURING THE TIME OF THESE REPORTS.

HON. JOHN APPLETON, LL.D., CHIEF JUSTICE.
HON. CHARLES W. WALTON.
HON. WILLIAM G. BARROWS, 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.

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* Term expired April 23, 1882. Vacancy not yet filled.

Table of Cases Reported.

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CASES

IN THE

SUPREME JUDICIAL COURT,

OF THE

STATE OF MAINE.

CHARLES P. BARTLETT, in *scire facias*, *vs.* THOMAS STEARNS.

Oxford. Opinion September 8, 1881.

Scire facias. Sale of equity of redemption.

A sale by an officer upon execution for a gross sum of all the right in equity which the judgment debtor has to redeem a certain parcel of property from two or more mortgages is not a sale of two or more equities when the several mortgages cover the same property and no other, and is not, therefore void as the joint sale of two or more distinct equities upon execution would be.

The head note to *Smith* v. *Dow*, 51 Maine, 21, to the effect that the same rule applies, "whether other pieces are included in the mortgages or not," is not warranted by anything in the case.

ON AGREED STATEMENT.

An action of *scire facias* whereby the plaintiff seeks to obtain an *alias* execution on a judgment recovered by the plaintiff against the defendant, on the third day of October, 1877, before the Supreme Judicial Court, Oxford county, for the sum of $254.46, debt or damage, and $13.78, costs of suit.

It is agreed by the parties that the judgment mentioned was duly recovered, that on the eighth day of October, 1877, an execution was duly issued thereon and placed in the hands of a deputy sheriff in and for said county, who thereafterwards, on the twentieth day of said October, by virtue of said execution took and proceeded to sell and did after due notice sell at auction, all the right in equity which the said Stearns had to redeem the homestead farm and buildings thereon, situated in Bethel, in said county, from two mortgages, to wit: one mortgage, given by said Stearns to R. A. Chapman to secure the sum of $600 and interest thereon, and another mortgage given by said Stearns to William Brown to secure the sum of $467.66 and interest thereon; that the said deputy sheriff sold to the plaintiff the said Stearns' right to redeem said homestead farm from both of said mortgages at one sale at the same time and place and for one gross sum, to wit: the sum of $267.40, from which he deducted the sum of $16.24 charges and fees for said sale, and applied the balance of $251.23 in part satisfaction of said execution, and made due return thereof; that thereafterwards on December 15, 1877, the said deputy sheriff made and executed to the purchaser of said right, so as aforesaid sold, a deed thereof which was duly recorded.

If the action is maintainable, and if the sale was void, for the reason that the right in equity of redeeming from both mortgages was sold at one sale, at the same time and place and for one gross sum, then the plaintiff is to have an *alias* execution for the original amount of the judgment, and interest from the date of said judgment; otherwise judgment to be rendered for the defendant.

R. A. Frye, for the plaintiff.

D. Hammons, for the defendant.

BARROWS, J. If, on account of a mistake in the mode of proceeding, no interest in the land passed by the sale of the defendant's equity of redemption upon execution, the return of satisfaction by the officer thereon ought not to stand, for the judgment is not in reality satisfied.

The debtor loses and the creditor gains no rights by virtue of the erroneous proceedings, and the creditor's remedy is by a writ of *scire facias* at common law to obtain a new execution on his judgment. *Pillsbury* v. *Smyth*, 25 Maine, 427, and cases there cited. The right of the plaintiff to revive his judgment is unquestionable if it be true that the seizure and sale of all the right in equity which the defendant had to redeem his homestead farm from two mortgages successively given by the defendant on the same property were void because said right of redeeming from both mortgages was sold at one sale at the same time and place and for one gross sum.

That a joint sale for a gross sum of two or more rights in equity of redeeming several parcels of land from several mortgages will be void although the tracts covered by the several mortgages are *in part* the same, was held by this court in *Smith* v. *Dow*, 51 Maine, 21. But the reporter's note in that case to the effect that the same rule applies "whether other pieces are included in the mortgages or not" is not warranted by anything in the case; and it still remains an open question whether the right in equity which remains in a debtor to redeem the same parcel of land subjected by him to successive mortgages must necessarily be regarded and treated when the same comes to be sold on execution against him as if there were as many distinct equities of redemption as there are mortgages.

The question is not free from difficulty, and the right of creditors to sell upon execution their debtors' right of redemption in mortgaged real estate, and the interests acquired by purchasers at such sales, are liable to be seriously affected, whatever the answer. Perhaps the most satisfactory solution may be reached by an examination of the reasons which are given for holding that a joint sale of two entirely distinct equities for a gross sum is invalid.

In *Stone* v. *Bartlett*, 46 Maine, 438; *Smith* v. *Dow*, 51 Maine, 21, and *True* v. *Emery*, 67 Maine, 31, where the doctrine of the invalidity of a sale upon execution for a gross sum of two or more rights in equity in several parcels of land arising under several mortgages is asserted or recognized, the

case of *Fletcher* v. *Stone*, 3 Pick. 250, is referred to as authority for it. The reasons assigned in the above named cases for holding this doctrine are that a joint sale for a gross sum is inconsistent with the exercise of the debtor's right to redeem any one parcel from the sale without redeeming the others; that the statute does not authorize the sale of numerous equities for one sum, and that as the equities are several the sales must be several; that the sum likely to be realized for the equities when sold together would be less than it would be from separate sales and hence a joint sale is prejudicial to both the debtor and creditor. The reasons are good and sufficient, and if the right which a debtor has to redeem from several mortgages of the same parcel of property really constitutes as many equities of redemption in him as there are mortgages, it is clear they should be separately sold. But every successive mortgage of the same parcel of real estate conveys from the mortgagor the right which he before had, subject to the right of redemption thereby created, so that, let the number of mortgages be what it may, the only substantial existing right in equity which the debtor *has* is the right to redeem from the last of the series and (upon the exercise of that right) from the next, under the right to which he is restored by the act of redeeming it from the incumbrance which he had imposed upon it, and so on in their order, to the first. The right to redeem is distinct from the duty to pay. The payment of no mortgage in the series except the last by the owner of the equity can confer any right to redeem the prior incumbrances. He who holds by purchase from such owner the right to redeem from the latest incumbrance may acquire the whole estate. But the purchaser of the right to redeem from any other mortgage in the series might not—would not, if the holders of the subsequent mortgages asserted their rights. The successive equities are not absolutely distinct, but depend upon each other like the links in a chain. So far as the debtor is concerned, a sale of the right to redeem from the latest valid outstanding mortgage carries with it all prior equities, and, if such sale is made specifically to include the others, it adds nothing to the value of the estate which passes from him, while he certainly (however it might be with other

attaching creditors of his) is estopped to deny the validity of his own deeds.

That the existence of prior mortgages and the apparent incumbrance thereby created should be made known at the sale, is necessary to prevent the purchaser from being defrauded. The seller however may or may not sell subject to them. If he does, the purchaser is precluded from disputing their existence and validity. *Russell* v. *Dudley*, 3 Met. 147. In this case, SHAW, C. J., remarks as follows; "The purchase money must be understood to be the value of the estate over and above the sum for which it is mortgaged. If he (the purchaser) could afterwards avoid the mortgage and hold the whole estate he might get it for a very inadequate consideration; he would get what the officer never intended to sell, to the manifest injury of the debtor and perhaps of the creditor."

It is necessary then in such cases by proper notice and reservation to make the sale subject only to such valid and outstanding mortgages as will exhibit the actual right of the debtor in the estate, if the creditor would give the purchaser a right to contest either of the mortgages, and to redeem and hold the estate by paying such of them only as are valid and just.

On the other hand one creditor cannot by attaching an equity of redemption and thereby recognizing the mortgage as valid deprive others of the right to treat it as void and to seize the land itself. *Bullard* v. *Hinkley*, 6 Maine, 289. If the mortgage debt is paid before the right of redemption is taken, there being no mortgage subsisting, nothing passes by the sale. *Brown* v. *Snell*, 46 Maine, 490.

Upon the whole the position of a creditor attaching an equity of redemption seems to be this: he must at his peril ascertain what is the latest valid outstanding incumbrance by way of mortgage upon the land and, in seizing that, he seizes all the proper right in equity of redemption in that parcel of land which the debtor has. If he would save the right to contest any of the apparent mortgages he must, by proper reservation in his notices and at the sale avoid any admission of their validity. In so doing he must be held to warrant the estate to the purchaser as against

them. If he sells the debtor's right subject to all the apparent mortgages the debtor cannot complain, and if either of them is a valid outstanding incumbrance the debtor's estate passes, and the purchaser may redeem, both being estopped to dispute the validity of any of the mortgages.

It is plain that in order to make the debtor's right available for the payment of the debt to its full value it is necessary that the creditor before undertaking to sell should have accurate and reliable information as to the validity of the various mortgages, if there is more than one, and as to the amount due upon them. But in the doctrines established by the decided cases we nowhere find the court has recognized more than one right in equity of redemption in one and the same parcel of land capable of being seized on execution as the property of the debtor, and that is the right arising under the latest valid subsisting mortgage, which right draws after it all the rest.

Thus in *Milliken* v. *Bailey*, 61 Maine, 317, the purchaser of a debtor's equity in land subject to two mortgages at a sale made without reference to the second apparent mortgage or any admission of its validity, was permitted at his own peril to redeem the first and contest the second. But it was solely upon his ability successfully to resist the second that his right to hold the estate was made to depend. If he was able to establish the invalidity of the second mortgage he took all the debtor's right of redeeming from the first. As the court say in *Thompson* v. *Chandler*, 7 Maine, 382; "after each successive incumbrance there still remains in the mortgagor a right to redeem upon the payment of all the mortgages created; this right a creditor may seize and sell and this sale is a statute conveyance from the mortgagor to the purchaser."

This remark is predicated upon the assumption that all the successive mortgages are valid and subsisting. Where confusion and controversy have arisen it has generally been from failure to discriminate between real and merely apparent mortgages. Upon the whole we conclude that the debtor's right of redemption of the same property from all valid successive mortgages must be

regarded for the purpose of seizure and sale upon execution as substantially a unit.

It is not perceived how independent sales of the rights under successive mortgages could be made to subserve any good and legitimate purpose for the benefit of either debtor or creditor.

Thus the reasons assigned for requiring separate sales where the mortgaged property is in whole or in part not identical do not apply. The case does not show that Bartlett did not acquire all the debtor's actual right of redemption in the mortgaged property.

Judgment for respondent.

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

IRVING J. BROWN *vs.* S. STILLMAN WEST, and HALL L. DAVIS, Trustee.

Cumberland. Opinion September 27, 1881.

Trustee process. Necessaries. R. S., c. 86, § 55.

A claim for necessaries is merged in and extinguished by a judgment rendered in a suit upon the claim, and an action upon such a judgment is not a suit for necessaries furnished, within the meaning of R. S., c. 86, § 55.

ON AGREED STATEMENT OF FACTS from superior court.

It was agreed that this action was brought on a judgment which was recovered in an action on account annexed for necessaries furnished by the plaintiff for the defendant, within the meaning of R. S., c. 86, § 55. And the trustee disclosed that he was indebted to the principal defendant in the sum of $13.20 as wages for the personal labor of the defendant performed within one month next preceding the service of the writ upon the trustee.

Augustus F. Moulton, for the plaintiff.

The statutes, (R. S., c. 86, § 55, clause sixth) do not say "any action on account for necessaries," but puts it broadly in general terms "any suit for necessaries." The undoubted intent was that wages in no event were to be exempt from trustee process on a debt for necessaries actually furnished.

Now while neither party can go behind the judgment for the purpose of attacking it, yet the original cause of action may be looked at for a purpose not inconsistent with the validity of the judgment, and designed to carry it into effect. *Evans* v. *Sprigg*, 2 Md. 473. And a judgment instead of being regarded as strictly a new debt is sometimes held to be the old debt in a new form, to prevent a technical merger from working injustice. *Clark* v. *Rowling*, 3 Comst. (N. Y.) 216. See also, *Betts* v. *Bagley*, 12 Pick, 579: Freeman on Judgments, § 244; *Dresser* v. *Brooks*, 3 Barb. 440.

O. M. Metcalf, for the defendant and trustee, cited: 32 Maine, 418; 36 Maine, 15; 4 Allen, 397; 35 Maine, 126; 10 Cush. 43; 9 Gray, 211; 11 Gray, 399.

APPLETON, C. J. This is an action of debt on a judgment recovered for "necessaries furnished" the defendant or his family. It embraces the amount due in the original suit and the costs of its recovery. It is not for necessaries furnished within the meaning of R. S., c. 86, § 55. That claim was merged in the judgment rendered in the suit to recover the amount due. The old debt is extinguished. The judgment constitutes the only existing cause of action. The nature of the security is changed. The statute of limitations is enlarged. While some rights are lost others are gained. But the suit is not a suit for "necessaries furnished" the defendant's family, and the trustee is not chargeable. *Bicknell* v. *Trickey*, 34 Maine, 273; *Uran* v. *Houdlette*, 36 Maine, 15; *Bangs* v. *Watson*, 9 Gray, 211.

The labor was performed within one month next preceding the service of the trustee process, hence, by the terms of the statute, the alleged trustee is not to be charged.

Trustee discharged.

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

ROBERT MARTIN, administrator on the estate of ROSANNA WALL,

vs.

ÆTNA LIFE INSURANCE COMPANY.

Cumberland. Opinion October 21, 1881.

Life Insurance. Adopted Children.

By a life insurance policy in the name of a wife on the life of a husband the amount of the policy was payable to the wife, her executors, administrators or assigns, if she survived her husband; otherwise to their children for their use or to their guardian if under age. The wife did not survive her husband. *Held*, that the children were the sole beneficiaries and the policy became payable to them.

In such a case where a child by adoption is the only child, and is of age, and the circumstances show that the parties intended that he should be included in the benefits of the policy, he is entitled to all the proceeds of the policy and an action upon it should be in his name.

ON AGREED STATEMENT OF FACTS from the superior court.

The opinion states the material facts.

The following questions were submitted to the determination of the court, with full power to make such inferences from the agreed facts as a jury might do.

I. Is the said John Edward Wall the child of John Wall, Jr. and Rosanna Wall, within the meaning of the terms of the policy?

II. If he is so, is said insurance due and payable directly to him by said company?

III. Can the plaintiff as the administrator of Mrs. Wall's estate maintain this action?

IV. If the plaintiff as administrator can maintain this action, and yet the court find John Edward Wall to be the child of John Jr. and Rosanna Wall within the meaning of the policy, and there are debts due from her estate in excess of her personal property, would the amount of the insurance be assets in the hands of the administrator for the liquidation of such debts, there being real estate sufficient for that purpose?

The defendant company admitted liability, and was willing to pay the loss to the party entitled to receive it, as the court should adjudge.

Ray and Dyer, for the plaintiff.

The action is properly brought in the name of the administrator of Rosanna Wall. She and the defendant company were the only parties to the contract. In England it is now clearly settled that a stranger to the consideration cannot enforce the performance of a contract. 1 Chitty's Pl. 4 note *u*. And the same is decided to be the law in America. *Ibid.* and authorities there cited. *Mellen* v. *Whipple*, 1 Gray, 317; *Exchange Bank* v. *Rice*, 107 Mass. 41; *Burroughs* v. *Mutual Life Ass. Co.* 97 Mass. 359; *Bailey* v. *N. E. Ins. Co.* 114 Mass. 177; *Carr* v. *National Security Bank*, 107 Mass. 45.

John Edward Wall has no interest in this policy. He was not the child of John and Rosanna Wall. He was not even adopted by any legal ceremony. The words child and children mean only legitimate child and children. 2 Jar. Wills, c. 32; *Kent* v. *Barker*, 2 Gray, 535; *Sewell* v. *Roberts*, 115 Mass. 262; *Burrage* v. *Briggs*, 120 Mass. 103; *Sohier* v. *Inches*, 12 Gray, 385.

Bion Bradbury, for the defendant, cited: *Hawes* v. *Smith*, 12 Maine, 431; *Cobb* v. *Lime Rock F. and M. Ins. Co.* 58 Maine, 328; 2 Pars. Mer. Law, 480; *Bohanan* v. *Pope*, 42 Maine, 96; *Brewer* v. *Dyer*, 7 Cush. 337; *Hinkley* v. *Fowler*, 15 Maine, 285; *Motley* v. *Manufacturing Ins. Co.* 29 Maine, 340; *Stimpson* v. *Mut. Fire Ins. Co.* 47 Maine, 385; *Carnogie* v. *Morrison*, 2 Met. 381.

DANFORTH, J. This is an action upon a policy of insurance upon the life of John Wall, Jr. issued to his wife Rosanna Wall, and payable "to the said assured, her executors, administrators, or assigns for her sole and separate use and benefit . . . and in case of the death of the said Rosanna Wall before the decease of the said John Wall, Jr. the amount of the said insurance shall be payable to their children for their use, or to their guardian if under age." The action is in the name of the administrator of

the wife, and four questions are submitted for answers upon an agreed statement of facts.

1. Is the said John Edward Wall the child of John Wall, Jr. and Rosanna Wall within the meaning of the terms of the policy? The case shows that he was not theirs by birth but was theirs by gift and adoption. If the word is to be understood in its ordinary sense, as used in wills and such instruments, without anything in the circumstances to qualify its meaning, it is clear he must be excluded. But this policy is a contract, and must be so construed as to carry out the evident intention of the parties. To accomplish this it is not only admissible but necessary to enquire into the circumstances of the parties to the contract as well as their contemporaneous acts. The word child in legal documents is not always confined to immediate offspring. It may include grand-children, step-children, children of adoption, &c. as may be necessary to carry out the intention. Abbott's Law Dic. Art. Child.

At the date of the policy, Mr. and Mrs. Wall had no child except John Edward whom they had previously adopted. The adoption was before he was one day old. Every possible pains was taken to furnish all the evidence possible that he was their own child and to conceal at least from him all information to the contrary; in which they were successful until after their decease. This conduct is inexplicable if at the date of the policy they expected other children and intended to exclude him from its benefits. It is equally inexplicable why this provision was inserted if no others were expected, unless he was to be included in its benefits. These facts lead conclusively to the inference that their intention was to provide for this child as well as for any others they might subsequently have.

2. The answer to the second question follows necessarily from that to the first. As he is the only child left he is by the express terms of the policy entitled to the amount of it. *Gould* v. *Emerson*, 99 Mass. 154. *Burroughs* v. *State Assurance Co.* 97 Mass. 359.

3. Can the present plaintiff maintain this action? He is the administrator of Mrs. Wall's estate. The cases cited in the

arguments shed but little light upon this question. They discuss mainly the question whether when a promise is made to one party for the benefit of a third, the latter may maintain an action for the breach of such promise. The cases cited from our own reports are clearly sufficient to maintain the affirmative of this much mooted proposition. In Massachusetts the same rule was formerly considered as well settled law. *Brewer* v. *Dyer*, 7 Cush. 340. Later decisions in that commonwealth have considered the general rule to be otherwise, that the action can only be maintained by the party to whom the promise was made and from whom the consideration moved, but have in certain cases allowed actions in favor of beneficiaries, which they call exceptions to the general rule. These exceptions are allowed for various reasons, as appears in *Mellen* v. *Whipple*, 1 Gray, 317. While in England, under the later decisions, the weight of authority is against sustaining such actions, in this country it seems to be in favor. 2 Green. Ev. § 109; 2 Parsons on Contracts, 468; 1 Chitty on Pleading, 4, and note; 1 Chitty on Contracts, 74, and note (11th ed.) and cases cited.

But whatever of conflict there may be in the authorities as to whether the action can be maintained in the name of the beneficiary, where it is so held the general rule is that it may also be maintained in the name of the person to whom the promise is made. Metcalf on Contracts, 211; and when so maintained the amount recovered is held in trust for the beneficiary. *Swan* v. *Snow*, 11 Allen, 224.

While then this class of cases do not show that the plaintiff may not maintain this action, they do show that the intention of the parties as evidenced by the terms of the contract must govern. To whom was the promise made? The contract was made with Mrs. Wall. The amount was payable to her, her executors, administrators or assigns for her sole and separate use and benefit, but in case of her death before that of her husband, the payment was to be made to their children for their use. The promise to her was contingent upon her surviving her husband. She did not so survive. Thereby her interest in the policy and the promise to her ceased, and both the interest and the promise

by the express provision of the policy was transferred to the child. He then became not only the sole beneficiary, but the only person who can avail himself of the promise. A further evidence that such was the intention of the parties is found in the fact, that in case of minority it was to be paid to a guardian, an unnecessary provision, if the administrator was to receive it in trust, as he must if he recovers in this action. This construction of the policy is in accordance with the principles settled in *Knickerbocker Ins. Co.* v. *Weitz*, 99 Mass. 157; and *Cragin* v. *Cragin*, 66 Maine, 517; and in accordance with the principles on which a beneficiary may recover as laid down in *Mellen* v. *Whipple*, *supra*, as well as in accordance with our own decisions.

Plaintiff nonsuit.

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

THOMAS SHERMAN, petitioner for review, *vs.* MICHAEL WARD.

Cumberland. Opinion October 21, 1881.

Review. Petition for. Exceptions.

A review may be granted of right in certain cases when the default is without appearance, (R. S., c. 89, § 1,) or it may be granted as a matter of discretion, and to the exercise of the discretionary power of the court, exceptions will not lie.

ON EXCEPTIONS.

Petition to review a judgment rendered in the superior court, Cumberland, at the September term, 1880, against this petitioner and in favor of the respondent, for one thousand dollars debt or damage, and costs of court taxed at $14.81. The petition sets out *inter alia*, that the petitioner is an inhabitant of Montreal, in the province of Quebec, dominion of Canada, and at the time of the service of the original writ, he was about departing from Portland for Montreal, and that after giving a bail bond he departed for Montreal and has not since returned; that before

leaving Portland he employed counsel and directed them to appear and answer to said suit at the return term, but through accident, inadvertance and mistake and without fault, they failed to enter an appearance in the suit, and the same was defaulted without the knowledge of the petitioner or his counsel; whereby justice was not done and he was deprived of making his defence, which was stated.

The presiding justice found that the allegations in the petition as to the cause and manner of the default were true, and granted the prayer of the petition as matter of discretion.

Strout and Holmes, for the plaintiff.

Thomas and Bird, for the defendant.

Review cannot be granted by reason solely of the negligence and carelessness of counsel.

That a review should not be granted to relieve against carelessness or negligence, see *Thayer* v. *Goddard*, 19 Pick. 66. In *Shurtleff* v. *Thompson*, 63 Maine, the ground on which the review was granted was mistake.

APPLETON, C. J. This is a petition for a review. The petitioner, a resident in a foreign jurisdiction, was defaulted without appearance, and judgment was rendered against him in damages for one thousand dollars and costs.

A review may be granted of right in certain cases when the default is without appearance. R. S., c. 89, § 1, case 1st; or it may be granted as matter of discretion. Here the presiding justice granted a review as a matter of discretion. Under the circumstances of the case, it was a judicious exercise of discretion. To the exercise of the discretionary power of the court, exception will not lie. A petition for a review is like a motion for a new trial. It is addressed to the discretion of the court. *Boston* v. *Robbins*, 116 Mass. 313.

It is urged that the default occurred through the lack of memory on the part of the counsel retained, but that was a matter for the consideration of the justice granting the review. In the English court, when the plaintiff was nonsuited through the neglect of the attorney in seasonably instructing counsel, the case having been

called sooner than was anticipated, the court granted a new trial, upon the payment of costs by the attorney. *Townley* v. *Jones*, 98 E. C. L. 288. In this case no conditions were imposed, and whether they should be, was within the discretion of the justice granting the review. *Jones* v. *Eaton*, 51 Maine, 386.

Exceptions overruled.

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

WILLIAM LAWRY, administrator on the estate of SUBMIT LAWRY, deceased, in equity, *vs.* SETH SPAULDING and wife.

Penobscot. Opinion November 8, 1881.

Bill in equity. Resultant trust.

L and S purchased a lot of land and took a deed in S's name. S purchased of L his interest and gave a mortgage on one-half the land to secure the amount of the purchase money, the mortgage running to the wife of L. It was discovered that the grantor to S did not hold the record title and S procured a deed from the person in whom was the title in trust for the grantor to S and had the deed run to his (S's) wife for the purpose of defeating the mortgage to the wife of L.

Held, 1. That the wife of S held the property in trust for L and S in equal proportions.

2. That L could enforce his equitable rights against the wife of S and would have been entitled to the aid of the court if the mortgage had been made to him.

3. That the wife of L, to whom the mortgage was made, was equally entitled to the protection of the court whether she held it in her own right or as the trustee of her husband.

4. That this was not a case where the complainant is required to proceed at law before he can claim the interference and protection of a court of equity.

BILL IN EQUITY, heard on bill, demurrer and joinder.

The bill sets forth the facts stated in the opinion, and prayed that "Elvira Spaulding and Seth Spaulding by a decree of this court be required to secure said notes in substance as they and each of them in equity and good conscience ought to have done."

Barker, Vose and Barker, for the plaintiff.

Plaisted and Smith, for the defendant.

APPLETON, C. J. The demurrer to the complainant's bill admits the facts therein set forth. The inquiry then arises, whether it states a case in which the complainant is entitled to the aid of a court of equity. We think it does.

It appears that William Lawry and Seth Spaulding on November 15, 1854, purchased of John Hall a tract of land in Hermon, each paying half the price, and that the conveyance was made to Spaulding alone.

On October 21, 1856, Spaulding conveyed to Lawry an undivided half of the Hermon lot, but the deed was not placed on record.

On April 30, 1860, Spaulding and Lawry exchanged the Hermon lot for one in Glenburn with one Abraham Close, taking a conveyance from him to Spaulding.

On May 11, 1861, Spaulding agreed with Lawry to purchase his half of the Glenburn lot for the sum of two hundred dollars, and to give him therefor three notes of that date, each for sixty-six dollars and sixty-six cents with interest, in one, two and three years, and to secure the same by mortgage of an undivided half of the Glenburn lot which he held in trust for said Lawry, the notes and the mortgage running to Submit Lawry, his wife, as whose administrator, Lawry brings this bill.

It appears that Close, when he conveyed on April 30, 1860, the Glenburn lot, had no title to the same, but that the title was in one John C. Clements in trust for him, and that said Clements on June 23, 1864, at the instance of said Spaulding, conveyed the same to Elvira Spaulding, the wife of said Seth, in trust for him, and for the purpose of defeating the mortgage given by him to Submit Lawry.

The consideration for the conveyance from Clements to Elvira Spaulding was the conveyance of the lot in Hermon to Close. This lot was owned by Lawry and Spaulding. No part of the consideration of the Clements deed was furnished by Elvira Spaulding. She paid nothing for it. She held the estate as trustee. As half of the consideration of the Clements deed was from Lawry, she held the estate, so far as regards him, in trust for him. It is the not unusual case of a resulting trust. The

consideration for the conveyance from Clements having been furnished by Lawry and Spaulding equally, the trustee holds the Glenburn lot in trust for each in equal proportions. *Corey* v. *Greene*, 51 Maine, 114; *Dudley* v. *Bachelder*, 53 Maine, 403; *Rines* v. *Bachelder*, 62 Maine, 95; *Buck* v. *Swazey*, 35 Maine, 41.

It is obvious, therefore, that William Lawry could have enforced his equitable rights as against Mrs. Spaulding. He was *cestui que trust* and she a trustee. This court can always enforce the execution of a trust, when equity requires it. *Morton* v. *Southgate*, 28 Maine, 41.

Nor would the condition of Mrs. Spaulding be improved, if the conveyance of the estate was made to her for the purpose of defeating the mortgage. She paid nothing for the estate. She cannot avoid the trust by the claim, that she holds the estate for the purpose of defeating the rights of a *cestui que trust*.

As William Lawry could have enforced his equitable rights, so can his assignee. A trust is assignable in equity and may be enforced by an assignee. *Buck* v. *Swazey*, 35 Maine, 41.

William Lawry was entitled to the aid of the court, if the mortgage had been to him. His wife, to whom the mortgage was made, is equally entitled to the protection of the court, whether she held it in her own right or as the trustee of her husband.

This is not a case where the complainant is required to proceed at law before he can claim the interference and protection of a court of equity. Whether Mrs. Spaulding holds the Glenburn lot as trustee or for fraudulent purposes, in either event she holds it subject to the superior equities of the mortgagee of the same.

The plaintiff, under the general prayer in the bill, is entitled to relief.

Demurrer overruled. Defendants to answer.

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

JABEZ T. WATERMAN *vs.* JOHN R. PULSIFER, appellant from decree of JUDGE OF PROBATE.

Androscoggin. Opinion November 8, 1881.

Probate appeal, notice of. R. S., c. 66, § 11.

Service upon the creditor of a notice of an appeal from the decision of commissioners of insolvency in the manner provided by R. S., c. 66, § 11, is not waived by another service of the notice and order of court thereon, made after the expiration of thirty days from the date of the return of the commissioners.

ON EXCEPTIONS.

The exceptions state that the question involved is the sufficiency of the notice of the appeal, from John R. Pulsifer to Jabez T. Waterman, as required by R. S., c. 66, § 11.

(Notice of appeal.)

"To the honorable judge of probate for the county of Androscoggin.

"John R. Pulsifer, of Poland, respectfully represents that he is a creditor of the estate of Jabez Waterman, late of Poland, deceased, whose estate has been represented insolvent, that Jabez T. Waterman, a creditor of said estate, presented his claim against the deceased to the commissioners of insolvency on said estate, with whose decision on the same, he is dissatisfied, and therefore gives notice that he appeals from said decision of said commissioners, and herewith files his bond as required by law.

"Dated this twenty fourth day of February, A. D. 1879.

JOHN R. PULSIFER.

"State of Maine. Androscoggin, ss. Probate Office. Received and filed February 25th, A. D. 1879.

Attest, GEO. S. WOODMAN, Register.

"Androscoggin, ss. March 10, A. D. 1879. I this day, left at the usual and last place of abode of the within named Jabez

T. Waterman, a copy of this notice attested by Geo. S. Woodman, Register of Probate, for the county of Androscoggin.

Fees. THOMAS LITTLEFIELD, Sheriff.

Service	.50
Travel 6 miles	.72
	$1.22

"Androscoggin, ss. At a probate court, holden at Auburn, within and for said County, on the third Tuesday of March, A. D. 1879.

"Ordered: The foregoing appeal being duly filed, that the same be recorded, and said claim of Jabez T. Waterman, be deemed contingent, and that said appellant cause the said claimant, his agent or attorney, to be duly served with an attested copy of said appeal, with this order thereon, within thirty days from the date hereof.

GEORGE C. WING, Judge.

"Androscoggin, ss. March 24, A. D. 1879. I, this day, left at the usual and last place of abode of the within named Jabez T. Waterman, a copy of the within notice and order of court thereon, attested by Geo. S. Woodman, Register of Probate, for the county of Androscoggin.

Fees. THOMAS LITTLEFIELD, Sheriff.

Service	.50
Travel 6 miles	.72
	$1.22

"A true copy. Attest. GEO. S. WOODMAN, Register."

N. and J. A. Morrill, for the plaintiff.

The appellant, having made a sufficient service, if the creditor was a resident, took an order of court prescribing a notice suitable to a non-resident, he thereby waived the first service; if he is to rely upon any notice to Jabez T. Waterman, as a resident of the State, it must be by virtue of the second service; but that was not made within thirty days after the return of the commissioners, and consequently is not sufficient. *Palmer* v. *Palmer*, 61 Maine, 243.

The reasons of appeal, filed in this case, also show that the appellant waived the first service.

In an appeal from a decree of the judge of probate the appellant is restricted to such matters as are specified in the reasons of appeal. *Bean* v. *Burleigh*, 4 N. H. 550; *Mathes* v. *Bennet*, 1 Foster, 188; *Gilman* v. *Gilman*, 53 Maine, 188. This imposes no hardship, it is said, upon the appellant, for he is at liberty to state as many reasons as he chooses; and the appellee should have notice of what matters are to be contested in the appellate court. The points specified in the reasons of appeal are the only subjects which the adverse party is notified to be prepared to investigate. Everything else not having been objected to, is impliedly assented to and presumed to be correct. *Boynton* v. *Dyer*, 18 Pick. 4. Had the appellant intended to rely upon the first service he should have specified it with the same distinctness that he did the second.

W. W. Bolster, for the defendant, cited: R. S., c. 66, § 11; *Tilden* v. *Johnson*, 6 Cush. 354; *Stinson* v. *Snow*, 10 Maine, 263; *Pullen* v. *Haynes*, 11 Gray, 379; *Agry* v. *Betts*, 12 Maine, 415. See Maine Digest, p. 966, § § 18, 19, 20 and 21, and cases there cited. *Adams* v. *Rowe*, 11 Maine, 89; *Pick* v. *Warren*, 8 Pick. 163; *Arnold* v. *Tourtellot*, 13 Pick. 172.

SYMONDS, J. The sufficiency, under R. S., c. 66, § 11, of the notice of appeal taken by the present appellant, a creditor of the estate of Jabez T. Waterman, from the decision of the commissioners of insolvency allowing the appellee's claim against that estate, is stated in terms to be the question reserved for consideration upon these exceptions.

The notice of March 10, 1879, was precisely what the statute required. The return of the officer, shows service upon the claimant by leaving, at his last and usual place of abode in this state, within thirty days from the time when the commissioners' report was made and accepted, a legally attested copy of the written notice of appeal which had been duly filed at the probate office.

For some reason, which does not appear, an order of court for new notice to the claimant was entered at a later date. It is urged that the notice given in pursuance of this order is itself insufficient, and at the same time is a waiver of the first. We do

not consider its sufficiency. We think it waived nothing. The requirement of the statute was met without it. The claimant, according to the only evidence in the case, then having his last and usual place of abode in this state, the statute prescribed the notice to be given, and the order of court could add nothing to its requirement. When the terms which the statute imposed were complied with, the appeal was completed, without further conditions.

This statutory notice, it will be seen, was not one that assigned a time and place for hearing — so that, one hearing only being intended, an earlier notice would naturally be regarded as superseded by a later and different one. Its object was to notify the creditor that an appeal was claimed. To give it was a step that must be taken in order to perfect the appeal. But when the creditor once had the legal notice, we do not perceive on what principle an unsuccessful attempt to repeat it, or to give another, could be said to leave him without the notice which the statute intended.

This ground is sufficiently stated in the reasons for the present appeal from the later decree of the probate court, and the single question reserved must be decided in favor of the appellant.

Exceptions sustained.

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

IRA P. FARRINGTON *vs.* B. F. FARRAR.

Cumberland. Opinion November 15, 1881.

Poor debtor. Citation.

In an action on a poor debtor's bond, where the debtor's citation alleged his arrest on an execution issued on a judgment recovered "on the first Tuesday of March, A. D. 1880, by the consideration of the justice of the superior court then held at," &c. and gave the date of the execution and other particulars sufficient to identify the judgment, (which was the only one ever recovered by the plaintiff against the principal in the bond,) and the certificate of the magistrates, recited a judgment identical in all respects with the one described in the citation, except that it says it was "recovered . . . by the con-

sideration of the justice of the superior court, at a term of said court, held at, &c. on the first Tuesday of March, A. D. 1880."

Held, 1. That there was no variance that would invalidate the certificate of the debtor's discharge.

2. That an averment in the citation that the bond had not expired, was not necessary when the citation gave the date of the bond, and it thereby appeared that the proceedings were seasonable.

3. That it was sufficent to aver in the citation that E. S. R. upon whom it was served was the attorney of record of the creditor, without adding the words, "in the suit," and that the citation was not invalidated by the omission of the street and street number of the lawyer's office where it was returnable, in the absence of all evidence tending to show that there was any difficulty in finding it.

ON EXCEPTIONS from superior court.

Debt on poor debtor's bond.

The presiding justice ruled *pro forma* that neither of the alternative conditions of the bond had been complied with, and that the evidence did not prove a legal notice to the creditor of the disclosure.

(Citation.)

"To Asa P. Moore, esquire, one of the justices of the peace within and for the county of Androscoggin.

"Whereas, I, the undersigned, S. D. Thompson of Webster, in said county of Androscoggin, have been arrested in the county of Androscoggin by force of an execution which issued on a judgment recovered against me on the first Tuesday of March, A. D. 1880, by the consideration of the justice of the superior court then held at Portland in the county of Cumberland, in favor of Ira P. Farrington of said Portland, said execution bearing date the sixteenth day of April, A. D. 1880, and being for the sum of one hundred ninety-three dollars and sixty-two cents, damage, and costs of court taxed at seventeen dollars and twenty-five cents, and have given the bond required by law and referred to in the twenty-fourth section of the one hundred thirteenth chapter of the revised statutes of the state of Maine, which bond bears date May 21, 1880. Now, therefore, I, the undersigned, claiming the benefit of the oath authorized by the thirtieth section of said chapter, and never having been refused a discharge from arrest on said execution or on any other execution

issued on said judgment, request you, the said justice, to cite the said creditor to appear before two disinterested justices of the peace and of the quorum, for the county of Androscoggin, at such place and time (within the time limited in said bond,) as you may appoint, when and where I will submit myself to examination, and take the oath as prescribed in the thirtieth section of the chapter above referred to, if allowed by the said justices, and the said creditor may be then and there present, and object if he shall see cause, and may select one of the justices, and be heard thereon.

"Dated at Lisbon this seventh day of August, 1880.

S. D. THOMPSON."

"State of Maine. [L. S.] Androscoggin, ss. To Ira P. Farrington of Portland in the county of Cumberland and state of Maine, whose attorney of record is E. S. Ridlon of said Portland: Greeting:

"In the name of the state of Maine, you are hereby notified of the desire of the above named debtor, as expressed in the foregoing application, and that I have appointed Saturday, the twenty-eighth day of August in the year of our Lord one thousand eight hundred and eighty, at nine of the clock in the forenoon, and the office of Calvin Record, attorney at law, in Lewiston in said county, as the time and place for said examination, and you are hereby notified to be present and select one of the justices, and be heard in said examination.

"Given under my hand and seal, at Lisbon in said Androscoggin county, this seventh day of August, in the year of our Lord one thousand eight hundred and eighty.

ASA P. MOORE, justice of the peace.

"A true copy. Attest, E. R. BROWN, deputy sheriff."

(Discharge.)

"State of Maine. [L. S.] Androscoggin, ss. [L. S.]

"To the sheriff of said county, or his deputy, and to the keeper of the jail at Auburn, or to any coroner in said county, or to any constable of any town in said county.

"We, the subscribers, two disinterested justices of the peace and quorum, in and for said county, hereby certify that, S. D.

Thompson of Webster in said county of Androscoggin, a poor debtor arrested on a certain execution issued on a judgment recovered against the said S. D. Thompson by the consideration of the justice of the superior court at a term of said court held at Portland within and for the county of Cumberland on the first Tuesday of March, A. D. 1880, said execution bearing date the sixteenth day of April, A. D. 1880, said judgment having been rendered on the fifth day of April, A. D. 1880, and being for the sum of one hundred ninety-three dollars and sixty-two cents, damage, and costs of court taxed at seventeen dollars and twenty-five cents; and enlarged on giving bond to the creditor, has caused Ira P. Farrington of Portland in said county of Cumberland, the creditor, to be notified, according to law, of his desire to take the benefit of the one hundred and thirteenth chapter of the revised statutes; that in our opinion he is clearly entitled to the benefit of the oath prescribed in the thirtieth section thereof; and that we have, after due caution, administered it to him. Witness our hands and seals this twenty-eighth day of August, A. D. 1880.

"Calvin Record, justice of the peace and of the quorum, selected by the debtor.

"H. C. Wentworth, justice of the peace and of the quorum, selected for the creditor, by I. N. Parker, a deputy sheriff of the county of Androscoggin, the said creditor, his agent or attorney, not being present at the time appointed, and unreasonably neglecting to appoint one of the justices to hear this disclosure, or to procure his attendance."

E. S. Ridlon, for the plaintiff.

The citation to the creditor is the foundation of the jurisdiction of the justices. Hence it should describe the judgment on which the debtor claims to take the oath. *Poor* v. *Knight*, 66 Maine, 482.

The citation in this case does not describe the judgment. The judgment was recovered April 5, 1880. The citation describes a judgment recovered against the debtor on the first Tuesday of March, A. D. 1880.

There is no averment in the citation that the bond therein

described had not expired. The citation was served on the attorney of record of the plaintiff. R. S., c. 113, § 27, requires that the citation shall be served on the creditor, or one of them if more than one, or on the attorney of record in the suit, &c.

There is no averment in the citation that E. S. Ridlon, was attorney of record "in the suit," nor could there have been any other evidence before the justices that such was the fact. They had no right to assume that such was the case without a distinct averment in the citation to that effect. The records of the superior court will disclose the fact that the plaintiff had several attorneys of record in various suits.

The case shows that the judgment upon which the execution was issued is the only judgment ever recovered by the plaintiff against S. D. Thompson. It was necessary to inspect the records of the court to determine that fact. From an examination of the citation and execution it might properly be inferred that there were two judgments in favor of the plaintiff against S. D. Thompson, to wit; one judgment recovered April 5, 1880, and one judgment recovered the first Tuesday in March, 1880.

The place fixed for the examination of the debtor was at the office of Calvin Record, attorney at law, in Lewiston in said county. One not familiar with the geography of our state, would be at loss to know whether the magistrate referred to the county of Androscoggin or county of Cumberland. The latter is the last county mentioned prior to the words "in said county."

In a city of the size of Lewiston, the place of examination should have been fixed more definitely, by giving the name of the street on which Record's office was located and the number of the same.

The citation does not anywhere state that the judgment was recovered at any term of the superior court held at Portland within and for the county of Cumberland.

Asa P. Moore, for the defendant, cited: R. S., c. 113, § § 27, 30, 33, 38, 50, 52; stat. 1878, c. 59, § 2; *Bell* v. *Furbush*, 56 Maine, 184; *Dunham* v. *Felt*, 65 Maine, 218; *Bliss* v. *Day*, 68 Maine, 201; *Prince* v. *Skillin*, 71 Maine, 368. This

case differs from the cases of *Poor* v. *Knight*, 66 Maine, 482; *Garland* v. *Williams*, 49 Maine, 16; *Farrar* v. *Fairbanks*, 53 Maine, 143; *Prescott* v. *Prescott*, 62 Maine, 428.

BARROWS, J. The attention of our legislators was directed to the relief of debtors really poor and not dishonest, at an early day.

In the laws of 1831, chap. DXX, we find an act entitled, "An act for the abolition of imprisonment of honest debtors for debt." Ever since then it has been made to appear in a series of enactments, that in the view of our law-makers, the sole purpose for which it is proper to give a creditor power over his debtor's body, is to secure a true disclosure of the state of the debtor's affairs and his means of payment and the honest appropriation of such means as he actually has, not exempt by law from attachment and execution, to the payment of the debt.

There is nothing in our laws to justify the libels which we sometimes see in print emanating from demagogues anxious to cultivate the good will of those who desire to be relieved from any legal compulsion to pay their debts, or from thoughtless and ignorant, if well meaning, philanthropists who mistake the howl of menaced knavery against the restraint of the laws for the wail of oppressed innocence. The real friend of the laboring classes knows that they need rather the means to compel the punctual payment of their just dues than relief from the payment of their honest debts; and all should know that all that remains of imprisonment for debt in this state, is the power of coercing a debtor to a full disclosure of his property affairs and business transactions, so far as they bear upon his means to pay, to the satisfaction of an intelligent tribunal which may fairly be said never to err against the right of the honest poor man to liberty. This, too, is all which a reasonable creditor will require at the hands of the ministers of justice. The opportunity to ascertain by a personal examination legally conducted, whether his debtor can pay, and to compel payment if the debtor has the means, is all the creditor has a right to ask in this direction. Nothing but his debtor's dishonesty can give him any power beyond this under our laws. The debtor

when arrested has his option—to request the officer making the arrest, to take him at once before the proper tribunal to make his disclosure forthwith, or to give a bond with sureties conditioned among other things, that he will make such disclosure with effect within six months. In either case the right of the creditor to a full disclosure of the state of his debtor's property and affairs, (which, in order to relieve the debtor, shall not be inconsistent in the opinion of a legally and fairly selected tribunal with the taking of the poor debtor's oath) is secured, and of this it is difficult to see how the debtor can well complain. And this is precisely what is designed to be secured whenever an arrest for debt is authorized by law, to wit: the opportunity for the creditor, if he supposes that his debtor can pay if he would, to ascertain how the fact is by examination of the debtor under the sanctions of an oath—the opportunity to secure by legal process at a just appraisal such property not exempt from attachment as the debtor may disclose, and the opportunity to be heard before a tribunal legally and mutually selected, upon the question whether the debtor has conducted honestly in the premises and is entitled to his discharge. Notice of the proceedings to the creditor in the outset, is obviously necessary, and is provided for by the statute regulating them, and this notice lies at the foundation of the jurisdiction of the magistrates, for the tribunal cannot be regularly constituted unless it is given substantially as required, and the creditor has an opportunity to select one of the justices. These essential rights of creditors are to be preserved; but on the other hand the provisions permitting the debtor to give bond that he will disclose at a future day, are not to be perverted into contrivances to make the sureties upon such bond responsible for the payment of the debt if the principal substantially fulfils either of the other conditions.

In a suit like the present such a certificate from the magistrates as these defendants produced is *prima facie* evidence that one of the alternative conditions of the bond has been performed. *Dunham* v. *Felt*, 65 Maine, 218. What does the plaintiff present here to invalidate it? He claims that there is a variance between the certificate and the citation served upon the creditor's

attorney (bringing the case within the doctrine of *Poor* v. *Knight*, 66 Maine, 482) in the date of the rendition of the judgment referred to. The citation should give such a description of the judgment and process to which it relates that the person and case may be rightly understood. When this is done, "no citation shall be deemed incorrect for want of form only, or for circumstantial errors or mistakes." Laws of 1878, c. 59, § 2. The essential thing is to give the creditor a notice, by inspection of which it can be judicially known that he could not have failed rightly to understand the person and case to which the proceeding related. The only discrepancy that is asserted to exist here between the citation as served and the rest of the record, is that in the citation the applicant recites his arrest, "in the county of Androscoggin by force of an execution which issued on a judgment recovered against me on the first Tuesday of March, A. D. 1880, by the consideration of the justice of the superior court *then held* at Portland, in the county of Cumberland, in favor of Ira P. Farrington of said Portland, said execution bearing date the sixteenth day of April, A. D. 1880," &c. while the execution, bearing date as alleged in the citation, recites a judgment recovered against the applicant in favor of said Farrington "by the consideration of our justice of our superior court holden at Portland within and for the county of Cumberland on the first Tuesday of March, A. D. 1880," with a further memorandum upon it, "judgment rendered the fifth day of April, 1880; and the certificate of the justices, besides giving the precise day of the rendition of judgment as noted on the execution and the date of the execution as given in the citation, refers also to the judgment as having been "recovered against the said S. D. Thompson, by the consideration of the justice of the superior court *at a term* of said court held at Portland, within and for the county of Cumberland on the first Tuesday of March, A. D. 1880." Now there is in fact no discrepancy here. The citation recites, without professing to give its precise date, and in phraseology somewhat awkward, but still sufficiently intelligible, a judgment recovered in the superior court in Cumberland county, at March term, A. D. 1880. The other papers show the same with additional particu-

lars, which it was not necessary to rehearse in the citation, provided enough appeared there to identify the judgment and execution to which the proceedings had reference. They are abundantly identified by numerous particulars, and the case finds that it was the only judgment which the plaintiff had recovered against said Thompson, so that there was no possibility of misapprehension on the part of the creditor's attorney when the citation was served on him.

The case bears no resemblance to *Poor* v. *Knight*, where there was a mistake both as to the term at which the judgment was rendered and the amount of the judgment. Here is no mistake as to the term, only an omission of the date of rendition of judgment.

The plaintiff next objects that there is no averment in the citation that the bond had not expired. Such an averment was not necessary. The date of the bond is given in the citation and shows that the proceedings were seasonable.

The plaintiff further says that there is no averment in the citation that E. S. Ridlon was attorney of record "in the suit." But in the connection in which the averment that E. S. Ridlon is the attorney of record of Ira P. Farrington stands, it can mean nothing else, and is sufficient.

That he was the attorney of record in the suit appears in his approval of the bond and is not disputed.

Lastly he complains that the street and street number of the lawyer's office at which he was cited to appear in Lewiston, was not given. It does not appear that he would have met with any difficulty in finding the office if he had cared to attend the disclosure. In the absence of all evidence tending to show that he was embarrassed by the omission, we cannot regard it as invalidating the citation.

Microscopic objections like these afford no ground for saying that neither of the conditions of the bond was fulfilled, or for converting the liability of the sureties on the bond into a liability for the debt.

Before the passage of c. 59, laws of 1878, before referred to, slight errors in the papers which could not have misled or injured

the creditor, were not regarded as sufficient to invalidate the debtor's certificate of discharge when the case showed that the creditor had had the opportunity to which he was entitled to appear and select one of the justices, and examine the debtor if he pleased. *Clement* v. *Wyman*, 31 Maine, 50.

Neither in that case nor in this, did the creditor think it worth while to avail himself of the opportunity offered. The *pro forma* ruling was erroneous.

Exceptions sustained.

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

SARAH P. LOVEJOY *vs.* GARDINER C. VOSE.

Kennebec. Opinion November 16, 1881.

Dower. Equity. Mortgage. Merger.

When one is entitled to dower in an equity of redemption and the mortgage has not been redeemed, the remedy to enforce the claim of dower, would be in equity only.

A stranger to a mortgage debt paying it with his own funds, has a right in law or in equity, at his option, to take an assignment of the mortgage and claim secured, and uphold it as a valid subsisting mortgage, against the mortgagor and all claiming under him.

The general rule that when the legal and equitable estates are joined in the same person that of the mortgagee is merged in that of the mortgagor is not inflexible. It will depend upon the intention and interest of the person in whom the estates unite.

ON REPORT.

An action of dower which the plaintiff claimed in certain real estate in Augusta, as the widow of Loyal Lovejoy.

The opinion states the material facts.

S. Lancaster, for the plaintiff.

The plaintiff's husband had acquired a sufficient title to the land in which dower is claimed, by possession, if in no other way, to make her dowable. 1 Washburn on Real Property, 189, and cases there referred to.

The plaintiff was dowable in the equity of redemption, see R. S., c. 103, § 12. This statute expressly gives her dower in this equity of redemption against every one but the mortgagee and those claiming under him. And if, in the language of the statute, "the heirs of the husband, or other person claiming under him, redeems the mortgage, she shall repay such proportion of the money paid by him as her interest in the mortgaged premises bears to the whole value; else she shall be entitled to dower only according to the value of the estate after deducting the money paid for its redemption."

Now the plaintiff, acting under the above statute, would have her option either to pay her proportion of the mortgage and claim her dower in the whole estate, or without paying her proportion of the mortgage to take her dower in what is left after the mortgage is paid; for this the statute expressly provides, and gives her dower "according to the value of the estate, after deducting the money paid for its redemption."

The Massachusetts R. S., c. 60, § 2, is in all essential particulars like Maine. The Massachusetts statute was before the court in the case of *Newton* v. *Cook*, 4 Gray, 46, a case similar in all the main points to the present case, and the court held the action for dower was maintained under the statute; and in the opinion, the court say that the case of *Eaton* v. *Simonds*, 14 Pick. 108, was decided before the passage of c. 60, § 2. See also, *Wedge* v. *Moore*, 6 Cush. 8, cited in *McCabe* v. *Swap*, 14 Allen, 188; *Hatch* v. *Palmer*, 58 Maine, 271; *Loud* v. *Lane*, 8 Met. 518.

Again, when Carson bought the Nason mortgage and took an assignment of it to himself, he held the equity of redemption, and thus united the two titles of mortgagor and mortgagee in himself, and in so doing merged the mortgage in the fee and thereby extinguished the mortgage. 1 Hilliard, Mortgages, (2d ed.) 500, 501.

"At law such a coming together of the respective interests of mortgagor and mortgagee works a merger of the mortgagee's in that of the mortgagor, especially if it take place during the life of the mortgagor, and consequently it would let in the right of

the mortgagor's wife to dower the estate." 1 Washburn on Real Property, 185, and cases there referred to.

G. C. Vose, for the defendant, cited: *Moore* v. *Rollins*, 45 Maine, 493; *Simonton* v. *Gray*, 34 Maine, 50; *Pratt* v. *Skolfield*, 45 Maine, 386: *Wing* v. *Ayer*, 53 Maine, 141; *Crosby* v. *Chase*, 17 Maine, 369; *Richardson* v. *Skolfield*, 45 Maine, 385; 1 Wash. R. P. 186.

DANFORTH, J. The plaintiff seeks to recover dower in the premises described. Her right is denied on the ground that she is barred by a mortgage given by Palmer Lovejoy to Bartholomew Nason before the seizin of the husband. The evidence fails to show a title in the husband by adverse possession, therefore her right must depend upon the paper title.

So far as appears, Nason was the original owner and conveyed to Palmer Lovejoy in 1849, at the same time taking back a mortgage to secure a part or all of the purchase money. In 1854, the mortgage still outstanding, Palmer died leaving Loyal his heir, who thereby became seized of Palmer's right of redemption. This right he sold in 1855, and in 1858 it came to Noah G. Carson by purchase. In 1859, Carson procured by assignment from Nason, the mortgage given by Palmer. The two rights thus joined in Carson, were by sundry deeds conveyed to the defendant. It will thus be perceived that the plaintiff's right depends upon the force and effect of the mortgage. The husband was, during coverture, seized of the right of redemption, and nothing more. So long as the mortgage exists, it is a bar to the wife's claim as against the mortgagee and all holding under him.

The plaintiff contends that in any event she is entitled to dower in the equity and may maintain her action under R. S., c. 103, § 12. She may undoubtedly be entitled to dower in the equity if the mortgage has not been foreclosed, but if it can be upheld as an outstanding mortgage, it must first be redeemed before her dower can be set out, and her remedy would be in equity only. *Wing* v. *Ayer*, 53 Maine, 138; *Farwell* v. *Cotting*, 8 Allen,

211; *Simonton* v. *Gray*, 34 Maine, 50; *Richardson* v. *Skolfield*, 45 Maine, 386.

The statute referred to will authorize a suit at law only when the mortgage has been redeemed; then she may be endowed by paying her share of the money paid, or in the balance "after deducting the money paid for its redemption." Whether, then, the plaintiff is entitled to dower in the equity or in the whole estate, the important question to be first solved is whether the mortgage has been redeemed, or in any way discharged so that it cannot be sustained as a bar in whole or in part.

It is first claimed that it has been paid, so as notwithstanding the assignment, such payment shall operate as a discharge and that this payment was made by Carson, the first assignee. To bring about this result it must appear that the debt has been paid by some one who, in reality, stands in the place of the debtor either by a payment with his funds, or under an obligation arising from a contract with him directly or indirectly to pay the debt. A stranger to the debt paying with his own funds, has a right in law or in equity, at his option, to take an assignment of the mortgage and claim secured, and uphold it as a valid subsisting mortgage against the mortgagor and all claiming under him. These principles are well illustrated in *Hatch* v. *Palmer*, 58 Maine, 271; *Wedge* v. *Moore*, 6 Cush, 8; *McCabe* v. *Swap*, 14 Allen, 188; 1 Washburn on Real Property, third ed. 217.

There is no evidence whatever to show that Carson had any funds of the mortgagor, or of the husband, in his hands at the time of the assignment, nor that the payment of the mortgage was any part of the consideration for the conveyance of the equity of redemption, nor does it appear that he or his grantor had in any way assumed any liability for, or obligation to pay the debt. In fact the husband was not the mortgagor; his interest came to him by inheritance which left it optional with him to redeem or otherwise. He did not redeem, but sold his right to do so, and in the absence of proof to the contrary we must assume, sold just what he received. This right and no more came into the

possession of Carson and when he subsequently acquired the mortgage it was at his option, with the consent of the mortgagee to pay and discharge, or purchase and uphold it as a subsisting claim. That he elected the latter course is sufficiently evidenced, as is also the consent of the mortgagee by the assignment.

These suggestions will also apply to some extent to the claim of merger. It is undoubtedly the general rule that when the legal and equitable estates are joined in the same person, that of the mortgagee is merged in that of the mortgagor; but this rule is not inflexible. It will depend upon the intention and interest of the person in whom the estates unite. *Simonton* v. *Gray*, 34 Maine, 50. In this case the interest of the assignee certainly requires that the mortgage should be upheld, and such was clearly his intention. To do so works no injustice to the plaintiff, as her husband was never seized of any interest except the equity of redemption and she has no right of dower in any greater interest unless she obtains it by means of a payment by one upon whom she has no claim. The defendant has all the rights of Carson, which enable him as holder of the mortgage to resist the plaintiff's claim to that extent, thus bringing his case within the principle of *Richardson* v. *Skolfield*, above cited.

Plaintiff nonsuit.

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

WILLIAM E. SLAYTON *vs.* WILLIAM MCDONALD and another, Appellants.

Washington. Opinion November 26, 1881.

Pleadings. Declaration.

When goods are sold to be paid for wholly or in part by other goods, or in labor, or otherwise than in money, an action to recover for same must be by special count on the agreement, and for a breach of it, and not for goods sold and delivered.

ON MOTION to set aside the verdict.

On appeal from the municipal court of Calais.

The writ declared in assumpsit upon an account annexed. The verdict was for the plaintiff in the sum of $77.49.

(Account annexed.)

Messrs. WM. MCDONALD & SON,

To W. E. SLAYTON, DR.

(1)	1878. Dec. 16.	To 402 lbs. lathe castings, 5		$20.10	
(2)*	27.	" 40 " 9 in. pulley and shin. machine, 5		2.00	
(3)	1879. Feb. 22.	" 5 " comp. lathe castings, 50		2.50	
(4)	"	" 4 " wheels, 6		24	
(5)	"	" making patterns for lathe heads, &c.		5.00	
(6)	"	" 40 lbs. shingle machine, 6		2.40	
(7)	"	" bed piece for lathe,		15.00	
(8)*	Mar. 20.	" 121 lbs. shingle machine castings, 6		7.26	
(9)*	May 8.	" 34 " " " " 6		2.04	
(10)	28.	" bed piece for lathe,		15.00	
(11)	July 7.	" " " " " for self,		15.00	
(12)	"	" 134 lbs. wheel H. and tail stock, &c. 5		6.70	27.70
(13)	"	" comp. and wh. iron fixtures for same,		6.00	
(14)*	May 8.	" 240 lbs. gears, 5		12.00	
				$111.24	
Cr.	By their bill for Dec. 18, 1878, to May 19, 1879, inclusive,			35.75	
				$75.49	

A. McNichol, for the plaintiff.

There is no tort in the legal sense in this transaction. It was a contract of sale of lathes to be paid in a lathe. And the plaintiff can recover in assumpsit. Story on Sales, 566. The principles that govern this case are well defined and settled in *Dunn* v. *Marston*, 34 Maine, 379.

E. B. Harvey, for the defendants.

VIRGIN, J. Assumpsit on an account annexed comprising fourteen items of various articles of iron casting, of different dates, running from December 16, 1878, to the following August. The plaintiff is an iron founder, and the defendants—William McDonald and his son James—machinists, having a shop where they manufacture and repair mill and other kinds of machinery.

The defendants admit their liability for items numbered 2, 8, 9 and 12, and for these charges the action is well brought in the usual form of *indebitatus* assumpsit for goods sold and delivered; but they deny all connection with the remaining items.

The remaining items, except 3, 4, 5 and 6 comprised four setts of "lathe castings"—that is a sufficent number and quantity to make four lathes when finished. In relation to these, the plaintiff testified in substance—that he delivered them in accordance with a verbal contract with one W. Randolph McDonald (son of William and brother of James, the defendants, one of their workmen and book-keeper,) whereby it was agreed that the defendants should have three of the setts for finishing and fitting the other for the plaintiff; that in making this contract Randolph professedly acted as agent of the defendants; that prior thereto Randolph had frequently come to the plaintiff's foundry and ordered castings for the defendants which they had invariably paid for; that the defendants, in June 1879, on complaint being made to them of the delay in fitting up the plaintiff's lathe, declared it should be done right away; but that they still neglecting to finish it, he on August 26, 1879, brought this action.

Assuming this testimony to be true, and that Randolph had authority to make the contract in behalf of the defendants, this form of action cannot be maintained for the recovery of the value of the lathe castings. For the general principle of law is well settled, that where goods are sold to be paid for wholly or in part by other goods or by the defendant's labor, or otherwise than in money, the action must be by special count on the agreement, and for a breach of it, and not for goods sold and delivered—otherwise the proper rule of damages cannot be applied. 1 Chit. Plead. (16 ed.) 357, and notes; *Mitchell* v. *Gile*, 12 N. H. 390, and the numerous cases there cited; *Holden S. Mill v. Westervelt*, 67 Maine, 446, 450, and cases. The verdict is therefore against law.

But if the declaration had contained a special count for the lathe castings, we do not think the jury were warranted in finding that Randolph was authorized to make the contract in behalf of the defendants.

Our opinion therefore is that the verdict is against law and the the evidence.

Motion sustained.

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

DAVID CYR *vs.* THOMAS MADORE, and others.

Aroostook. Opinion December 2, 1881.

Ways over state lands. Dedication.

A public way over lands belonging to the State, set apart for settlement, can be established only in the manner pointed out in *Burns* v. *Annas*, 60 Maine, 288.

A party in possession without title, cannot make a valid dedication, which will bind his successors in the possession when he has obtained a good title; nor can the local land agent, acting either personally or by an assistant, accept a dedication thus made so as to give the public any rights in the premises.

Silent acquiescence in the use of a way by the public across his land, even for several years, is not of itself sufficient to establish a dedication by the owner. The maintenance of a fence with bars or gate across the way by the owner of the land, at any time, is evidence negativing his intention to dedicate.

The naked fact that the owner has suffered the way to remain open for a few years without maintaining such fence, will not of itself prove a change of intention.

ON REPORT.

Trespass for breaking and entering plaintiff's close, called lot No. 13, in Cyr plantation, and tearing down and destroying the plaintiff's fence, and plowing and digging plaintiff's land.

Plea, not guilty, and a brief statement alleging that there was a public way by dedication and acceptance, over and upon the lot No. 13, and the acts complained of were committed within the limits of that way, in removing obstructions and making necessary repairs.

The opinion states the facts which were found material.

L. R. King, for the plaintiff, cited: *White* v. *Bradley*, 66 Maine, 254; Angell on Ways, § 153; *Maine* v. *Bradbury*, 40 Maine, 154; *Mayberry* v. *Standish*, 56 Maine, 342; *Hinks* v. *Hinks*, 46 Maine, 423.

P. C. Keegan, for the defendants, in an elaborate argument, contended that there was a dedication of this road and acceptance, many years ago, and that it has since been continually used by the public, and the acts complained of were the suitable acts of defendants within the limits of the way in making the necessary repairs to the road.

BARROWS, J. The defendants attempt to justify the acts of which the plaintiff complains, upon the ground that the locus was part of a public way in which the public had acquired rights by purchase, by prescription, or by dedication and acceptance. That it has been used under some limitations by the public since eighteen hundred and sixty or eighteen hundred and sixty-one, for a way, incumbered with gates or bars during the first years, and not open until within the last twelve years, is established by the testimony of John B. Farrell and A. S. Richards called by the defendants, and Dennis Farrell called by the plaintiff. The two last named first prepared it for use as a way, Richards acting at the request of the local land agent, and Farrell being at that time in possession of the lot. The date which they assign to their operations shows conclusively against the vague recollections of the witnesses who testify to a road there more than twenty years ago, that no rights by prescription can have been acquired.

Richards's testimony, in the absence of positive recollection of the payment or allowance of any sum to Dennis Farrell as a consideration for his permission to traverse any part of lot 13 with the road, could not avail, against Farrell's positive denial, to establish any right by purchase, even if it could be supposed that the employee of a local land agent, and the party in possession, had any power thus to incumber a lot of land, the title to which remained in the State. They had no such power. The only mode of making a legal location of a way over State lands set apart for settlement, is pointed out in *Burns* v. *Annas*, 60 Maine, 288, where, among other things, it is held that the land agent himself has no power to dedicate the State lands for a way, or to cause a location over them, except in the manner prescribed by the statute. The defence is reduced to an inquiry whether

there is sufficient evidence to show a dedication of the locus by David Cyr the plaintiff, who got his title to the land from the State, in eighteen hundred and sixty-nine, or a ratification by him of an asserted dedication by Dennis Farrell, whose possessory right the plaintiff also acquired some years before he received his deed from the State.

We do not deem it necessary to determine from the conflicting testimony given by Richards and Dennis Farrell, whether the permission given by the latter to make a road across lot 13, while it was in his possession, for the convenience of the settlers that might come upon the back lots, was temporary or permanent. No dedication, however full and complete, made by one whose only right in the premises was that arising from a naked possession could bind those who afterwards acquired an unincumbered title from the State, nor does the fact that the plaintiff purchased Dennis Farrell's possessory right before he got his deed from the State, bind him to make good any dedication which Farrell might have assumed to make. He does not claim the land under any title derived from Farrell, for Farrell had none. Farrell's permission then could avail no one after his possession ceased. For no one can make a dedication of this sort, unless he has the fee in the land. It is obvious that an intruder or a tenant cannot thus permanently impose a burden upon land to which he has no title. *Schenley* v. *Commonwealth*, &c. 36 Penn. State, 29; *Ward* v. *Davis*, 3 Sandf. 502; *Gentleman* v. *Soule*, 32 Ill. 279.

We look in vain for the clear proof of an intention to dedicate on the part of David Cyr, which is necessary to give the public any right of way in the premises. At most, a silent acquiescence in the use of the way by his neighbors on the back lots and the public for some years, is all that we have to indicate it. But it appears that he has not lived upon the lot all the time. When he first went there, the fence and bars erected by Dennis Farrell, seem to have been maintained. When they disappeared is not in evidence. Perhaps, during his absence. But the maintenance of them at any time, is to be regarded as evidence negativing the intention to make it a public way; and the failure to keep them

up, even for a considerable time, is not considered sufficient proof of a change of intention. *Commonwealth* v. *Newbury*, 2 Pick. 57, 58; *Roberts* v. *Karr*, 1 Camp. 262; *White* v. *Bradley*, 66 Maine, 260; *Carpenter* v. *Gwynn*, 35 Barb. 395, 406.

Without other evidence of intention on his part to dedicate his land to public use, it was the duty of his neighbors, when he rebuilt the fence and ploughed and sowed his land to grain, to respect his rights of property therein. The testimony seems to connect all the defendants with the trespasses committed, Achille Parent as well as the others.

Judgment for plaintiff for $10 and costs.

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

SAMUEL E. LYON *vs.* RICHARD HAMOR.

Hancock. Opinion December 5, 1881.

Mill lot. Private ways. Judicial act. R. S., c. 18, § § 18, 23.

A mill site upon which a mill is erected, is cultivated or improved land within R. S., c. 18, § § 18, 23.

A private way is only authorized by those sections of the statutes from the petitioner's land to a town or public highway.

The locating a private way by the selectmen of a town is a judicial act requiring disinterestedness on their part in making the location.

The sons or nephews of a petitioner for a private way are not disinterested, and the location of such way by them is void.

ON REPORT.

Trespass *quare clausum* upon the plaintiff's close in the town of Eden. The sole question presented was upon the legality of the laying out of a private way by the selectmen of the town of Eden.

By the terms of the report if the action is not maintainable, the plaintiff is to be nonsuit, if maintainable the defendant to be defaulted and damages settled at *nisi prius*.

The material facts affecting the legality of laying out the private way are stated in the opinion.

Hale and Emery, for the plaintiff, cited: Cooley's Const. Lim. 530, 531, 413, 411; *Sadler* v. *Langham*, 34 Ala. 311; *Osborn* v. *Hart*, 24 Wisconsin, 89; *Jordan* v. *Woodward*, 40 Maine, 323; *Dimes* v. *Grand Junction Canal*, 3 H. L. 759; *Spear* v. *Robinson*, 29 Maine, 531, 542; *Hall's Case*, 62 Maine, 325; *Hinckley's Case*, 8 Maine, 146; *State* v. *Delesdernier*, 11 Maine, 473; *Small* v. *Pennell*, 31 Maine, 267; *Harlow* v. *Pike*, 3 Maine, 438; *Conant* v. *Norris*, 58 Maine. 451; Freem. Judg'ts. 518; 2 Whar. Ev. 986.

A. P. Wiswell, for the defendant.

Revised Statutes, chapter one, section four, rule twenty-two, which provides the degree of relationship within which a person would not be regarded disinterested or indifferent does not apply to selectmen, because the interest which disqualifies them is expressly stated to be a pecuniary interest, R. S., c. 3, § 28.

Upon the question of the termini of the private way, counsel contended that the way could legally be laid out to terminate at the mill lot in question, that it was not necessary that it should terminate on the lot, citing: *Orrington* v. *Co. Comr's*, 51 Maine, 570; *Hall* v. *Co. Comr's*, 62 Maine, 327; *Sumner* v. *Co. Comr's*, 37 Maine, 112; *Southard* v. *Ricker*, 43 Maine, 575.

APPLETON, C. J. This is an action brought to determine the legal location of a private way laid out for the benefit of the defendant.

By R. S., c. 18, § 18, the selectmen of a town are authorized to lay out private ways for one or more of its inhabitants, leading from land "under improvement in a town to a town or highway," § 23. A mill lot upon which a mill is erected is cultivated or improved land equally within the letter and the spirit of the statute.

But the taking of the land of one man for the use of another is the taking of land for private purposes. Waiving the question of the constitutionality of a law authorizing such taking, this much is certain, that such law should receive a strict construction. The private way authorized is from the petitioner's "land under improvement to a town or highway." Here the private

way is entirely on the plaintiff's land, not touching that of the defendant. It needs no argument to show that one cannot legally build a road over his neighbor's land for his own convenience.

The selectmen before locating a private way, must determine its expediency or necessity and the damage thereby done to the land owner and what would be a reasonable compensation for such damage. These are judicial acts, requiring disinterestedness on the part of those making the adjudication. E. T. Hamor, one of the petitioners for the private way in controversy and one of the selectmen locating the same was the son of the defendant. J. E. Hamor, the other selectman, was the defendant's nephew. They were not "disinterested or indifferent in a matter in which other persons are interested," within R. S., c. 1, § 4, rule 22. They could not have sat as jurymen in a cause where the validity of these proceedings should be involved. They could not act as appraisers in case of a levy on the real estate of the defendant. It was held in *Sanborn* v. *Fellows*, 22 N. H. that the duties of fence viewers are judicial and that one related to one of the parties within the fourth degree was not qualified to act as such. This was held to be the law of this state in *Conant* v. *Norris*, 58 Maine, 451. It matters not in principle whether the adjudication relates to the appraised value of a division fence or of a private way. In neither case do sons or nephews constitute an impartial tribunal.

The counsel for the defendant, in his able argument, claims that the selectmen not "being pecuniarly interested," were by R. S., c. 3, § 28, authorized to act. But that section relates entirely to municipal matters and prohibits certain municipal officers from voting upon any question in which such officer has a pecuniary interest. But in the case at bar the question was one between parties litigant; the one petitioning, the other resisting the granting such petition; the one asking to appropriate to his own use the land of his opponent; the other resisting such appropriation. It was a judicial question requiring an impartial tribunal, which the tribunal adjudicating was not.

The selectmen being by their relationship to the defendant disqualified to act, the proceedings before them were void and furnish no defence.

Defendant defaulted.

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

JOHN H. RICE *vs.* GEORGE F. DILLINGHAM.

Penobscot. Opinion December 5, 1881.

Trover. Equity.

Where the mortgagee assigned a mortgage of real estate and the notes secured thereby, to secure a loan to him from the assignee, payable at a specified time, and the loan not being repaid on time, the assignee foreclosed the mortgage, and after such foreclosure was perfected, the assignor tendered the amount due, and demanded the notes and mortgage which the assignee refused to assign or transfer. *Held;* that trover would not lie for the same. Whatever remedy the assignor may have, is in equity.

ON agreed statement of facts.

Trover for one promissory note and a mortgage of real estate to secure the same.

The material facts are stated in the opinion.

By the terms of the agreement, if the action could be maintained, a default was to be entered, and damages to be assessed at *nisi prius*, otherwise plaintiff nonsuit.

Plaisted and Smith, for the plaintiff.

I. The property in controversy is the subject of pledge.

Any tangible property may be pledged, hence not only goods and money, but also negotiable paper may be put in pledge. Story, Bailments, § 290; Edwards, Bailments, § 205. See Bouvier's Dict. vol. 2, "Pledge," and cases cited.

A mortgage deed of real estate, with the note it is given to secure, may be pledged. 9 Bosw. 322; Story, Bailments, § § 51 and 290; 15 Mass. 389.

II. The assignment of a subsisting mortgage as collateral, to

secure a debt, operates like a mortgage or pledge. Edwards on Bailments, § 324, and cases there cited; 9 Bosw. 322; 8 Allen, 167.

A pledge is a bailment of personal property, as security for some debt or engagement. Story, Bailments, § 286; 3 Parsons, Contracts, 271, *et seq.*

III. The general property in chattels bailed under the contract of pledge, remains in the bailor, only a special property passes to the bailee, the bailor retains the title and a right to redeem, by discharging the original debt or obligation. Edwards, Bailments, § 245.

On tender of the amount due, with interest and costs, the pledgor has an undoubted right to recover the property pledged, or the value thereof. Story on Bailment, § 341; 3 Parsons on Contracts, 274.

And the non-payment of the debt after it is due, does not work a forfeiture of the pledge. The property remains in the pledgor until he is legally divested, either by a foreclosure in equity, or by sale on due notice. Edwards, Bailments, § 245; Story, Bailments, § 346; 2 Parsons, Contracts, 118; *Brownwell* v. *Hawkins*, 4 Barb. 491; Edwards on Bailments, § 249, and cases there cited; 2 Kent, 581, 582, 583; Story, Bailments, § 345; *Cortelyou* v. *Lansing*, 2 Cains' Cas. in Err. 200; *Luckett* v. *Townsend*, 3 Texas, 119; 10 Bosworth, 325.

IV. The plaintiff has never been divested of the property in question; he has never lost the right to the immediate possession of the property on payment, or tender of payment, of the amount due the pledgee. *Fletcher* v. *Dickinson*, 7 Allen, 23. American Law Review, (new series,) vol. 1, No. 10, October, 1880, and cases there cited.

The collaterals were in the hands of the pledgee, and the pledgor tendered him the full amount due, and demanded his property. The defendant refused to deliver, this refusal amounted to a conversion of plaintiff's property by defendant.

V. Under ordinary circumstances, the remedy is by an action at law. Edwards, Bailments, § 312. Trover in this case is the proper remedy. 2 Parsons, Contracts, 118.

Trover may be maintained for a note wrongfully withheld from the owner, or person having the property in, and entitled to the possession thereof. *McNear* v. *Atwood*, 17 Maine, 434; 1 Pick. 503; 63 Maine, 197; 60 Maine, 84; 2 Hillard's Torts, 60; *Spencer* v. *Dearth*, 43 Vt. 98.

Trover may be maintained for the mortgage deed given to secure the payment of the note, and as incidental to it. *Campbell* v. *Parker*, 9 Bosw. 322; 15 Mass. 389; *Gleason* v. *Owen*, 35 Vt. 590; *Wheeler* v. *Newbold*, 16 N. Y. 392; Edwards, Bailement, § 292.

C. A. Bailey, for the defendant, cited: *Gould* v. *Newman*, 6 Mass. 241; *Hills* v. *Eliot*, 12 Mass. 26; *Mitchell* v. *Burnham*, 44 Maine, 286; *Bailey* v. *Myrick*, 50 Maine, 171; *Eaton* v. *Green*, 22 Pick. 526; *Pond* v. *Eddy*, 113 Mass, 149; *Cutts* v. *York M'f'g Co.* 18 Maine, 191; *Henry* v. *Davis*, 7 Johns. Ch. 40; *Slee* v. *Manhattan Co.* 1 Paige, 48; *Phillips* v. *Robinson*, 4 Bing. 106; *Stewart* v. *Crosby*, 50 Maine, 130; *Maynard* v. *Hunt*, 5 Pick. 240; *Currier* v. *Gale*, 9 Allen, 522; *Clapp* v. *Shepard*, 2 Met. 127; *Fulton* v. *Fulton*, 48 Barb. 581; *Foster* v. *Crabb*, 12 C. B. 136; *Atkinson* v. *Baker*, 4 T. R. 229; *Hooper* v. *Ramsbottom*, 6 Taunt. 12.

APPLETON, C. J. The defendant is the assignee of a mortgage and notes, given by one Abner R. Hallowell, to the plaintiff, and by him assigned to the defendant as security, for a loan to him from the defendant, payable in three months from the twenty-first day of June, eighteen hundred and seventy-eight. The plaintiff neglected to make payment at the time specified. The defendant as assignee, foreclosed the mortgage. Shortly after the foreclosure, the plaintiff tendered the defendant the full amount due and costs, and demanded a reconveyance of the estate acquired by virtue of the assignment and the foreclosure, which being declined, the plaintiff brought an action of trover for the notes and mortgage before mentioned. We think the action is not maintainable.

The assignment of the notes and mortgage was as collateral

security. It transferred the legal title to them. Being for security of a loan it constituted a mortgage. Whether it was a legal or an equitable mortgage, it matters not. The cases cited by the counsel for the defendant abundantly show that the transaction would be regarded as a mortgage. *Slee* v. *Manhattan Co.* 1 Paige, 48; *Pond* v. *Eddy*, 113, Mass. 149; *Cutts* v. *York Manufacturing Co.* 18 Maine, 191.

The defendant having the legal title had perfect right as assignee to foreclose. Foreclosing, he held the estate as security for his debt. A tender of the full amount due might entitle the plaintiff to reconveyance in equity, but it would not authorize the maintenance of an action of trover for not reconveying real estate which the defendant holds as equitable mortgagee.

"A pledge of goods or chattels is completed by a delivery of them; it does not transfer the title; it only gives the the pledgee a lien on them. If there be a transfer of the property it is more than a pledge, it is a mortgage." Edwards on Bailments § 186; *Langdon* v. *Buel*, 9 Wend. 80. In *Halliday* v. *Holgate*, L. R. 3 Ex. 299. WILLES, J., says: "There are three kinds of security; the first, a simple lien; the second, a mortgage passing the property out and out; the third, a security intermediate between a lien and a mortgage, viz.: a pledge, where by contract a deposit of goods is made security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt." Until the debt is paid the pledgee has only the present interest. The plaintiff's rights are those of an equitable mortgagor and not those of a pledgor. His remedy, whatever he may have, is in equity.

Plaintiff nonsuit.

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

WILLIAM B. DINGLEY

vs.

ROBERT H. GARDINER and others, Trustees.

Sagadahoc. Opinion December 7, 1881.

Mill dam. Reservoir dam. Flash boards. R. S., c. 92.

A complaint under the mill act, R. S., c. 92, is the proper remedy and may be maintained by one whose lands are injured by flowage caused by flash boards erected upon a dam when the dam itself is within the mill act.

A reservoir dam may be a dam within the mill act.

A mill owner, whose mill is benefitted by the reserved water of a reservoir dam erected upon his land, is subject to the provisions of the act, though there are other mills benefitted by the same reservoir.

ON EXCEPTIONS.

Action on the case.

The opinion states the material facts.

The deeds of the five dams on the stream not now owned by these trustees contained the following provision:

"And whereas the dam at the outlet of Winthrop pond and the dam at the upper mills, so called, in Gardiner are necessary for the use of all the mills and for the benefit of all the privileges on the Cobbossee stream, including that granted by said indenture to . . [Grantees.] It is agreed by the parties hereto that the discharge of water at these points shall be subject to regulations to be adopted by all parties and persons who may be interested therein in manner following, that is to say: The owner or owners of either of the dams benefitted by said reservoir dam may call a meeting of the owners or proprietors of dams on said stream, below the upper dam by, &c. . . . [Notice.] At such meeting the owners of such dams as are benefitted by said reservoir dams below the upper dam may vote by proxy duly appointed in writing. And such owner shall have one vote for every foot of head and fall of water owned by him. . . . . [Quorum.] Rules may be adopted or modified and changed at

such meetings by a majority of the votes present, for the regulation of the water and the discharge thereof at said reservoir dams. An agent or agents may be appointed at such meetings to carry into effect the rules adopted by such proprietors, who shall have the right of entering the premises where said reservoir dams are situated at all times and of performing all such acts as may be necessary for carrying such rules into effect. The expense of tending the gates at said reservoir dams and of repairing and rebuilding the said gates or dams and all damages hereafter incurred, or for which said dams may be liable in consequence of flowing, or otherwise, shall be borne by the proprietors of all the dams, below the upper dam, benefitted thereby in proportion to the number of votes to which they are severally entitled as herein stipulated."

At the trial after the testimony was out the presiding justice ruled that the action could not be maintained and directed that a nonsuit be entered. To this ruling the exceptions were taken.

J. W. Spaulding and F. J. Buker, for the plaintiff, cited: *Baird* v. *Hunter*, 12 Pick. 556; *Fitch* v. *Stevens*, 4 Met. 426; *Crockett* v. *Millett*, 65 Maine, 195; *Jones* v. *Skinner*, 61 Maine, 25; *Farrington* v. *Blish*, 14 Maine, 423.

This case differs from *Goodwin* v. *Gibbs*, 70 Maine, 243. There the several owners of mills standing on their own land united in building and maintaining a dam on land they owned as tenants in common. Here the several owners of mills united in erecting flash boards upon the dam, situated on land owned by one of them (these trustees) and it was the flowage caused by these flash boards that damaged this plaintiff. And, therefore, a complaint could not truthfully allege the essential facts that the parties who erected and controlled the flash boards owned the land upon which the dam stood.

Our statutes differ from Massachusett's statutes, hence, the intimation of the court in *Norton* v. *Hodges*, 100 Mass. p. 244, could not apply in this State.

Orville D. Baker (*J. Baker* with him), for the defendants, cited: R. S., c. 92, § 23; *Hill* v. *Baker*, 28 Maine, 20; *Veazie* v.

Dwinel, 50 Maine, 485; *Shaw* v. *Wells*, 5 Cush. 537; *McNally* v. *Smith*, 12 Allen, 455; Angell, Water Courses, § 489; *Gordon* v. *Saxonville Mills*, 14 Allen, 220; *Brady* v. *Blackington*, 113 Mass. 242; *Richardson* v. *Curtis*, 2 Cush. 341; *Walcott Co.* v. *Upham*, 5 Pick. 292; *Nelson* v. *Butterfield*, 21 Maine, 220; *Crockett* v. *Millett*, 65 Maine, 191; *Goodwin* v. *Gibbs*, 70 Maine, 243; *Bates* v. *Weymouth Iron Co.* 8 Cush. 548; *Farrington* v. *Blish*, 14 Maine, 426; *Strout* v. *Millbridge Co.* 45 Maine, 87; *Jones* v. *Skinner*, 61 Maine, 26; Wood on Nuisances, § § 834, 836; *Fitch* v. *Stevens*, 4 Met. 426.

APPLETON, C. J. This is an action on the case to recover damage for the flowage of the plaintiff's meadow in Richmond, by reason of the defendants' dam on the Cobbosseecontee stream in Gardiner.

The dam in controversy is a reservoir dam on land belonging to the defendants as trustees, but there is no mill on this dam. There are seven dams below on the Cobbosseecontee stream, on which are mills, all of which are operated by the head of water raised by the dam in question. The defendants as trustees own two of the dams below and the mills on the same, with the land on which their dams and mills are erected.

The damage for which compensation is sought, was occasioned by flash boards.

The defendants own the land on which the reservoir dam is built, and the dam and mills for whose use the first named dam exists. They are operated by the head of water created thereby.

No principle of law is better settled than that this action cannot be maintained, where the party injured can proceed under the flowage act, R. S., c. 92.

It matters not whether the flowage was caused by the dam or by flash boards. The injury is none the less in the one case than in the other. The same remedy for redress is open in the one case as in the other Whether the plaintiff's land is overflowed by a dam or by flash boards, the height of the water the same, the damage to his land is the same. *Gordon* v. *Saxonville Mills*, 14 Allen, 220; *Brady* v. *Blackington*, 113 Mass. 242.

The reservoir dam is within the mill act. It has ever been so held. The statute authorizes the erection of dams. It does not restrict the mill owner to one dam. *Bates* v. *Weymouth Iron Co.* 8 Cush. 548; *Nelson* v. *Butterfield*, 21 Maine, 220. "Reservoir dams," remarks COLT, J., in *Norton* v. *Hodges*, 100 Mass. 242, "for the benefit of mills upon the same stream have been held to come within the protection of the statute; and this although such a dam may not be immediately connected with or very near the mill."

The defendants are mill owners as well as dam owners. They are within the clear language and object of the statute. That others may be benefitted by the water saved by the reservoir dam does not in the least relieve them from liability. They none the less own the dam, which injures the plaintiff by causing back water, and the mills which are benefitted by the water reserved. The dam is directly subservient to the purpose of driving the defendants' mills and increasing their water power, though other dams and mills may be nearer the reservoir dam.

The only remedy open to the plaintiff is by complaint under the statute. *Goodwin* v. *Gibbs*, 70 Maine, 243; *Shaw* v. *Wells*, 5 Cush. 538; *Crockett* v. *Millett*, 65 Maine, 191.

Exceptions overruled.

73 66
94 458

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

MARY ELIZA NORTHROP, in equity,

vs.

CLARENCE HALE, administrator.*

Cumberland. Opinion December 15, 1881.

Gift. Savings bank deposit. Trust.

Where A deposited in a savings bank money in the name of B, but without her knowledge, "sub. to A," in the books of the bank, and on the bank pass book, received the dividends and such portion of the principal as she

*See following case.

required for her own use, and held the pass book always in her possession till her death; *Held*, that there was not a gift *inter vivos*. That there was no trust in favor of B. That if there was a trust, B was trustee for the depositor, and could not claim or hold the deposit in her own right.

On bill and agreed statement of facts.

The opinion states the case.

Drummond and Drummond, for the plaintiff.

We do not claim a gift or *donatio causa mortis*, but the creation of a trust in favor of the complainant. The money passed from Mrs. Robinson to the bank and was held in trust by it for somebody. For whom? Does it not appear beyond question that she intended it for Northrop, unless she revoked the trust, as we admit she had the power to do.

An illustration of this kind of trust, is found in the taking out of a policy of life insurance for the benefit of another. The policy is in the name of the insured, he pays the premiums and keeps the policy, yet the beneficiary is entitled to the money. Bliss on Life Insurance, § § 317, 341; *Burroughs* v. *Assurance Co.* 97 Mass. 359; *Gould* v. *Emerson*, 99 Mass. 154; *Knickerbocker L. Ins. Co.* v. *Weitz*, 99 Mass. 157. See *Stone* v. *Hackett*, 12 Gray, 227, which is on all fours with the case at bar; also *Hunnewell* v. *Lane*, 11 Met. 163; *Wall* v. *Prov. Inst. for Savings*, 3 Allen, 96; *McCluskey* v. *Prov. Inst. for Savings*, 103 Mass. 300; *Farrelly* v. *Ladd*, 10 Allen, 127; *Brabrook* v. *Boston Five Cent Savings Bank*, 104 Mass. 228; *Howard* v. *Windom Co. Savings Bank*, 40 Vt. 597; *Ray* v. *Simmons*, 11 R. I. 266; *Minor* v. *Rogers*, 40 Conn. 512; *Blaisdell* v. *Locke* 52 N. H. 238; *Gardner* v. *Merritt*, 32 Md. 78; *Martin* v. *Funk*, 75 U. S. 134.

It may be stated generally, we believe, that in all the cases in which the deposit was made in the name of the *cestui que trust*, the trust has been sustained, unless evidence was introduced to show the intention of the depositor was not to create a trust.

Clarence Hale, for the defendant, cited:

Stone v. *Bishop*, 4 Clifford, 593; S. C. 6 Reporter, 706; *Gerrish* v. *New Bedford Ins. for Sav.* 128 Mass. 159; *Hill* v.

Stevenson, 63 Maine, 364; *Ray* v. *Simmons*, 11 R. I. 266; Am. Law Reg. vol. 15, N. S. 701; *Minor* v. *Rogers*, 40 Conn. 512; *Gardiner* v. *Merritt*, 32 Mo. 78; *Blasdel* v. *Locke*, 52 N. H. 238; *Howard* v. *Windham Bank*, 40 Vt. 597; *Warriner* v. *Rogers*, L. R. 16 Eq. 340; U. S. Revised Statutes, § 3408, p. 669; *Taylor* v. *Henry*, 48 Md. 550; Albany Law Journal, vol. 20, p. 387; Smith, Leading Cases, vol. 1, 34 *et seq.*; *Stone* v. *Hackett*, 12 Gray, 227; Perry on Trusts, § § 96 and 99, and cases cited: *Hatch* v. *Aitckison*, 56 Maine, 324; *Taylor* v. *Henry*, 48 Md. 550; *Murray* v. *Cannon*, 41 Md. 466; *Brabrook* v. *Boston Five Cent Savings Bank*, 104 Mass. 228; *Powers* v. *Prov. Ins. for Sav.* 124 Mass. 377; *Clark* v. *Clark*, 108 Mass. 522; *Chase* v. *Breed*, 5 Gray, 440; *Grover* v. *Grover*, 24 Pick. 261; *Martin* v. *Funk*, 75 N. Y. 134; *Young* v. *Young*, N. Y. 21 Albany Law Journal, 395; *Antrobus* v. *Smith*, 12 Ves. 39; *Bunn* v. *Winthrop*, 1 Johns. Ch. 329; *Roberts* v. *Roberts*, 11 Jurist, 992; Perry on Trusts, § 126; *Pembroke* v. *Allenstown*, 21 N. H. 107; Hill on Trustees, § § 83, 84; *Moore* v. *Moore*, 38 N. H. 382.

APPLETON, C. J. On the tenth of June, eighteen hundred and seventy-four, Eliza M. Robinson, deposited in the Portland Savings Bank, two thousand dollars, taking a bank book, headed as follows:

"No. 20607. Portland Savings Bank, in account with Mary Eliza Northrop," and above this name was written "Sub. to E. M. Robinson." On the first page, below the heading, is the following:

	Dolls.	Cts.
"1874. June 10. To dep. (two thousand)	2000	00."

The account was entered on the books of the bank in the same manner as on the bank or pass book. Mrs. Robinson was childless, and the complainant is a daughter of her nephew. The bank book she retained during her lifetime, and it was in her possession at the time of her death, January 9, 1879. She drew the dividends as they accrued, and twenty-five dollars of the principal, and used the sums so drawn, entirely for her own use. It does not appear that the complainant ever knew of the fact of the deposit as made.

Here was no gift *inter vivos*. "To constitute a donation *inter vivos*, there must be a gift absolute and irrevocable," observes SHEPLEY, C. J., in *Dole* v. *Lincoln*, 31 Maine, 428, "without any reference to its taking effect at some future period. The donor must deliver the property, and part with all present and future dominion over it." Here the bank book remained in the possession of Mrs. Robinson. The funds deposited, ever remained subject to her control. She drew money as she needed it. Nobody else could draw the funds. There never was a moment of time from the day of the deposit to that of the death of the depositor, when this complainant had any title to the money deposited, or any right to control its disposition. By the very terms of the deposit, as entered on the books of the bank, and in the pass book, it was "sub [subject] to Mrs. E. M. Robinson," and her conduct and that of the bank, was in entire accordance with such view. The entry in the pass book decisively establishes the proposition that here was no complete and perfect gift. *Murray* v. *Cannon*, 41 Maine, 466. "To make such a gift perfect and complete," observes ALVEY, J., in *Taylor* v. *Henry*, 48 Md. 550, "there must be an actual transfer of all right and dominion over the thing given by the donor, and an acceptance by the donee, or some competent person for him; and it is essential to the validity of such gift, that it should go into effect, that is, transfer the property at once and completely; for if it has reference to a future when it is to operate as a transfer, it is but a promise without consideration, and cannot be enforced either at law or in equity." A declaration of an intention to give, is not a gift. The donor must be divested of, and the donee invested with the right of property. The indispensable essentials of a gift, delivery to the donee, and loss of dominion over it by the donor, are wanting. *Geary* v. *Page*, 9 Bosworth, 297. In *Robinson* v. *Ring*, 72 Maine, 141, the question here presented, was decided adversely to this complainant. It was there held that in case of a deposit in a savings bank by A, in the name of B, that in the absence of any declaration of trust at the time of the deposit, or subsequently of any delivery of the pass book to B, that the deposit belonged to the estate of the depositor. In *Brabrook* v.

Boston Five Cent Savings Bank, 104 Mass. 230, the deposit was made by a father, as trustee of his daughter, thus, "A B, trustee for C D" but the father always retained the pass book in his possession, but upon proof that it was his money, and upon proof that he had a deposit in his own name, and that this one was made in his daughter's name, because the amount of both exceeded the amount which the law allowed the bank to hold for a single depositor, it was held that the daughter could not recover. In *Clark* v. *Clark*, 108 Mass. 522, the doctrine of the case last cited, was affirmed. In *Stone* v. *Bishop*, 4 Cliff. 593, the deposit was as follows: "No. 3749. A. C. Jackson, in trust for George Carpenter, December 31, 1863, deposited one hundred and fifty-two twenty-eight one hundredths dollars." The bank pass book was delivered to and retained by Jackson. No notice was given of the deposit to the alleged *cestui que trust*, and it was held that the title to the money remained in the depositor. In the case at bar, there was not merely no notice at any time of the deposit, and no delivery to the complainant of the pass book, but a complete control of the deposit, reserved to the depositor and exercised by her.

The savings bank book, if given to Miss Northrop as trustee, was given to her as trustee of the depositor. It is a case of a resulting trust, as where upon the purchase of property, the title is taken in the name of one person, while the consideration is paid by another, a resulting trust arises in favor of the party from whom the consideration proceeded, the person named in the conveyance holding the estate conveyed as his trustee. The natural presumption is, that he who supplies the money means the purchase to be for his own benefit, rather than that of another, and that the conveyance is in the name of such other person as a matter of convenience, and for other collateral purposes. "The same doctrine is applied to cases where securities are taken in the name of another person. As if A takes a bond in the name of B, for a debt due to himself, B will be a trustee of A for the money." 2 Story, Eq. § 201.

If there is a trust in the case at bar, it is for the depositor. There is no language indicating a trust for the complainant, but

the reverse, that it was for the depositor, subject to her control, and controlled by her. This negatives a trust for the complainant.

There has been no delivery of the bank book. This case was before the court to determine whether parol evidence was admissible to show the intention of the depositor, either at the time of the deposit or subsequently. Such evidence was held admissible, but none such has been offered. Neither did the depositor declare herself as trustee, or as making the deposit for a *cestui que trust*, for whom she was trustee. *Northrop* v. *Hale*, 72 Maine, 275.

"It is well setted, that where a trust is once completely and effectually created, whether by a formal instrument or by parol, where a parol declaration of a trust is sufficient, the trust is beyond revocation, by the simple act of the donor." *Taylor* v. *Henry*, 48 Maryland, 550; *Kilpin* v. *Kilpin*, 1 M. & K. 520; *Adlington* v. *Cann*, 3 Atk. 151.

Here there was no such trust. There never was a moment when the depositor had not entire control of the funds, and when she could not have revoked the trust, if there had been one created.

The bill is not to enforce a trust for the benefit of the estate of Mrs. Robinson, but for that of the complainant, to whom nothing has been given in his own right.

Bill dismissed.

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

GEORGE JEWETT NORTHROP, in equity, *vs.* CLARENCE HALE.*

Cumberland. Opinion December 15, 1881.

Gift. Savings bank deposit. Trust.

When A having seventeen hundred dollars in a savings bank, made a further deposit in the name of B without his knowledge, of two thousand dollars, retaining the pass book till death, and drawing the dividends and such portions of the principal for her own use as she chose; *Held*, 1, that the

*See preceding case.

title to the deposits remained in the depositor and subject to her control. 2, that if the deposit was in trust, that B was trustee for the depositor and not *cestui que trust.*

On bill and agreed statement of facts.

The opinion states the case.

Drummond and Drummond, for the complainant.

Clarence Hale, for the defendant.

APPLETON, C. J. Elizabeth M. Robinson, the defendant's intestate, having seventeen hundred dollars deposited in the Maine Savings Bank, on the twenty-ninth day of June, 1874, deposited in the same bank the further sum of two thousand dollars in the name of George J. Northrop, payable by the terms of the deposit and of the pass book to herself; the bank being subject to the provisions of c. 218, § 9, of the acts of 1877, limiting the amount of any one depositor to two thousand dollars.

The deposit when made was not deposited in trust for the complainant, who was not aware of its existence, so far as appears. If there was any trust, it was for the depositor, but this bill is not brought to enforce any such trust. Mrs. Robinson always had the pass book; she never parted with it. She never by word or act transferred her title, but drew for her own purposes, the accruing interest and such portion of the original deposit as she deemed expedient. The control of the money deposited never vested and was never intended to vest in the complainant. There was never a moment of time when he could have drawn out a dollar, had he so wished. It ever remained under the control of the depositor.

The bill cannot be sustained for the benefit of the complainant. He has no title by gift. He is trustee rather than *cestui que trust* and cannot enforce his claim for his own benefit. *Robinson* v. *Ring*, 72 Maine, 141; and cases cited. *Northrop* v. *Hale*, *ante*, p. 66.

Bill dismissed.

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

DAVID N. BIRD and others, in equity,

vs.

FREEMAN C. HALL and others, and trustee.

Sagadahoc. Opinion December 20, 1881.

Equity. Shipping. Master sailing on shares.

A bill in equity by the owners of a vessel against the master who had taken her on shares cannot be maintained when no discovery is sought for and the prayer is to render an account of her earnings.

The plaintiffs in such case have an ample remedy at law.

On demurrer to bill in equity.

The plaintiffs were the owners of the schooner Sarah F. Bird, and the bill alleges that Freeman C. Hall was master of the schooner and sailed her on shares from February 21, 1878, to June 14, 1880, and has never come to a final account and adjustment of the affairs of the vessel during that time with the owners, and they "pray that the defendants may be required to make a full and true answer to this bill, that a just and true account of the earnings and disbursements and freights and of all the business of said schooner between said Freeman C. Hall, master as aforesaid, and the owners aforesaid, may be taken under the order of the court and that the court will decree and order that the said Freeman C. Hall shall pay to the plaintiffs such sums as shall be found justly due to each of them, (the plaintiffs hereby offering and being always ready to pay such sums, if any, as shall be due from them to said Freeman C. Hall, as master sailing said schooner as aforesaid,) and that the plaintiffs may have such other and further relief as to justice and equity may appertain."

C. E. Littefield, for the plaintiffs.

This court has now full equity jurisdiction. Stat. 1874, c. 175.

It is not contended that prior to the enactment of that statute this court would have jurisdiction in equity in a case like the one at bar.

"Cases of account between trustees and *cestui que trust*, may properly be deemed confidential agencies and are peculiarly within the appropriate jurisdiction of courts of equity."

"Cases of account between tenents in common, between joint tenants, between partners, part owners of ships and between owners of ships and the master, fall under like considerations." Story's Eq, Jur. § § 443-449.

The remedy in equity is more compete and adequate than it can be at law. *Idem*, § § 67, 450, 451, 458; *Miller* v. *Lord*, 11 Pick. 25; *Baker* v. *Riddle*, Baldwin, 394.

The owners and the master were partners as to the earnings. *Musier* v. *Trumpbour*, 5 Wend. 274; *Everitt* v. *Chapman*, 6 Conn. 347; *Loomis* v. *Marshall*, 12 Conn. 86; Pars. Partnership, 47, 569; *Fail* v. *McRee*, 36 Ala. 61; 17 Wis. 140, 320; Story, Partnership, 42; *Merritt* v. *Walsh*, 32 N. Y. 689; 1 Pars. Ship. and Ad. 92; Abb. Shipping, 111, 115; see *Jarvis* v. *Noyes*, 45 Maine, 106; *Crooker* v. *Rogers*, 58 Maine, 342; *Miller* v. *Lord*, 11 Pick. 26.

A. P. Gould, for the defendants, cited: *Thompson* v. *Snow*, 4 Maine, 264; *Bridges* v. *Sprague*, 57 Maine, 543; *Jones* v. *Newhall*, 115 Mass. 244; *Black* v. *Black*, 4 Pick. 234; *Charles River Bridge* v. *Warren Bridge*, 6 Pick. 376; *Oelrichs* v. *Spain*, 15 Wall. 211; *Grand Chute* v. *Winegar*, 15 Wall. 373; *Ins. Co.* v. *Bailey*, 13 Wall. 616; *Parker* v. *W. C. and W. Co.* 2 Black, 545; *Woodbury* v. *Brazier*, 48 Maine, 302; *Hall* v. *Gray*, 54 Maine, 230; *Bridges* v. *Sprague*, 57 Maine, 543; *Call* v. *Perkins*, 55 Maine, 517; *Mustard* v. *Robinson*, 52 Maine, 54; *Dinwiddie* v. *Bailey*, 6 Ves. Jr. 136; 1 Danl. Ch. 610 (note 1, 2); *Pool* v. *Loyd*, 5 Met. 525; *Woodman* v. *Saltonstall*, 7 Cush. 181; *Pratt* v. *Pond*, 5 Allen, 59; *Clark* v. *Jones*, 5 Allen, 379; *Metcalf* v. *Cady*, 8 Allen, 587; *Mill River L. F. Ass.* v. *Claflin*, 9 Allen, 101; *Com.* v. *Smith*, 10 Allen, 448; *Bassett* v. *Brown*, 100 Mass. 355; *Bassett* v. *Brown*, 105 Mass. 551; *Blood* v. *Blood*, 110 Mass. 545; *Carter* v. *Bailey*, 64 Maine, 458.

APPLETON, C. J. This is a bill in equity by the owners of a vessel against the master who had taken her on shares. The prayer is

that he render an account of her earnings. No discovery is sought for.

It is provided by R. S., c. 77, § 5, that jurisdiction in equity is conferred on this court between part owners of vessels, but the master is not alleged to be a part owner. The statute therefore does not apply in a case where the master is not a part owner.

When the vessel is let on shares, the master having control, he is to be regarded as the owner for the time being. There is no partnership between him and the owners of the vessel. *Thompson* v. *Snow*, 4 Greenl. 265; *Cutler* v. *Winsor*, 6 Pick. 335; *Winsor* v. *Cutts*, 7 Greenl. 261; *Somes* v. *White*, 65 Maine, 543; *Bonzey* v. *Hodgkins*, 55 Maine, 98. A bill cannot be maintained against the defendant as a partner.

The plaintiffs may maintain an action of account. *Hardy* v. *Sprowl*, 33 Maine, 508; *Closson* v. *Means*, 40 Maine, 337; *Jarvis* v. *Noyes*, 45 Maine, 106.

The plaintiffs by the contract are to receive a definite share of the earnings of the vessel as compensation for its use instead of a fixed and definite sum. If the sum is definitely fixed an action of assumpsit could be maintained for the sum agreed upon by the parties. When the compensation is a definite proportion of the earnings no reason is perceived why the same form of action may not be adopted to recover the amount due, as in *Hall* v. *Gray*, 54 Maine, 230, where, however, the plaintiffs failed in consequence of a release given by one of their number. The ship owners must look to the master for his performance of his part of the contract with them. *Bridges* v. *Sprague*, 57 Maine, 543.

The plaintiffs have an ample remedy at law. "A bill is demurrable, not only if it show that the plaintiff has a remedy at law, equally sufficient and available, but also if it fail to show that he is without such remedy." *Jones* v. *Newhall*, 115 Mass. 244. Nothing here shows that the rights of the parties cannot be determined at law. No discovery is prayed for. *Blood* v. *Blood*, 110 Mass. 547.

Bill dismissed with costs.

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

SARAH A. BENSON, administratrix, *vs.* ALBERT C. CARR.

Kennebec. Opinion December 20, 1881.

Attorney at law, authority of. R. S., c. 81, § 66.

An attorney at law, having control of a suit, has control of the remedy and the proceedings connected therewith and may release an attachment of real or personal property, and such release will bind his client as between such client and a party purchasing or taking a mortgage of such released estate on the strength of such release.

The object of R. S., c. 81, § 66, was not to restrict or annul the general authority of an attorney. It leaves that untouched.

ON EXCEPTIONS.

Writ of entry for four-ninths of certain real estate in Winthrop, and for the rents and profits of the same from June 1, 1877. Writ was dated February 17, 1880. Plea, general issue and brief statement that the attachment in the suit in which the judgment was rendered upon which the levy was made, under which the plaintiff claims title, was fully discharged prior to the rendition of such judgment.

The material facts are stated in the opinion.

At the trial the presiding justice directed the jury to render a verdict for the plaintiff, which was done. To this ruling, exceptions were alleged.

Baker and Baker, and L. C. Cornish, for the plaintiff.

We maintain that the writing given by the attorney, purporting to release the attachment, was absolutely void.

Originally an attachment was only to secure appearance of the parties. *Hubbard* v. *Hamilton*, 7 Met. 342. But the colonial ordinance of 1650 added to or changed this and its spirit is found in R. S., c. 81, § 54. Thus an attachment, as securing a lien upon the property, is a creature of the statute; *Grosvenor* v. *Gold*, 9 Mass. 210. And the statutes provide the only methods of dissolving attachments. See R. S., c. 81, § § 64-73. The writing in question cannot operate as a release by any method provided by the statute, because it was not signed by the plaintiff.

To make this unsealed, unacknowledged and unrecorded instrument, signed by the attorney only, a valid release, is to render the statute provision nugatory.

The attorney had no authority from employment alone to release the attachment. This pretended release was without consideration, and therefore void. It was not under seal, and therefore cannot be permitted to contradict the record of the attachment. *Bachelder* v. *Perley*, 53 Maine, 414; Drake on Attachment, § 239; *Lyon* v. *Sanford* and others, 5 Conn. 544.

The writing was voidable by the plaintiff because it was obtained by fraudulent representations. Bigelow on Torts, 25, 26; *Mead* v. *Bunn*, 32 N. Y. 275; *McClellan* v. *Scott*, 24 Wis. 81; *Matlock* v. *Todd*, 19 Ind. 130; *Parham* v. *Randolph*, 6 How. (Miss.) 435; *Kiefer* v. *Rogers*, 19 Minn. 32; *Holland* v. *Anderson*, 38 Mo. 55; *Atwood* v. *Chapman*, 68 Maine, 38; *David* v. *Park*, 103 Mass. 501;

It could work no estoppel. Bigelow on Estoppel, 253, 255; *Lowell* v. *Daniels*, 2 Gray, 161; *Pierce* v. *Chace*, 108 Mass. 254; *Merriam* v. *R. R. Co.* 117 Mass. 241; *Hazard* v. *Irwin* 18 Pick. 95; *Partridge* v. *Messer*, 14 Gray, 180.

J. H. Potter, for the defendant, cited: *Davis* v. *Tibbetts*, 39 Maine, 279; *McLarren* v. *Thompson*, 40 Maine, 284; *Blodgett* v. *Chaplin*, 48 Maine, 322; *Forsyth* v. *Rowell*, 59 Maine, 131; *Moulton* v. *Bowker*, 115 Mass. 36; *Jenny* v. *Delesdernier*, 20 Maine, 183.

APPLETON, C. J. The plaintiff, on the seventh of October, 1870, commenced a suit against Luther Whitman, on which she caused an attachment of all his real estate. Judgment was rendered in this action at the August term, 1876, in this county, on which execution issued August 12, 1876, by virtue of which a levy was duly made on the real estate attached September 4, 1876.

If the case stopped here the plaintiff's right to recover would be unquestioned. But of the real estate attached, three lots were subject to mortgages. The attachment, as to these, was only of equities of redemption. Two of the mortgages were to Phineas Morrill and one to Levi Jones. The defendant, Whit-

man, was desirous of discharging these mortgages by a loan, secured by a mortgage, to be obtained from the Winthrop Savings Bank. To accomplish this it was necessary to procure a release of the plaintiff's attachments of the equities of redemption before mentioned. Accordingly, in June, 1872, the attorney of the plaintiff, knowing the purpose for which it was wanted, executed a release of the three lots before mentioned. Luther Whitman with this release procured the desired loan, and gave the savings bank a mortgage on the lots thus released, having, with the funds thus obtained, discharged the mortgages before mentioned.

The release, if the attorney could legally make it for his client, is valid, and if valid and binding on her, defeats the levy, which was made on the estates released and then mortgaged to the savings bank.

That the release is valid, if within the authority of the attorney, will not be questioned. Was it within his authority? An attorney at law has authority to release an attachment of real or personal estate before judgment. He may elect and control the remedy and the proceedings connected therewith. His clients are bound by what he does. *Jenny* v. *Delesdernier*, 20 Maine, 183; *Moulton* v. *Bowker*, 115 Mass. 36; *Pierce* v. *Strickland*, 2 Story, 292.

But it is urged that the release is without consideration and was obtained by fraud from the plaintiff's attorney. If there was no consideration or if there was fraud there is no pretence that the officers of the Winthrop Savings Bank were consuant of such facts. The release was given for the purpose of satisfying them that a loan might be safely made. The attorney making it knew the purpose for which it was wanted and the officers of the bank acted upon the release as valid. They acted in perfect good faith in loaning the money of the bank. If a loss is to ensue the loss should not fall on the bank. The release being valid, the bank acquired a good title by mortgage to the premises released. Having a good title, their conveyance, or that of the receiver, as between the plaintiff and the tenant, transferred a good title to the latter.

But it is insisted that the authority of the attorney has been modified and restricted by statute. In 1859 an "act (c. 62) to provide for recording discharges of attachments on real estate," was passed, which is found in R. S., c. 81, § 66. The object was, when an attachment was dissolved, to provide in certain cases for a record of such fact. It was not to restrict or annul the general authority of the attorney. It leaves that untouched. The purpose was to provide what should be recorded and being recorded should be notice to the public. The question here is between the plaintiff releasing by her attorney and a title acquired in good faith, in consequence of such release and by relying on the same. It might present a different question if the plaintiff had conveyed after her levy to a stranger without notice, who in his purchase had relied only on what appeared of record.

Exceptions sustained. Verdict set aside.

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

FIRST NATIONAL BANK OF AUBURN

vs.

N. L. MARSHALL and another.

Androscoggin. Opinion December 20, 1881.

Promissory notes. Release. Principal and surety.

An agreement, not under seal, to discharge an indebtedness is not a release and cannot have that effect.

A discharge given by the holder of a promissory note to one who signed upon the back does not discharge one who signed upon the face of the note, when there is no evidence that the holder had any other knowledge of the relation between the signers than that obtained from an examination of the note. How far parol evidence is admissible to show a relationship between the parties the reverse of that shown by the note is not decided.

Where an agreement to discharge one party to a note in express terms reserves all claims against all other parties to the note it will not discharge any other party.

ON EXCEPTIONS.

Assumpsit on the following promissory note.

"$375. Canton, May 17, 1880.

Four months after, date, I promise to pay to the order of First N. B'k Auburn, Me. Three hundred seventy-five Dollars at first Nat. B'k Auburn, Me. Value received.

No. 4594. Due, Sep. 17-20. N. L. Marshall."

(Indorsed,)—"Otis Hayford. Pd by O. H. 37.50."

Plaintiff discontinued as to Hayford. Marshall pleaded the general issue and by way of brief statement set up the following agreement:

"Whereas, Otis Hayford of Canton in the county of Oxford and state of Maine, is liable to the undersigned, his creditors, upon open account and absolutely or contingently as maker, drawer, acceptor or indorser of certain negotiable paper and in the several sums herein below set against the names of said creditors;

"And whereas said Otis Hayford is unable to pay his said liabilities in full, and for the purpose of paying a release from said liabilities, agrees to pay ten per cent. of the face of his said several liabilities in three and six months from December first, A. D. 1880, with interest.

"Now, therefore, in consideration of the premises, it is mutually agreed between said Otis Hayford, debtor as aforesaid and the undersigned individuals, firms and corporations, creditors as aforesaid, their legal representatives and successors, severally and not jointly one with another that said creditors will each receive ten per cent. of the liabilities of said Otis Hayford held by them respectively, the ten per cent. aforesaid payable in two and four months from December first, A. D. 1880, with interest, in full settlement of the several liabilities to them of said Otis Hayford whether the same be an open account as maker, drawer, indorser, or maker of bills, notes, checks or drafts or other paper, or however such liabilities may arise; but such settlement and discharge of liability shall not affect or discharge the liability of any party upon such paper other than said debtor. When any negotiable paper upon which is the name of said Otis Hayford as maker, drawer, acceptor or indorser bears the name of any other party or parties who are or may become liable thereon

absolutely or contingently as indorsers or otherwise, it is hereby severally agreed between said parties and the holders of said paper and said Otis Hayford that the payment of said ten per cent. as aforesaid to the present holder or to any party who shall then hold the same, shall discharge said Hayford from all liability ensuing out of said paper.

"In case said Otis Hayford shall be adjudged insolvent under and by virtue of the insolvent laws of Maine before the delivery of notes for, or payment otherwise, of said ten per cent. then this agreement is not to be binding upon the parties thereto.

"In witness whereof the parties have severally, and not jointly, hereunto set their hands this eighteenth day of October, A. D. 1880." . . . . . .

First National Bank of Auburn,
By J. Dingley, Jr. Prest, $4956 00."

The case was submitted to the presiding justice, who ruled *pro forma*, that the contract made by plaintiffs with Hayford, claimed to be the principal on said note, did not discharge [the surety] Marshall, and ordered judgment for plaintiffs. To which rulings the defendant excepted.

N. and J. A. Morrill, for the plaintiff, cited: *McAllester* v. *Sprague*, 34 Maine, 296; *Drinkwater* v. *Jordan*, 46 Maine, 432; *Catskill Bank* v. *Messenger*, 9 Cow. 38; *DeZeng* v. *Bailey*, 9 Wend. 336; *Frink* v. *Green*, 5 Barb. S. C. 459; *Rowley* v. *Stoddard*, 7 Johns. 209; *Averill* v. *Lyman*, 18 Pick. 353; 2 Chit. Contr. (11th ed.) 1155, and cases cited; *Rich* v. *Lord*, 18 Pick. 325.

J. P. Swasey, for the defendant.

Hayford was in fact the principal and Marshall the surety on the note in suit. The plaintiffs in writing discharged the principal without the consent of the surety. They released Hayford from any further payment on that note not only to them but to any subsequent holder. That was an extinguishment of the debt. Story Prom. Notes, § 424 *et seq.*; Chit. Contr. 774, 775.

DANFORTH, J. This is an action upon a promissory note of which the defendant Marshall is the maker and which Otis Hayford indorsed at its inception, it not having been indorsed by the payer. Hence so far as the note shows, though Hayford may be considered as surety from the position of his name upon the note, he is an original promisor, and as to the holder, the two are jointly as well as severally liable and must be treated as joint debtors. *Brett* v. *Marston*, 45 Maine, 401; *Union Bank* v. *Willis*, 8 Met. 504.

The defence is an agreement entered into by the plaintiff and Hayford by which Hayford upon certain conditions was to be discharged from his liability upon the note. It is claimed that this agreement having discharged Hayford, discharges the defendant also. But the agreement is not under seal and is therefore not a technical release and by well settled law cannot have that effect. *McAllester* v. *Sprague*, 34 Maine, 296; *Drinkwater* v. *Jordan*, 46 Maine, 432.

It is, however, contended that in fact Marshall signed the note for the benefit of Hayford who had the proceeds, and who by an agreement between themselves, was to pay it, thus making Marshall the surety and Hayford the principal. It may be conceded that ordinarily when the holder of a note discharges a party thereto he discharges all subsequent parties who might otherwise upon payment have a remedy over. This is clearly so when the order in which the parties are liable appears upon the face of the note and when the discharge is of such a character as to deprive the subsequent parties of their remedy over in case of payment.

In this case neither of these conditions are complied with. By the note itself it appears that Marshall is the prior party. How far parol evidence is admissible to show a relationship existing between the parties the reverse of that shown by the note, it is not necessary now to decide. It does not appear that the bank had at the time it took the note any knowledge other than that obtained from the note. But if it had, unless it was a party to the agreement between Marshall and Hayford, it could hardly be bound by it. The contract between the bank and defendant was that of payor and payee of the note. The defendant

held himself out as maker of the note and he has no reason to complain if the bank treats him as he has treated himself. The defendant had voluntarily signed the note as maker. He had thereby assumed the contract of maker with all its liabilities, to any one who might become the legal holder of the note, and for his indemnity he depended on his agreement with Hayford. Why then should not the bank in the exercise of its own rights do that which in its judgment its interests seem to require inasmuch as by so doing it has violated no contract existing between it and the defendant. These views, whatever might have been the result of some of the earlier decisions, seem to be fully sustained by the later authorities. Story on Bills, § 423, note and cases cited; *Commercial Bank* v. *Cunningham*, 24 Pick. 270, 275-6. Thus by virtue of the contract between the bank and those liable upon the note it was the subsequent and not the prior party who was discharged; nor is the agreement to discharge Hayford of such a nature as to effect a discharge of Marshall even if we assume that Hayford is the principal and Marshall the surety. It in express terms reserves all claims against all other parties to the note. To this provision Hayford must be considered as assenting. There is nothing in the contract which prevents the plaintiff from pursuing its remedy against Marshall at any moment after the note becomes payable and Hayford having assented to this his liability to any subsequent party to the note is neither delayed nor discharged. If Marshall pays the note his remedy over is in no respect impaired by this agreement, unless by his own assent. This law is so well settled that it requires no further discussion. 2 Chitty on Cont. (11th ed.) 1155: Story on Bills, § 416; *Sohier* v. *Loring et als.* 6 Cush. 537, and cases cited.

The clause in the contract by which Hayford is not to be pursued by other parties upon the note, cannot and does not purport to have any effect upon Hayford's liability except as it is assented to by such other parties. If it has Marshall's assent he is bound by it; if not, his rights remain unimpaired.

Exceptions overruled.

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

DAVIS R. STOCKWELL *vs.* CHARLES M. GIDNEY and another.

Penobscot. Opinion December 20, 1881.

Promissory notes. Contingency.

S agreed with G at the time of receiving two of G's notes from him, that the notes should be void, in a certain contingency. That contingency did not happen, but S did an act, which had a tendency to prevent, and which for all the court could know actually prevented, its occurence.

Held, in an action of assumpsit on such notes by S against G, that the plaintiff could not deprive the defendant of the benefit of the occurrence of the contingency, and still be in a condition to demand payment of the notes.

ON REPORT.

Assumpsit on two notes of hand, signed by the defendants, payable to the plaintiff, dated June 21, 1876; one for $27.96, payable in two years; the other, for $21.00, payable in two years and nine months.

The opinion states the facts, the following being the plaintiff's agreement referred to in the opinion:

"Bangor, June 21, 1876. Whereas, I have this day made an exchange of property and securities with Mrs. Martha C. Gidney, and Charles M. Gidney, of Houlton, Me. I having conveyed real estate in Amity to said Charles M. Gidney, and have taken notes signed by Harry O. Gidney, amounting to $541 originally, and interest on the same to the present time (said notes being dated November 9, 1860,) making said notes now worth $1,008, or about, at simple interest; and, whereas, said notes are secured by mortgage on real estate in Houlton, which was foreclosed on the thirtieth day of March last, by Martha C. Gidney, and expiring on the thirtieth day of March, 1879; and the said Charles M. Gidney having given me his notes payable yearly for the difference of interest, which is collectible under the mortgage, on said notes of $541, and the amount they are now worth, $1,008, till the expiration of the foreclosure of said mortgage.

"I hereby agree, that if said mortgage notes, with interest, is paid to me before the expiration of foreclosure as above named, then I am to refund or indorse on said Charles M.

Gidney's notes, the amount of interest at same rate on the unexpired time of foreclosure, on the above named difference."

DAVIS R. STOCKWELL."

A. W. Paine, for the plaintiff.

The plaintiff did not interfere to prevent the redemption of the mortgage, as specified in the contract. The right of redemption was not tampered with in the least degree, nor the amount or time of redemption at all changed. The utmost that can be said is, that he sold his mortgage to one who might under certain circumstances desire to pay. But he had a right to sell to whomever he would so long as the right of redeeming remained intact. It was no fault of the plaintiff if the holding by the purchaser prejudiced the defendants. The plaintiff had nothing to do with the second mortgage. There is no proof that any damage resulted to the defendant from the sale of the mortgage. Nor is there the least proof that if he had not sold at the reduced price to the second mortgagee the purchaser would have redeemed.

The *onus probandi* was on the defendant to prove such damage. The court cannot be governed by probabilities, suppositions or uncertain future events in estimating damages. *Winslow* v. *Lane*, 63 Maine, 161; *Washington Ice Co.* v. *Webster*, 62 Maine, 341; *Ripley* v. *Mosely*, 57 Maine, 76; 2 Greenl. Ev. § 256, *et seq.*; *Brown* v. *Cummings*, 7 Allen, 507.

Wilson and Woodard, for the defendant, cited: Co. Lit. 206, a, b; Leake Contr. 367; *Holms* v. *Guppy*, 3 M. and W. 381; *Russell* v. *Bandeira*, 13 C. B. N. S. 149; *Bigland* v. *Skelton*, 12 East. 436; *Beswick* v. *Swindells*, 3 A. and E. 249; Chitty Contr. (11th Am. ed.) 1087–9; *Read* v. *Davis*, 35 Maine, 379; *Brigham* v. *Wentworth*, 11 Cush. 123; *Eyre* v. *Bartrop*, 3 Madd. 120; 1 Pars. Notes and Bills, 236.

SYMONDS, J. The declaration is in assumpsit upon two promissory notes, signed by the defendant. The question is, whether the plaintiff's written agreement of June 21, 1876, and the stated admissions of fact, afford a legal defence to the action.

On the date of that agreement, the plaintiff gave the defendant a deed of lands in town of Amity. In exchange therefor, he

received from the defendant the notes of Harry O. Gidney for $541, dated November 9, 1860, on which the amount then due was about $1,008. They were secured by mortgage of real estate in Houlton. Notice of foreclosure had been given, and the equity of redemption was to expire March 30, 1879. As a part of that transaction, the defendant also gave the plaintiff three notes, (of which those in suit are two; the other, due in one year, has been paid,) in such amounts as were sufficient to make up the difference between the interest on a principal of $541, and the interest on a principal of $1,008, from June 21, 1876, the date of exchange of lands for the mortgage notes, to March 30, 1879, when the foreclosure was to become absolute; thus securing to the plaintiff, if the premises were not redeemed, interest on the amount then due upon the mortgage notes, instead of, or rather in excess of, the interest on their face only, from the date of the bargain, till he acquired full title.

The plaintiff agreed that, if the mortgage notes, with interest, were paid to him before the expiration of the foreclosure, he would refund or indorse on the defendant's notes an amount equal to the interest on $467 — the difference between $1,008 and $541 — for that part of the period of foreclosure which had not expired when such payment was made. This was his agreement, not in words, but in effect.

On February 26, 1877, without the defendant's knowledge or consent, the plaintiff sold and assigned the mortgage to a second mortgagee of the same property. To that date, and beyond it, the plaintiff has received the additional interest stipulated for, by the payment of the first of the defendant's notes. Can he require more?

The plaintiff's agreement of June 21, reserved certain rights to the defendant in the event of the payment of the mortgage debt. There was a chance that the mortgagor, or a second mortgagee, might pay; and thereby prevent the accruing of the interest, for which, in the event it did accrue, the defendant's notes were given. This whole chance belonged to the defendant. The plaintiff had substantially agreed that he might have it, and that whatever saving of interest there should be on the $467,

by an earlier payment of the principal invested, which included the $467, should go to reduce the amount due on the defendant's notes, which were given only for the interest that might accrue on that sum before payment, or the maturing of title. Having given the defendant the right to have his notes reduced, if payment was made, or to have them cancelled, if the payment was made early enough, the plaintiff does an act which directly diminishes the chance of payment. Prior to the time when any interest, for which the notes in suit were given, had accrued, he sells the mortgage to one whose only legal right was to pay it; that is to say, to a second mortgagee, who with reference to the plaintiff, as holder and owner of the mortgage, had no other legal right than that of paying or redeeming it. He could compel the plaintiff to accept payment. He could not compel him to sell. Had the mortgage been paid to the plaintiff, either by the mortgagor or by the second mortgagee, on the day when he sold it, it would be precisely within the terms of his contract, that he should not recover on these notes. If his own act prevented the payment, which under his agreement was to give the defendant certain rights, the defendant's rights, as against him, still remain. By his contract he did not say to the defendant, you may have this benefit, if payment is made, but I shall see that payment is not made. On the contrary, the agreement to give the defendant an advantage in case of payment, carries with it the implied duty not to prevent payment. To impair the prospect of payment by selling to the second mortgagee, has the same legal effect as preventing payment. The court cannot estimate chances, and determine whether the mortgagor or the second mortgagee would have paid, if the plaintiff had not sold. It is enough that the plaintiff, by his agreement, gave the defendant a right to have these two notes cancelled, if payment should be made at as early a date as that at which he subsequently sold the mortgage; and that such sale, for all that can be known, was the only thing that prevented the payment of it.

The fact that the plaintiff chose to sell at a discount, does not affect the merits of the case. The same principle which would defeat this action, if he had assumed to sell to the second mort-

gagee for the full amount due, or even to the mortgagor for the same sum, precludes recovery here.

The plaintiff agreed that these notes should be void in a certain contingency. That contingency did not happen. But the plaintiff did an act which had a tendency to prevent, and which for all the court can know, actually prevented its occurrence. The chance of the second mortgagee's paying this mortgage was the principal advantage that the defendant derived from this agreement. It was worth more than the chance of the mortgagor's paying. The plaintiff could not deprive the defendant of that, and still be in position to demand payment of the notes.

Plaintiff nonsuit.

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

EDWARD C. MORRIS and another *vs.* GEORGE A. LYNDE.

Knox. Opinion December 20, 1881.

Conditional sale. R. S., c. 111, § 5.

The defendant gave the plaintiffs an order, in these words: "Rockland, October 22, 1873. Messrs. Morris and Ireland, Boston. Please ship to Lynde Hotel, one fire proof safe, with patent inside bolt arrangement, size, No. 21, for which I agree to pay two hundred and sixty-three dollars, payable May 1st, 1874. George A. Lynde. The same remaining the property of Morris and Ireland, till payment."

Held, that this was not a note for the payment of the safe, which was thereupon furnished, within the meaning of R. S., c. 111, § 5,* and that the safe remained the property of Morris and Ireland, until paid for.

ON REPORT.

Replevin of one fire proof safe, with patent inside bolt arrangement, size No. 21, Morris and Ireland manufacture, of the value of two hundred and fifty dollars.

Writ dated March 1, 1877.

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*The following is the language of the statute: "SECTION 5. No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note; nor when it is so made and signed in a note for more than thirty dollars, unless it is recorded like mortgages of personal property, and on receipt of twenty-five cents each, town clerks shall record such notes in a book kept for that purpose."

Plea, *non cepit*, and a brief statement, alleging title at the date of the writ, in one Jeremiah Furbush.

The opinion states the facts.

The following is a copy of the order referred to in the opinion:

"Rockland, October 22, 1873.

Messrs. Morris and Ireland, Boston.

Please ship to Lynde Hotel, one fire proof safe, with patent inside bolt arrangement, size No. 21, for which I agree to pay two hundred and sixty-three dollars, payable May 1st, 1874.

George A. Lynde."

"The same remaining the property of Morris and Ireland, till payment."

Indorsement: "Safe to be finished extra nice, with plain border."

Rice and Hall, for the plaintiffs.

J. E. Hanley, for the defendant.

SYMONDS, J. The evidence shows a conditional sale in the fall of 1873, by the plaintiffs to the defendant, of the safe which was replevied in March, 1877, from the defendant's possession. By the terms of the sale, the safe was to remain the plaintiffs' property, till the price was paid. No part of the payment has ever been made.

The defendant justifies his possession under the title of one Jeremiah Furbush, to whom the safe was mortgaged by the defendant himself, in December, 1875; claiming that the record of the order which he gave to the plaintiffs for the safe, in which was contained the stipulation that the safe was to remain their property till payment, was so defective as to be a nullity, and thereby his mortgage to Furbush gained precedence.

Except so far as some statute might require it, there was no need either of writing or of record, to enable the plaintiffs to retain the title to their own property, till the event occurred which they had made a condition precedent to their parting with title, namely, till the price was paid. The title could pass to the defendant *in presenti*, or *in futuro*, only by the consent of the

plaintiffs; in accordance with their agreement. The plaintiffs agreed that the title should vest in the defendant, when he paid the price. This he has never done. The safe has always remained the plaintiffs' property, as if they had never parted with the possession, and as against Lynde and all persons claiming under him, unless some statute controls the contract, and changes the relations of the parties. By R. S., c. 111, § 5, the rule is changed in this respect in cases of sales of goods for which a note is given.

"No agreement that personal property bargained and delivered to another, for which a note is given, shall remain the property of the payee till the note is paid, is valid, unless it is made and signed as a part of the note, nor when it is so made and signed, in a note for more than thirty dollars, unless it is recorded. . ."

The amendments of this section (1872, c. 71; 1874, c. 181,) are not material on this point. They both recognize this same limitation. They apply only to cases in which a note has been given for goods sold. This § 5, therefore, contains the only statutory restriction, applicable to this case, upon the principles of law already stated in regard to conditional sales of personal property. If the case is not within the provisions of that section, a record was not required to enable the plaintiffs to hold the title to their own property till their agreement to part with it took effect according to its terms.

It is to be observed that the note mentioned in this section, is one given for personal property bargained and delivered; that is to say, given in payment of the price. It is not the "memorandum or note" of a contract referred to in the first section of the same chapter. An order upon the plaintiffs, asking them to ship a safe (described) and agreeing to pay a certain price for it on a day stated, is not a note given for personal property bargained and delivered. It is an order for goods, describing them and specifying terms of payment. We think a business man, holding such a preliminary order as this, for the subsequent delivery of goods, might well understand that it was not a note given in payment of the price of an article actually sold and delivered, and therefore not a paper requiring record under the statute. The plaintiffs were manufacturers of safes, the order was not filled for

five weeks after it was given; and one of the plaintiffs on cross examination, states his understanding that no note was given in payment for the safe. We think it is true, legally, that there was none within the meaning of § 5.

The statute for some reason has limited the requirement of record to conditional sales, in which a note has been given for the price of the thing sold; and this is not that case.

Judgment for the plaintiffs.
Damages assessed at $1.00.

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

STATE *vs.* CHARLES A. JACKSON.

Knox. Opinion December 22, 1881.

Bribery at a municipal election. Indictment.

Bribery at a municipal election, is a misdemeanor punishable by the common law of this State.

An attempt to bribe or corruptly influence the elector, although not accomplished, will subject the offender to an indictment.

Wilfully and unlawfully attempting to influence an elector to give in his ballot at such election, by offering or paying him money therefor, is a crime at common law in this State.

ON EXCEPTIONS to the ruling of the court in overruling a demurrer to the indictment.

(Indictment.)

"State of Maine. Knox ss. At the Supreme Judicial Court, begun and holden at Rockland, within and for the county of Knox, on the second Tuesday of March, in the year of our Lord, one thousand eight hundred and eighty-one.

"The jurors for said State, upon their oath present, that a meeting of the inhabitants qualified to vote, of ward one, in Rockland, in the county of Knox, for the election of one alderman, and three common councilmen, on the eighth day of March, in the year of our Lord, one thousand eight hundred and eighty-one, at said Rockland, was then and there duly holden.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that one Augustus Montgomery, was then and there a qualified voter in this State, to wit, in ward one, in said Rockland, in the county aforesaid.

"And the jurors aforesaid, upon their oath aforesaid, do further present, that Charles A. Jackson, of Rockland, in said county of Knox, did then and there at the said election, unlawfully, and wilfully attempt to influence the said Augustus Montgomery, so being a qualified voter in this State as aforesaid, to give his, the said Augustus Montgomery's ballot, in said election then and there duly holden, by then and there offering and paying him, the said Augustus Montgomery, the sum of two dollars in lawful money, against the peace of said State.

"A true bill. Robert Long, Foreman, *pro tem.*"

"J. O. Robinson, county attorney."

A. P. Gould, for the defendant.

1. The offence set out in the indictment, is not within the statute, R. S., c. 4, § 67. The statute declares in what bribery at elections shall consist; and at the election of what officers it may be committed. It does not embrace municipal elections.

2. Having undertaken, thus specifically, to provide at what elections, improperly influencing voters, shall constitute the crime of bribery, the statute, by necessary implication, excluded all others. We need not consider, therefore, whether the acts charged, would constitute bribery at common law.

3. The indictment is defective.

(1.) Because it is not alleged that a legal meeting of ward one, in Rockland, was held for the purpose alleged.

(2.) It is not alleged for what town or city "one alderman and three councilmen" were to be elected at that meeting.

(3.) It is not alleged that Augustus Montgomery was a legal voter in the same "ward one," in said Rockland, in which the meeting is alleged to have been held. There may have been more than one ward, by that designation in that city, as there may be more than one town of the same name in a State or county.

4. No crime, under any law, is alleged in the indictment. It is alleged that Augustus Montgomery was a "legal voter" at that election. It is alleged that defendant "wilfully attempted" to influence Montgomery, "to give his, the said Augustus Montgomery's ballot, in said election." It was not a crime, nor was it any wrong act for Montgomery to give his ballot in said election, but was a perfectly lawful and laudable act. It is not a crime to wilfully, (which means intentionally,) induce one to do a perfectly lawful and laudable act, even by giving him money. The charge is not that defendant attempted to influence Montgomery, "in giving his vote;" which would be an offence, and is the offence under the statute, but that he sought to influence him "to give" his vote.

5. To improperly influence a voter in a municipal election, of town or city officers, has not been regarded as an indictable offence in this country. No such case has been found in the reports. It is for the State to make it appear that such is the common law in this State.

"*Non apparentibus, &c.*" We submit that if such is the common law of England, it has never been adopted in this country; and that to show whether it has been, we must look into the reports of cases, and not into the text books which cite English cases only for support.

Henry B. Cleaves, attorney general, and *J. O. Robinson*, county attorney, for the State, cited: *Rex* v. *Pitt*, 3 Burr. 1328; S. C. 1 Blac. R. 380; 3 Inst. 147; *Rex* v. *Vaughan*, 4 Burr. 2500; 1 Bishop Crim. Law, 355; 2 Archibold's Crim. Pr. & Pl. 904; Wharton Pr. 74; 2 East. 5; *Walsh* v. *People*, 65 Ill. 58; *State* v. *Ellis*, 33 N. J. Law Reports, 102; *State* v. *Barefield*, 14 Ala. 603; *Com.* v. *Shaver*, 3 Watts & S. 338; *U. S.* v. *Worrell*, 2 Dallas, 284; *State* v. *Ames*, 64 Maine, 386; *State* v. *Danforth*, 3 Conn. 114; *State* v. *Wilson*, 2 Root, 62; *State* v. *Doud*, 7 Conn. 384.

LIBBEY, J. This is an indictment against the defendant for unlawfully and wilfully attempting to influence a qualified voter to give in his ballot at a municipal election, in the city of Rockland, by offering and paying him money therefor.

The offence charged is not within R. S., c. 4, § 67.

Is bribery at a municipal election a misdemeanor at common law in this State? It is claimed by the learned counsel for the defendant, that it is not recognized as such in this country. We think it is. It was an offence at common law in England. 1 Russell on Crimes, 154; *Plympton's Case*, 2 Ld. Raym. 1377; *Rex* v. *Pitt*, 3 Burr. 1335.

The common law of England upon the subject of bribery, fraud and corruption at elections, is generally adopted as the common law in this country. *Comm.* v. *Silsbee*, 9 Mass. 417; *Comm.* v. *Hoxey*, 16 Mass. 385; 1 Bish. Crim. Law, 355; *Walsh* v. *The People*, 65 Ill. 58; *State* v. *Purdy*, 36 Wis. 224; *State* v. *Collier*, 72 Mo. 13; *People* v. *Thornton*, N. Y.; S. C. Third Department; Albany L. J. Dec. 3, 1881, p. 441; *Com. of Penn.* v. *McHale*, S. C. Penn.; Albany L. J. Nov. 19, 1881, p. 412.

Bishop in his work on criminal law, vol. 1, § 922, says: "We see it to be of the highest importance that persons be elected to carry on the government in its various departments, and that in every case a suitable choice be made. Therefore any act tending to defeat these objects, as forcibly or unlawfully preventing an election being held, bribing or corruptly influencing an elector, casting more than one vote, is punishable under the criminal common law."

PAXON, J., in the opinion of the court in *Comm.* v. *McHale*, *supra*, says: "We are of opinion that all such crimes as especially affect public society, are indictable at common law. The test is not whether precedents can be found in the books, but whether they affect the public policy or economy. It needs no argument to show that the acts charged in these indictments are of this character. They are not only offences which affect public society, but they affect it in the gravest manner. An offence against the freedom and purity of the election, is a crime against the nation. It strikes at the foundation of republican institutions. Its tendency is to prevent the expression of the will of the people in the choice of rulers, and to weaken the public confidence in elections. When this confidence is once destroyed, the end of

popular government is not distant. Surely if a woman's tongue can so far affect the good of society as to demand her punishment as a common scold, the offense which involves the right of a free people, to choose their own rulers in the manner pointed out by law, is not beneath the dignity of the common law, nor beyond its power to punish. The one is an annoyance to a small portion of the body politic, the other shakes the social fabric to its foundations."

We have no doubt that bribery at a municipal election is a misdemeanor punishable by the common law of this State.

An attempt to bribe or corruptly influence the elector, although not accomplished, will submit the offender to an indictment. *State* v. *Ames*, 64 Maine, 386.

But admitting that attempting to bribe an elector at a municipal election is an offence at common law, it is claimed by the counsel for the defendant that the indictment in this case does not properly charge such offence.

1. It is claimed that willfully and unlawfully attempting to influence an elector to give in his ballot, by offering or paying him money therefor, is not criminal. We think it is. What the law deems criminal and seeks to prevent is the corrupting of the elective franchise. Every elector not only has the right to vote or not to vote according to his own judgment of duty, but he has an interest that every other elector shall exercise the franchise in the same manner, without being influenced by the corrupt payment of money, or other unlawful means. If the elector determines that under all the circumstances it is not his duty to vote, but is induced to cast his ballot in the election by the corrupt payment of money, the ballot does not represent the free and unbiased act of the elector, but it represents the money paid for it; and when counted neutralizes the ballot of the honest voter. When such corrupt influences are used, the result of the election does not depend upon the honest, uncorrupted judgment of the electors, but upon the amount of money paid to corrupt them. It is an offence against the people, and has been so regarded in England as well as in this country.

Plympton's Case, supra, was an information at common law, for offering an elector money to induce him to cast his vote for mayor.

The statute of 2 Geo. 2, c. 24, § 7, declares it an offence for any elector to "ask, receive, or take money or other reward, by way of gift, loan, or other device . . . to give his vote," "or to refuse or forbear to give his vote in any such election," and any person who by such means, shall corrupt or procure any elector to give his vote, or to forbear to give his vote in any such election, shall be equally guilty with the elector.

It was held that this statute was merely an affirmance of the common law, and did not take away the common law crime. *Rex* v. *Pitt*, 3 Burr. 1335.

The statute of 5 & 6, Wm. 4, c. 76, § 54, in regard to the election of mayor, or of a councilor, auditor or assessor of any borough, uses terms similar to the statute of 2 Geo. 2.

The form of an indictment under the statute of Massachusetts, given by Train and Heard (Precedents of Indictments, 185,) is the same upon the point under consideration, as the indictment in this case.

2. It is further objected that it is not alleged in the indictment that a legal meeting of ward one in Rockland was held; nor for what city one alderman and three councilmen were to be elected; nor that Augustus Montgomery was a legal voter in the same ward one in which the meeting was held. But on a careful examination of the indictment, we think the allegations sufficient on each of these points. *State* v. *Bailey*, 21 Maine, 62; *State* v. *Boyington*, 56 Maine, 512.

Exceptions overruled.
Judgment for the State.

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

JAMES E. GARLAND and others *vs.* ORLANDO GARLAND.

Penobscot. Opinion December 22, 1881.

Will. Life-estate. Taxes.

A testator inserted the following clause in his will: "And it is my desire that if Orlando Garland shall pay the interest annually, on what is due from him, to wit, on $541, that he be not disturbed in his possession of the place where he now resides." *Held*, 1; that Orlando Garland took a life-estate in the premises referred to, on condition that he should pay annually to those lawfully representing the estate, the legal interest on $541. 2; that he should pay all taxes assessed upon the premises during his life-tenancy.

BILL IN EQUITY to obtain a construction of the will of James Garland. Heard on bill, answer and proofs.

The opinion states the case.

A. W. Paine, for the plaintiffs.

P. G. White, for the defendant, contended that the provision of the will relating to the defendant, clearly expressed the intention of the testator, that all the defendant was to pay was the interest on $541, or what would be equivalent to that, and nothing more, and that intent must control in the construction of the will. 1 Redf. Wills, 440, 454; *Cotton* v. *Smithwick*, 66 Maine, 360; *Mann* v. *Mann*, 1 Johns. Ch. R. 281; 2 Whar. Ev. § 992; Abbott's Trial Ev. 130, 131; *Goodhue* v. *Clark*, 37 N. H. 525: *Morton* v. *Perry*, 1 Met. 446; *Howard* v. *Am. Peace So.* 49 Maine, 288.

BARROWS, J. In March, 1866, James Garland bought and took a deed of a piece of real estate containing about eighty acres, paying therefor $550, apparently with the design to secure a place for his brother Orlando (who had been impoverished by a fire) to live on. He seems to have permitted Orlando to take possession of it and make improvements on it. In 1869 he made

his will which, shortly afterwards, in July of that year, was duly proved and allowed in the probate court. The clause in it, which we are asked to construe, runs as follows: "And it is my desire that if Orlando Garland shall pay the interest annually, on what is due from him, to wit, on $541, that he be not disturbed in his possession of the place where he now resides." During James' life Orlando paid the taxes assessed upon this place. He has continued to occupy it from the first and it has been assessed to him as the person in possession, according to R. S., c. 6, § 9.

For some years after James' death he paid the interest called for in the above item, and the taxes. Latterly he has declined to pay the interest unless he might be permitted to deduct the amount required to pay the taxes. Hence this process, brought by the heirs of James Garland, to have the rights, interests and duties of the parties under the foregoing clause in his will, ascertained and declared.

James Garland seems to have supposed that Orlando would eventually become the purchaser of the property, and that he had, with that view, up to the time of the making of the will paid the interest and a trifling amount of the principal of James' outlay for the place. But the respondent denies the existence of any contract for the purchase, and as there was none in writing signed by the parties, it is clear that there could be none which would be binding on them or their successors, in law or equity. It is not necessary to decide any of the questions of fact about which the parties differ and offer conflicting testimony; for without resort to any of these matters, which, however determined, would not affect the construction of the clause in question, the rights and duties of the parties respectively may be readily ascertained.

We think that James Garland gave by his will to his brother Orlando a life-estate in this piece of property, upon condition that Orlando should pay annually to those lawfully representing his estate the legal interest on $541. It follows from this that Orlando should pay the taxes while he possesses the estate. *Transit terra cum onere. Qui sentit commodum, sentire debet et onus.* "It is the duty of the tenant for life to cause all taxes

assessed upon the estate, during his tenancy, to be paid," says SHEPLEY, J., in *Varney* v. *Stevens*, 22 Maine, 334. If the tenant for life neglects to pay the taxes assessed upon the estate during the tenancy and thereby subjects the estate to a sale, the reversioner may maintain an action of waste against him to recover the place wasted and the damages. *Stetson* v. *Day*, 51 Maine, 436.

This duty of paying taxes is entirely independent of the condition imposed by the testator, which calls for the payment of a certain sum annually to his estate in order to entitle the devisee to retain the possession during his life; and the testator says nothing to exempt the tenant for life from its performance. It was the plain duty of the respondent to pay the taxes assessed upon the property as well as the interest to those entitled to it; and the payment of the taxes affords him no ground to claim a rebate upon the interest. He is poor, it is said; he is likely to remain so if he exposes himself to the expense of litigation and his estate to forfeiture in the hope to avoid the payment of the very few dollars which were in dispute here. Yet doubtless equity will permit him, upon repairing waste unwittingly committed, to be relieved from forfeiture incurred. His poverty, of itself, is no reason why he should be relieved from the payment of costs when it is found that he is in the wrong. But it is apparent also that the heirs of James Garland had an interest in having it judicially determined whether his interest in the estate extended beyond the term of his own life, and in having some record evidence of the character of his possession. It turns out that he claims only a life estate and admits his possession to be in its origin permissive and not adverse. Looking at the two-fold object of the process, we think the plaintiffs may well bear a portion of the expenses.

They may tax against the respondent, officer's and clerk's fees and the cost of printing. As to all else let each party pay his own costs.

Decree to be entered in conformity herewith.

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

WOODBURY HIX DECROW, by WILLIAM H. MOODY, Guardian,

vs.

JAMES MOODY, executor of the last will of WILLIAM MOODY.

Waldo. Opinion December 27, 1881.

Will, construction of.

M. eighty-three years of age, in 1876, made his will, giving, among other bequests to his grandson D. the plaintiff, then fourteen years old, (who had lived with him from the time he was two years old, his mother being dead and his father worthless,) five dollars to be paid as soon as practicable after the testator's decease, and "a further sum of one hundred dollars, and a suit of clothes if he remains with me until he is twenty-one years of age, to be given him by my said son, J. M." who had all the property, real and personal, subject to certain bequests. The personal estate appeared to be ample to meet all the calls of the will. The executor, qualified as such in January, 1877, but never settled an account. He paid to an attorney employed by plaintiff's father (who was never his legal guardian,) the five dollars first mentioned, but on demand by plaintiff's legal guardian, in the winter of 1879, refused to pay anything. The plaintiff remained with his grandfather while he lived, and with his grandmother on the place as long as she or the defendant wished him to do so. No complaint was made of his conduct there, or of his leaving when he did.

Held, that the payment of the five dollars to the father's attorney would not relieve the defendant from paying, on demand of the legal guardian, the first payment never having in any manner enured to the plaintiff's benefit.

Held, also, that the testator intended to make the other legacies depend on the voluntary act and conduct of the plaintiff, and not upon the contingency of his own life's being prolonged for seven years from the time of the making of the will; and the plaintiff, having performed the condition until its further performance was rendered impossible by the act of God, was entitled to the other legacies. No time being fixed for their payment under the circumstances here developed, they should have been paid at the end of a year from the time defendant became executor. Having rendered no account, nor shown his readiness to pay, he is liable to interest from that time.

ON REPORT.

Action to recover certain legacies under the will of William Moody.

The opinion states all the material facts.

Joseph Williamson, for the plaintiff, cited: Co. Lit. 206 *a*; *Thomos* v. *Howell*, 1 Salk. 170; 1 Jarman, Wills, 807; *Bur-*

chett v. *Woolward*, 1 T. & R. E. Ch. 442; *McLachlan* v. *McLachlan*, 9 Paige, 534; *Farrar* v. *Ayres*, 5 Pick. 404; *Merrill* v. *Emery*, 10 Pick. 507; 2 Peere Williams, 601; *Kent* v. *Dunham*, 106 Mass. 586.

William H. Fogler, for the defendant, contended that there had been no demand on the defendant for the five dollar legacy.

In regard to the legacy of one hundred dollars, and suit of clothes: (1,) It was conditional; the condition was a condition precedent; the condition has not been performed and the legacy is therefore defeated. 2 Redf. Wills, 283, 284; 1 Jarman, Wills, (1st Am. ed.) 796, 797, 759, 806. (2,) If the court holds that the legacy vested in the plaintiff upon the death of the testator, the legacy is not payable until the plaintiff arrives at twenty-one years of age, and this suit is prematurely commenced, and cannot be sustained.

In the construction of wills, but little aid can be derived from the adjudged cases. *Olney* v. *Hull*, 21 Pick. 315; *Shattuck* v. *Stedman*, 2 Pick. 468.

BARROWS, J. The plaintiff who is still a minor, brings this action by his guardian, to recover certain legacies to which he says he is entitled, under the will of his grandfather, William Moody. James Moody, the defendant, qualified as executor of the will in January, 1877; and from the admitted facts, it would seem that there was property enough to meet all the calls of the will, though the executor has never settled his account in probate court. We think the testimony establishes a demand made in the winter of 1879-80, by the plaintiff's guardian, for payment of all the legacies which he claims to recover, and defendant's refusal to pay the same or any part thereof.

The will gave to the plaintiff and four other grandsons of the testator, five dollars each, to be paid them as soon as practicable after the testator's decease; and to the plaintiff, who had lived with his grandfather from early childhood, "a further sum of one hundred dollars, and a suit of clothes, if he remains with me until he is twenty-one years of age, to be given him by my said son, James Moody." The will was made in 1876, when the tes-

tator was eighty-three years old, and plaintiff was at that time about fourteen years old. As long as his grandfather lived he continued to live with him, and remained with his grandmother some months afterwards, and till after the defendant took charge of the place. He says he left because the defendant said he had no further use for him. Defendant says he left because the grandmother said she had no further use for him. Both statements may be true. At all events, no fault was found with his conduct there, nor with his leaving when he did to hire out. The plaintiff has done nothing to forfeit the bequests, if the language of the will is such as to entitle him to receive them.

The defendant denies his liability in this action to pay either of the legacies. The first, (of $5) he says he has paid, and he produces the receipt of an attorney employed by the minor's father with other proof establishing the fact of a payment so made. This will not relieve him here. The father was never the legally appointed guardian, and as next friend and natural guardian had no authority to receive or control the disposition of a legacy to the plaintiff who does not appear to have had the benefit of the payment.

But the principal question is as to the plaintiff's right to recover for the one hundred dollars and the suit of clothes. As to these, defendant's positions are that they are by the terms of the bequest payable only upon the performance of a condition precedent which has not been fulfilled; or if this be not so that they cannot be regarded as payable until the legatee has arrived at the age of twenty-one years, and hence this suit is premature. It is well settled that no form of words will constitute a condition precedent to the vesting of a legacy or devise when it appears from the whole will, read by the light in which the testator wrote it, that such could not have been the testator's intention. *Stark* v. *Smiley*, 25 Maine, 201; see also, *Hotham* v. *East India Co.* 1 T. R. 645; *Robinson* v. *Conyers*, Cases T. Talbot, 164, 166. It is simply unreasonable to suppose that this aged testator, with whom this grandson had lived from the time he was two years old, intended to make this legacy depend upon the contingency of his own survival to the age of ninety. Doubtless he

wished the boy to remain with him until he was twenty-one if he himself lived so long. Beyond that he must surely have been indifferent. The further performance of the condition having become impossible by the act of God, we act in conformity both with the law and the evident intention of the testator in declaring that thereupon the plaintiff's right to the legacy became absolute.

In *Thomas* v. *Howell*, 1 Salk. 170, a testator devised to his daughter on condition that she should marry his nephew on or before reaching the age of twenty-one years. The nephew died at the age of twelve, and after his death, but before she became twenty-one years old the devisee married another person. But the court held that the performance of the condition having become impossible by the act of God the condition was not broken and the estate of the devisee became absolute. The case is a marked illustration of the unwillingness of the court to construe any condition imposed by the testator as a condition precedent where the performance of it is liable to be made impossible by the act of God, or inevitable accident, without fault on the part of the legatee or devisee, if at the same time it appears that the testator designed to make the gift depend upon the option of the beneficiary to be exercised under the circumstances existing when the will was made, and not upon events over which he had no control.

The principle upon which *Thomas* v. *Howell* was decided is recognized in *Aislabi* v. *Rice*, 3 Madd, 137; S. C. 8 Taunton, 459; (4 E. C. L. R. 166-171,) and in *Burchett* v. *Woodward*, Turn. and Russ. 442; *Merrill* v. *Emery*, 10 Pick, 507; *Finlay* v. *King's Lessee*, 3 Pet. 346; *McLachlan* v. *McLachlan*, 9 Paige, 534; *Hughes* v. *Edwards*, 9 Wheat. 489; 2 Story Eq. Jur. § 1304.

We do not see that it is necessary now to consider the distinction which has been recognized between devises of real estate and bequests of personalty, as to the effect of conditions precedent, which are impossible in the outset or become so by the act of God. It is quite true that so far as form is concerned it would not be easy to find a condition which would more nearly answer to a condition precedent, according to the rules laid down in

Swinburne and the old decisions for distinguishing a condition precedent from a condition subsequent. But with the doctrine once thoroughly established, as it now is, that no form of words will make a condition precedent, when placing ourselves in the situation of the testator, we can see clearly that such could not have been his intention, the question resolves itself at once into the inquiry whether the testator designed that the provision should take effect if the consent and endeavor of the beneficiary were not wanting and its failure was not attributable to him, or whether the occurrence of the event or the performance of the act was, in the mind of the testator, the essential thing, without which (however the failure might occur) the testator did not intend to have the provision stand. We think it clear that the testator intended that this provision for the grandson over whom he had so long had a paternal care should depend upon the acts of the boy himself and not upon the contingency of his own life being protracted until the condition could be fully performed.

Nor do we think that the position that the legacy is not in any event payable until the beneficiary reaches the age of twenty-one years is tenable. No time for its payment is fixed. If valid at all it became payable as other legacies not made payable upon any specified time do; in a reasonable time after the death of the testator and the probate of the will.

There is nothing to suggest that it should not have been paid at the end of a year from the time the executor assumed the trust, except that the minor had no guardian. If the executor had settled his account as he should have done at the end of the year, and exhibited his readiness to pay the legacy as soon as he could have a legal discharge therefor, it might have been a question whether he ought to be liable for interest before lawful demand made. But he did no such thing.

Judgment for plaintiff for $125, and interest from January 31, 1878.

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

SARAH RICKER and others *vs.* ERASTUS G. HIBBARD.

Androscoggin. Opinion December 30, 1881.

Disseizin — title by. Mistake in location.

S. received a deed of a lot of land, but took possession of the adjoining lot, claiming it as his own, and that possession was continued by him and his successors, with that claim, for more than twenty years. *Held*, that such possession had ripened into a title, though it appeared that there was a mistake, either in the deed or in the taking of possession.

ON REPORT.

Writ of entry to recover certain premises on Park street in Lewiston. The writ was dated April 5, 1880.

The plea was *nul disseizen*, with a brief statement setting up title by possession.

The material facts are stated in the opinion.

Frye, Cotton and White, for the plaintiffs.

An entry by one man on the land of another, is an ouster of the legal possession arising from title, or not, according to the intention with which it was done; . . . . . in legal language, the intention guides the entry and fixes its character. *Ewing* v. *Burnet*, 11 Pet. 41.

It might well be asked here, how a man can be said to intend that which he does by mistake. If it be clear that there is no intention to claim title, there can be no pretense of an adverse possession. Angell on Limitations, page 389.

The rule of law applicable to this case, is laid down in *Worcester* v. *Lord*, 56 Maine, 265, and affirmed in *Dow* v. *McKenney*, 64 Maine, 138, where the court say that "the parties and those under whom they severally claim were the owners of adjoining lots, conveyed to them by deeds with sufficiently described lines, and neither party claimed title to any land beyond the lines thus described, until the mistake in the location of the fence was discovered." "The case is thus brought clearly within the principle settled in *Worcester* v. *Lord*."

Thus in the case at bar, the parties here are the owners of adjoining lots, conveyed to them by deeds, with sufficiently described lines, and neither party claimed title to any land beyond the lines thus described, until long after the mistake was discovered.

Counsel further cited: *Frye* v. *Gragg*, 35 Maine, 29; *Gray* v. *Hutchins*, 36 Maine, 142; *Drew* v. *Towle*, 30 N. H. 531; 2 Greenl. Ev. 394, n. 5; *Abbott* v. *Pike*, 33 Maine, 204.

W. W. Bolster, for the defendant, cited: R. S., c. 104, § § 3, 8; *Wyman* v. *Brown*, 50 Maine, 139; *Rawson* v. *Taylor*, 57 Maine, 343; *Abbott* v. *Pike*, 33 Maine, 204; *Drinkwater* v. *Sawyer*, 7 Maine, 366; *Field* v. *Huston*, 21 Maine, 69; *Wing* v. *Burgis*, 13 Maine, 111; *Abbott* v. *Abbott*, 51 Maine, 575; *Andrews* v. *Pearson*, 68 Maine, 19; *School Dist.* v. *Benson*, 31 Maine, 381; *Otis* v. *Moulton*, 20 Maine, 205; *Jewett* v. *Hussey*, 70 Maine, 433; *Drew* v. *Drew*, 8 Foster, 489; *Harvey* v. *Mitchell*, 11 Foster, 575; 1 Greenl. Ev. 22.

DANFORTH, J. By the testimony as reported in this case, the plaintiffs make a good paper title to the land in dispute. The defendant claims by disseizin. It is admitted that he has all the interest of his wife, who claimed under a deed from Samuel S. Starbird. Starbird took possession in 1858, under a deed from the Franklin company, the original owners. It now appears that the deed from the Franklin company does not cover the premises in question, but an adjoining lot. It is therefore claimed that Starbird's possession was under a mistake, and was not adverse to the title of the true owner; and for that reason, insufficient to give title, though continued for the necessary length of time. The cases of *Worcester* v. *Lord*, 56 Maine, 265, and *Dow* v. *McKenney*, 64 Maine, 138, are relied upon to support this proposition.

That these two cases are correctly decided, we have no doubt. But the principles involved, are not applicable to the case at bar. In those cases which grew out of a disputed boundary line, the occupation was beyond the line from ignorance of, or a mistake as to, its true location, and what is material, not with any inten-

tion to claim title to any land not covered by the deed. That this intention is a necessary element to make an adverse possession, is held by all the authorities.

In the case at bar, there was indeed a mistake. The deed described one lot, while the grantee took possession of another and different one. Whether the mistake was in the deed or in taking possession, does not appear, and perhaps it is not material. The true question is, whether Starbird, when he took possession of that lot, intended to hold it as his own and against all persons. The intention is the test and not the mistake. It is not unusual for an adverse possession to begin under a mistake as to the title; perhaps it is so in most cases where the party is honest. If he goes into possession, fully believing he has a good title, and intending to hold under that title, surely such a claim would not be rendered invalid by a discovery after twenty years that the title was not good.

That Starbird took possession of that lot under a claim of title, his own testimony and subsequent conduct clearly prove. The mistake confirms it, for he had no motive for his action, except a sincere belief that he had bought and owned that lot. It was the one he examined with a view to purchase, and which he thinks was pointed out to him as the lot to be sold. He immediately expended a considerable amount in the erection of buildings, managed it as his own, and sold it to Mrs. Hibbard, for there is no doubt as to the identity of the lot in regard to which they negotiated. The law applicable to this case, is clearly laid down in *Abbott* v. *Abbott*, 51 Maine, 584, and the facts bring it within the decision, in *Hitchings* v. *Morrison*, 72 Maine, 331.

It is, however, claimed that before the expiration of the twenty years, the mistake was discovered by the defendant, and after that discovery he ceased to claim title, and therefore his title was not completed. The evidence offered for this purpose, fails to prove what is claimed for it. It does satisfactorily establish the fact that the defendant had discovered the mistake. But this does not affect the possession of Starbird or his grantee. The defendant was then the owner of their interest. He made no

surrender nor offer of any, except upon a consideration. Here was nothing to interrupt his possession with all its elements. The disseizin which had been made, was not purged, but he still persisted in it, claiming that he "would soon have a title by possession." The result is, that the evidence shows a sufficient possession in the defendant and his predecessors, for more than twenty years previous to the date of the writ, to give him a title.

Judgment for defendant.

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

INHABITANTS OF NORTH YARMOUTH *vs.* CITY OF PORTLAND.

Cumberland. Opinion December 31, 1881.

Pauper. Emancipated minor, settlement of.

An emancipated minor cannot acquire a settlement by having his home in any particular town for five successive years.

To acquire a settlement in his own right, by the sixth mode, a person must reside in a town five years after he has attained his majority.

ON REPORT from superior court.

An action for pauper supplies furnished one Sherwood.

To maintain the issue the plaintiff offered to prove that the alleged pauper was emancipated when he was fifteen years of age, and from that time resided and had his home in the city of Portland, until he was twenty-five years and six months old, when he moved away. Thereupon it was agreed to submit the case to the law court, to determine the question whether by such emancipation and residence, the pauper gained a settlement in Portland in his own right; if the court decide that he did, the case to stand for trial; otherwise judgment to be for the defendant.

Drummond and Drummond, for the plaintiffs.

We rely upon *Lowell* v. *Newport*, 66 Maine, 78, and cases therein cited. "In our own State the doctrine that a minor, emancipated, may gain a settlement independent of the parent, and from the time the emancipation ceases to follow that of the parent has been recognized and followed by a long and unbroken series of cases." *Id.* p. 86.

Clarence Hale, city solicitor, for the defendant, after commenting on *Lowell* v. *Newport*, 66 Maine, 78, cited: R. S., c. 24, § 1; *Veazie* v. *Machias*, 49 Maine, 105; *Hampden* v. *Troy*, 70 Maine, 484; *Endicott* v. *Hopkinton*, 125 Mass. 521; *Worcester* v. *Springfield*. 127 Mass. 540.

VIRGIN, J. The question expressly presented by this record is: Did a minor, emancipated at fifteen years of age, acquire a settlement *suo jure*, by having his home continuously thereafter in the city of Portland until he was twenty-five years and six months of age?

It would seem as if the statute answered this question beyond all cavil in the negative. R. S., c. 24, § 1, provides that "settlements are acquired as follows;" and then proceeds to enumerate and describe eight distinct modes of acquisition and the persons to which each mode is applicable. By the sixth mode, "a person of age," describes the person and "having his home in a town five sucessive years," etc. the mode of acquiring a settlement. And the statute contains no provision that a person under age can gain a settlement by such a five years residence.

As early as 1833, this court seemed to have no doubt upon this question. In deciding that the words "any person" as used in the seventh in the original St. 1821, c. 122, § 1, embraced emancipated minors, PARRIS, J., speaking for the court, said: "That this branch of the statute was intended to embrace minors under certain circumstances, as well as persons of full age, is manifest from the phraseology of the paragraph immediately preceding it, which provides that a residence of five years shall give a settlement, provided the person thus residing be of the age of

twenty-one years. The change of language indicates the intention that the one case shall be limited to persons of full age, the other not." *Leeds* v. *Freeport*, 10 Maine, 356, 360. And although the construction of the sixth mode was not then before the court, the opinion of the court was expressed upon it; and we are not aware that any intimation to the contrary has since been expressed.

To be sure, when discussing other clauses of the statute, the court have dropped some general remark, that a minor cannot acquire a settlement in his own right unless emancipated; (*Milo* v. *Kilmarnoc*, 11 Maine,455,) or that emancipated minors may gain a settlement in their own right; (*Oldtown* v. *Falmouth*, 40 Maine, 108,) or independent of the parent; (*Lowell* v. *Newport*, 66 Maine, 86); but these general remarks should be read in connection with the clause of the statute then under discussion, and when so applied they are sound law, as will be seen by the numerous cases cited in the margin of the statute under the various clauses of R. S., c. 24, § 1. Mr. Justice BARROWS' general statement was more guarded, viz: "A minor, who, while living with his parents, can have only a derivative settlement, if emancipated may acquire a settlement in his own right, in any mode provided in the settlement acts applicable to persons under twenty-one years of age." *Munroe* v. *Jackson*, 55 Maine, 55, 58.

There is no case in this state wherein the court has ever intimated that an emancipated minor might acquire a settlement by the sixth mode; but on the contrary, it has been expressly decided that he could not. *Veazie* v. *Machias*, 49 Maine, 105; see also, *Hampden* v. *Troy*, 70 Maine, 484; *W. Gardiner* v. *Manchester*, 72 Maine, 509.

The pauper could not, therefore, gain a settlement while he was a minor, although he resided in Portland six years after emancipation. Neither did he acquire a settlement by his residence there after he attained his majority; for after that time his residence there was less than five years, and a residence of five years by "a person of age" is what the statute calls for. He could not begin to acquire a settlement by this mode until

the disability of his minority ceased, the law not allowing any of the years of his residence while under age to be tacked to those after age to make up the requisite number.

Judgment for the defendant.

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

The same question was presented to the court in

INHABITANTS OF BROOKSVILLE *vs.* INHABITANTS OF BUCKSPORT.

Hancock. Opinion March 30, 1882.

Assumpsit for pauper supplies furnished one John F. Webber.

C. J. Abbott, for the plaintiff.

O. P. Cunningham, for the defendant.

PETERS, J. The brief of the defendants' counsel admits that judgment must go for the plaintiffs, unless the doctrine be established, that an emancipated minor can gain a settlement for himself by residence in a town for five consecutive years. The statute expressly prevents such a thing. "A person *of age*, having his home in a town five successive years . . . has a settlement therein." R. S., c. 24, § 1, mode 6. This does not permit a person of non-age to do so. And it was so judicially declared in *Veazie* v. *Machias*, 49, Maine, 105.

It has frequently been said, speaking generally, that a minor who has been emancipated may acquire a legal settlement in his own right, and the statement without qualification is misleading. He may acquire a settlement in his own right under certain modes and conditions, but not in all the modes prescribed by statute for acquiring settlements, and not by residing in a town continuously for five years.

Defendants defaulted.

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

GEORGE M. STANWOOD, Treasurer of India street Universalist Society in Portland, *vs.* THOMAS L. LAUGHLIN.

Cumberland. Opinion December 31, 1881.

Principal and agent. Deed.

A religious society, at a legal meeting thereof, voted to raise a specific sum of money by various methods, including a sale of pews, and appropriate the money toward its debt; to choose an agent to regulate the sale with directions that ten per cent. of the purchase money be paid down, and the balance in sums not less than ten per cent. annually; to adopt the form of deed reported by the committee, to be given purchasers; and that the pastor (naming him) "be appointed agent of the society to raise the above named sum, and that he have full power to make terms, contracts and agreements with purchasers of pews, and to transact all business legitimately belonging thereto." *Held*, in an action on a note given for a pew sold by said agent, "for and in behalf of" said society, that the agent had authority under the vote to execute the deed.

ON EXCEPTIONS from superior court.

Assumpsit on a promissory note brought for the benefit of Samuel H. Colesworthy, assignee.

(Note.)

"$225. Portland, Me., May 1, 1874.

For value received, I promise to pay the treasurer of the India street Universalist society, or order, two hundred and twenty-five dollars, in nine equal annual installments, with interest annually, at seven per cent.

T. S. Laughlin."

Upon the back of the note appear the following indorsements:

(Indorsements.)

"Oct. 20th, 1874. Received on the within note thirty-two 88-100 dollars ($32.88.)

Geo. C. Littlefield, *Treas.*"

"Received interest and assessment to May 1st, 1876. $39.

G. C. L."

"Received interest and assessment to May 1st, 1877. $37.25.

N. C. *for Treas.*"

"June 18, 1879. Received on the within note thirty-five and 50-100 ($35.50.)"

At the time the note was given, the India street Universalist society was in debt, and at a legal meeting of the society it was voted "to raise ten thousand dollars by obtaining subscriptions, donations, notes, and by sale of pews, said sum to be appropriated towards the reduction of the debt."

As appears by the record, the following vote was passed at the same meeting:

"Voted to adopt the plan presented by Brother Bicknell, as follows: That an agent be appointed with power to regulate sales of pews at an appraisal presented by Brother Bicknell, covering the indebtedness of the society, ten per cent. of the purchase money to be paid down, and the balance at option of purchaser, not less than ten per cent. each subsequent year, interest at the rate of seven per cent. being charged for balances. The form of deed presented by the committee for drafting the same, shall be issued to each party. Parties not desiring to purchase pews, can become subscribers to the fund by giving notes according to form adopted by the board of trustees at their meeting of January 28, 1874. Voted that Reverend George W. Bicknell be appointed agent of the society to raise the above named sum of ten thousand dollars, and as much more as possible, and that he have full power to make terms, contracts and agreements with purchasers of pews, and to transact all businesss legitimately belonging thereto."

Under this action of the society the defendant purchased pew No. 77, which was appraised at the sum of two hundred and fifty dollars. For the pew he paid twenty-five dollars in cash, and gave the note in suit for the balance of the purchase money. At the same time the following deed was executed and delivered to the defendant, said deed being of the same form as adopted by the society by the vote above written.

(Deed.)

"Know all men by these presents, that I, George W. Bicknell, of Portland, in the county of Cumberland, for and in behalf of

India street Universalist society, in Portland, aforesaid, and appointed agent by vote of said society to execute deeds therefor, in consideration of two hundred and fifty dollars, paid to said society by Thomas S. Laughlin, of Portland, in said county, (the receipt of which is hereby acknowledged,) do hereby sell and convey to said Laughlin, heirs and assigns, all the right, title and interest of said society in and to pew No. 77, in the Universalist church recently erected on the easterly corner of India and Congress streets, in Portland, on the lot of land conveyed to said society by William W. Thomas and others, trustees, by deed dated April 21, 1869, recorded in the registry of deeds for said county of Cumberland, book 370, page 1, to which reference is hereby made.

"To have and to hold said pew, with the privileges thereunto appertaining unto him, the said Laughlin heirs and assigns forever.

"Upon condition, nevertheless, that the title of the said grantee, his heirs and assigns thereto shall at any time be defeated and vest in said society by the payment or tender by said society to said grantee, his heirs or assigns, of the aforesaid sum of two hundred and fifty dollars, or such part thereof as shall have been actually paid.

"And whenever said grantee, his heirs or assigns, shall in writing, authorize said society to occupy or lease said pew, for the benefit of said society, the same or such part thereof as the said grantee, his heirs or assigns shall so authorize said society to occupy or lease, shall not be subject to taxation for any of the ordinary expenses of said society so long as said society shall so be authorized to use or lease the same.

"In witness whereof, I, George W. Bicknell, in behalf of said society, and in the capacity aforesaid of agent to execute deeds therefor, have hereunto set my hand and seal this first day of May, in the year of our Lord one thousand eight hundred and seventy-four."

George W. Bicknell, [L. S.]

"Signed, sealed and delivered in presence of
M. P. Frank."

"State of Maine. Cumberland ss. May 1, A. D. 1874.

"Personally appeared the above named George W. Bicknell, and acknowledged the foregoing instrument by him made and subscribed, in his capacity as agent as aforesaid, to be his free act and deed, and the deed of said society.

"Before me,

M. P. Frank, *Justice of the Peace.*"

On the fifteenth day of February, 1871, the society executed a mortgage of their meeting house to secure certain bonds issued by the society, the amount outstanding at the date of the writ being twelve thousand dollars. Subsequent to the date of the writ, the mortgagees took possession of the meeting house and advertised the same for sale but had proceeded no further at the time of the trial. The defendant was a member of the society at the time the note was given, and knew of the existence of the mortgage and the debt secured thereby. On the twenty-fourth day of May, 1880, various notes including the one in suit were assigned by the finance committee to Samuel H. Colesworthy, to whom the society was then indebted by an instrument in writing.

At the trial the defendant claimed that there was a failure of consideration of the note in suit, but the presiding justice ruled as a matter of law that the foregoing facts did not constitute such a defence. And the defendant alleged exceptions.

B. J. Larrabee, for the plaintiff, cited: *Cunningham* v. *Wardwell*, 3 Fairfield, 466; *Sears* v. *Wright*, 24 Maine, 278; *McLellan* v. *Cum. Bank*, 24 Maine, 566; *Boody* v. *McKenney*, 23 Maine, 517; *K. & P. R. R.* v. *Waters*, 34 Maine, 369; *Shaw* v. *Shaw*, 50 Maine, 94; *Sylvester* v. *Staples*, 44 Maine, 496; *Bell* v. *Woodman*, 60 Maine, 465; *Palmer* v. *Fogg*, 35 Maine, 368.

Webb and Haskell, for the defendant.

The mortgagee of the meeting house seeks to collect the note in suit which he knew was given to free the meeting house from his mortgage and give the defendant a good title to the pew he had bargained for.

A note given for a deed of real estate which conveyed no title to the maker of the note, who is the grantee named in the deed,

is void for want of consideration. *Fowler* v. *Shearer*, 7 Mass. 14; *Howard* v. *Witham*, 2 Maine, 390.

The vote does not give Mr. Bicknell any authority, even to sell, much less convey any pew of the society. Another agent was to have been chosen to sell and convey the pews.

Mr. Bicknell was to procure subscribers to the loan, and determine the terms of such subscription, whether by conditional notes or pew notes, and if the latter, to determine the terms upon which the aid should be given. How much cash; how much note, and if note, upon what time and terms.

These arrangements having been made, and the loan having been subscribed, then it was the duty of another to execute the deeds of pews and receive the funds.

If a deed be executed by the agent of a corporation, his authority must be affirmatively shown. *Miller* v. *Ewer*, 27 Maine, 509; *Tolman* v. *Emerson*, 4 Pick. 160.

This case fails to show any authority to execute the deed which is the only consideration for the note in suit, and as no title passed, the deed being void, as not executed by the society, that note is without consideration and void, and the learned judge in the court below erred in his ruling to the contrary.

VIRGIN, J. In February, 1871, the "India street Universalist society," of Portland (of which the defendant was a member), mortgaged its church to another of its members to secure a debt of the society.

At a legal meeting, in 1874, the society voted to raise a specified sum by various methods including a sale of pews, and appropriate the money toward the debt; to choose an agent to regulate the sale, with directions that ten per cent. of the purchase money be paid down, and the balance in sums not less than ten per cent. annually; and to adopt the form of deed, reported by the committee, to be given purchasers of pews. At the same meeting, the society also voted that their pastor, George W. Bicknell, "be appointed agent of the society, to raise the above named sum, and that he have full power to make terms, contracts and agreements with purchasers of pews, and to transact all business legitimately belonging thereto."

The only objection raised in the brief of the defendant against the judgment rendered against him in the court below, is that Bicknell had no authority to execute a deed for, and in behalf of the society, and that hence the note in suit is without consideration. We think the objection is not tenable. The language of the vote is very general and sweeping, and although authority *in totidem verbis* to execute deeds is not given, still such authority is implied from the express power given; we think *Nobleboro'* v. *Clark*, 68 Maine, 87, is decisive of this case. The acts of the parties show beyond cavil that it was so understood by all concerned.

Exceptions overruled.

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

BENJAMIN R. BOOTHBY *vs.* JOHN BENNETT.

York. Opinion December 31, 1881.

Limitations, statute of. Acknowledgment. R. S., c. 81. § 93.

Where the issue between the parties at the trial was whether the defendant agreed in 1873 to be personally responsible for the deposit of certain bonds as collateral security for a loan which the plaintiff then made a third party, so that the defendant was in fault in letting the money go without securing them, or whether, as defendant claimed, his whole relation to the loan was that of an agent, acting for the plaintiff in good faith and under his direction, and on July 6, 1876, the defendant wrote the plaintiff: "I am expecting the interest on said note to be paid to me within ten days. In regard to the principal of $1000, I have these bonds which I named to you. I understand they are worth a small premium, I think about two per cent. above par. I am authorized to let you have the bonds at their market value if you want them; or I will dispose of them to other parties and get you the money. Please inform me by return mail whether you would like the bonds or the money."

Held, that the letter was not an express acknowledgment in writing of the original contract, as claimed by the plaintiff, such as is required by R. S., c. 81, § 93, to take the contract or promise out of the operations of the statute of limitations.

ON EXCEPTIONS, and motion to set aside the verdict.

Assumpsit.

(Declaration.)

"In a plea of the case for that the said defendant at Augusta, to wit, at Limerick in the said county of York on or about the twelfth day of February, A. D. eighteen hundred and seventy-three, requested of the plaintiff to loan to one A. G. O'Brion one thousand dollars, on demand with interest, upon the promissory note of said O'Brion, secured by bonds of the United States government to the amount of one thousand dollars as collateral thereto, and the plaintiff then and there agreed with said defendant to make said loan upon the terms and security aforesaid, and in pursuance of said agreement the plaintiff then and there delivered to said defendant five hundred dollars in cash, and on or about the twenty-sixth day of March, A. D. 1873, at Cornish, in said county, the plaintiff delivered to said defendant another five hundred dollars in cash, the whole to be, by said defendant in behalf of said plaintiff, loaned to said O'Brion upon the terms and security aforesaid, and thereafterwards on or about the second day of April, A. D. 1873, the said defendant contriving to injure and defraud the plaintiff, delivered to said plaintiff the note of said O'Brion for one thousand dollars, but did not deliver United States bonds as aforesaid as collateral as he had agreed to do, but instead thereof delivered to the plaintiff a number of notes of individuals amounting to one thousand dollars as collateral thereto, but which the plaintiff is unable to particularize as they are not in his possession or under his control, but have been returned to said defendant; the defendant then and there falsely and fraudulently representing said notes to be good and collectible, and the plaintiff relying upon said representations of said defendant, accepted said O'Brion's note, and said collateral notes. And the plaintiff avers that said collateral notes were not good and collectible, and that this was then and there well known to said defendant. But the plaintiff had no knowledge of said fact until the year 1876, when for the first time he discovered that said collateral notes were not good and collectible when so delivered to him by said defendant, but were utterly worthless, and thereupon he immediately, to wit, March 1, A. D. 1876, returned to said defendant the note of said O'Brion and all

said collateral notes for the reason of their worthlessness as aforesaid and demanded of said defendant either the return of his one thousand dollars in money so deposited with said defendant to be loaned as aforesaid and interest thereon or the note of said O'Brion secured by United States government bonds as aforesaid as agreed by defendant, and said defendant then and there accepted and received said O'Brion's note and all said collateral notes, and promised and agreed with said defendant to procure and deliver to him forthwith the note of said O'Brion as aforesaid, secured by bonds of the United States as aforesaid, and to the amount aforesaid. But the said defendant though often requested, has never obtained or delivered to the plaintiff the note of said A. G. O'Brion for one thousand dollars secured by United States bonds as collateral aforesaid to the amount aforesaid, nor has he paid or returned to the plaintiff his said one thousand dollars or any part thereof, so as aforesaid deposited with said defendant to be loaned as aforesaid upon the security aforesaid, but wholly neglects and refuses so to do."

The writ also contained the money counts. *Ad damnum* $2000. Writ dated September 1, 1879.

The plea was general issue, and statute of limitations under a brief statement.

The opinion states the material facts and the question presented by the defendant's exceptions.

Ayer and Clifford and *Frank M. Higgins*, for the plaintiff, cited: Story Contr. § 1427; Pars. Contr. 62, 63, 67-73; 4 Maine, 41; 4 Maine, 413; 15 Maine, 443; 17 Maine, 184; 71 Maine, 313.

L. S. Moore and Ira T. Drew, for the defendant, cited: 15 Maine, 443.

SYMONDS, J. The declaration alleges that in February, 1873, the defendant requested the plaintiff to loan to one A. G. O'Brion the sum of $1000, upon the promissory note of O'Brion, with the deposit of United States bonds as collateral security; that the plaintiff in pursuance of this request, and upon the agreement of the defendant to effect the loan in that way, gave the $1000

to the defendant, to be by him in behalf of the plaintiff "loaned to said O'Brion upon the terms and security aforesaid;" and that the defendant broke his agreement, to the injury of the plaintiff, by lending the money to O'Brion upon his note without the collateral security which had been promised.

These are the substantial averments of the declaration. What is alleged of the acceptance of certain notes, as collateral, in place of the bonds, and of such acceptance being void of effect by reason of the fraud of the defendant; what is set forth in regard to a return of the notes to the defendant, upon the discovery of the fraud, in 1876, the demand on him for payment of the $1000 loaned with interest or the deposit of the United States bonds, and the renewal at that date of the defendant's original promise; these parts of the declaration simply show the facts attending the alleged breach of the contract of February, 1873. They do not present a distinct ground of liability. There is no consideration averred for a new and independent promise in 1876. The right to recover upon proof of what took place in 1876, alone, does not appear to have been claimed at the trial, and is not urged in argument here, under the declaration in its present form.

The plaintiff relies upon the defendant's agreement of February, 1873, as at first stated, to procure United States bonds as collateral security for the loan, and his breach of contract in lending the money without obtaining them. The rest of the declaration simply negatives the valid acceptance by the plaintiff of other security instead of the bonds, and states the circumstances under which the defendant, without new consideration, orally renewed the promise in 1876. The averment of the breach of contract is distinct in its reference to that of 1873.

The agreement declared upon is an oral one, and having been made more than six years before the date of the writ, September 1, 1879, the statute of limitations is a bar, unless there is something in the case to defeat the operation of the general rule. An acknowledgment of liability, or new promise to perform the contract, cannot have this effect, "unless the acknowledgment or promise is an express one, in writing, signed by the party chargeable thereby." R. S., c. 81, § 93.

It is the claim of the plaintiff—and this claim was sustained by the *pro forma* ruling at the trial—that the defendant's letter of July 6, 1876, was a sufficient written acknowledgment of the original contract to keep it in force under this section of the statute.

A thorough examination of the case leaves no doubt that this ruling was erroneous.

The issue between the parties at the trial was whether the defendant made the agreement alleged—to be personally responsible for the deposit of the bonds—so that he was in fault in letting the money go without securing them; or whether, as he asserted, his whole relation to the loan was that of an agent, acting for the plaintiff in good faith and under his direction. We fail to find in the letter of July 6, standing alone or in its proper connection in the correspondence, anything which is not as consistent with the theory of the defence on this point as with that of the plaintiff. The defendant on March 18, 1876, had procured for the plaintiff two new notes from O'Brion for the loan and the interest on it, with railroad bonds of less value than was then represented, as collateral security for them; had notified the plaintiff by letter of that fact on March 24, inquiring if he should give O'Brion the thirty days delay which he requested on the smaller note, and if the security was satisfactory; the the plaintiff had replied by letter on March 29, that he did not like the security, did not feel safe, wanted something there was no doubt about, and desired the defendant "to look right after it," as Boston creditors were troubling O'Brion; on June 19, following, the plaintiff had written again to inquire about it, saying, "I am anxious to know it is all right;" and to this the defendant replied by the letter of July 6, "I am expecting the interest on said note to be paid to me within ten days. In regard to the principal of $1000, I have those bonds which I named to you. I understand they are worth a small premium, I think about two per cent. above par. I am authorized to let you have the bonds at their market value, if you want them; or I will dispose of them to other parties and get you the money. Please inform me by return mail whether you would like the

bonds or the money." Thereupon the plaintiff wrote his letter of July 13, saying, "I prefer the money; I don't want the bonds any way."

In the proposition of the defendant to dispose of the bonds which he had obtained on March 18, as security for this loan, and get the money for the plaintiff, nor in anything else which this letter of July 6 contains, can we see any recognition whatever, or acknowledgment, by the defendant of a personal liability on his part to furnish government bonds as the security, arising out of a contract to do so made in February, 1873. If it may be said that the letter is consistent with such a sense of obligation on his part, it is equally so with the theory that he was acting simply under the responsibilities of an agent. The letter is one that might have been written, word for word, precisely as it is, if there had been no transaction between the defendant and the plaintiff about this loan till March, 1876, when the defendant procured the new notes for the plaintiff, and the railroad bonds to secure them. The offer is only to get the plaintiff the market value of the bonds.

It is impossible to regard this letter as the acknowledgment of a long-precedent liability, to which it does not refer, directly or indirectly, when there is nothing in it that requires the existence of such an obligation as an explanation, but, on the contrary, its whole contents are as consistent with the non-existence of the agreement alleged, as with any other theory.

Exceptions sustained.

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

JAMES B. HALL *vs.* RICHARD A. MONROE.

Piscataquis. Opinion January 3, 1882.

Officer — liability of. Service of replevin writ. Bond.

A sheriff who has seasonably served and returned a writ to the clerk's office, is not responsible for its not having been duly entered.

The sheriff is a trespasser, if in replevin he fails to take a bond in double the real value of the goods to be replevied, unless the defendant in the action shall have waived his right of action by resorting to the bond for his remedy, or in some other way.

The real value of the property is the test which is to govern, not that which the plaintiff may put upon it.

ON REPORT.

Trespass against a deputy sheriff for taking the plaintiff's horse. The deputy took the horse upon a replevin writ duly issued, with bond, against this plaintiff, in the name of one William W. Hall. After service the writ and bond were seasonably returned into the clerk's office and there remained, but the action was never entered upon any docket of the court. The question was whether the defendant is liable in this action, for the reason that the former action was never entered in court. Another question was whether the defendant is liable in this form of action if the bond was taken for less than double the value of the property replevied.

If the plaintiff can legally prevail upon either of these questions the action to stand for trial.

The replevin writ valued the property at fifty dollars. The bond was in the sum of one hundred dollars. The plaintiff contended that the property was worth seventy-five dollars which the defendant denied.

C. A. Everett, for the plaintiff.

Young, I. W. Davis and Hudson, for the defendant.

APPLETON, C. J. The sheriff having seasonably served and returned his writ to the clerk's office, is not responsible for its not having been duly entered.

The officer, before serving the writ, was required to take a bond "in double the value of the goods to be replevied," and "with sufficient sureties," R. S., c. 96, § 10. He is a trespasser if he fails to take such bond. If the bond is for less than double the value of the property, as in *Kimball* v. *True*, 34 Maine, 85, or if there be but one surety, as in *Greely* v. *Currier*, 39 Maine, 517, or the bond be running to the sheriff instead of the plaintiff, as in *Purple* v. *Purple*, 5 Pick. 226, the sheriff may be held in trespass for an unlawful seizure of the property, unless by resorting to his remedy under the bond, or in some other way, the defendant may have waived that mode of redress. *Tuck* v. *Moses*, 54 Maine, 115. Without the legal bond the officer replevying, is a trespasser. *Morse* v. *Hodsdon*, 5 Mass. 314.

The legal bond is in double the value of the property. It is not the value a plaintiff may put upon the property for the purpose of obtaining its possession by giving a bond, when the property may not be valued at a quarter of its actual value. The officer must see to it that property is not replevied at an insufficient valuation. In *Kimball* v. *True*, before cited, the property was undervalued, and the sheriff held responsible for such undervaluation, though the bond was in double the estimated value of the property in the writ.

When the action is entered, advantage must be seasonably taken of a defective or insufficient bond. *Douglass* v. *Gardner*, 63 Maine, 463.

The case to stand for trial.

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

INHABITANTS OF WELLINGTON

vs.

HERBERT LAWRENCE, and others.

Piscataquis. Opinion January 4, 1882.

Taxes. Town treasurer. Collector. R. S., c. 6, § § 94, 95.

By R. S., c. 6, § § 94, 95, it is the duty of the collector and not of the treasurer of a town, to pay the state tax.

Where a town treasurer received from the collector some eighty dollars, which, at the collector's request, the treasurer inclosed with his own official receipt for the town's shares of the school funds, and received from the State treasurer, his receipt for the state tax, and passed it over to the collector, and it was allowed to him in the settlement of his collections as a voucher for the payment of the State tax;

Held, (in an action on the treasurer's bond) that the amount of the school funds was chargeable to him, and he must look to the collector.

ON REPORT.

Debt on bond given by the principal defendant as treasurer of the town of Wellington, the other defendants being sureties upon the bond. Bond was for five thousand dollars, usual form, and dated March 15, 1879. The writ was dated August 14, 1880. The plea was general issue, with brief statement of performance of all the conditions.

The law court were empowered to draw inferences from the evidence legally admissible, and to enter such judgment as should be in accordance with the law of the case.

The material facts as found by the court are stated in the opinion.

Josiah Crosby and *A. M. Robinson*, for the plaintiffs.

D. D. Stewart, for the defendants.

VIRGIN, J. Not only the money necessary to defray the expenses of the town, but also its due proportion of county tax, and of State tax are annually assessed upon the polls and estates of each town. R. S., c. 6, § 70. The lists are committed to

the collector with a warrant for each tax. R. S., c. 6, § § 94, 95. The warrants direct the collector to pay the money collected on the several taxes at the times therein specified to the respective treasurers, neither treasurer having any concern with the money of the other.

The State treasurer annually apportions to and distributes among the several towns, six per cent. of the school fund, (R. S., c. 11, § 91,) together with the mill tax, for the benefit of schools. Stat. 1872, c. 43. These funds are paid by the State treasurer to the respective town treasurers; but a town is expressly "precluded from drawing the school funds so long as its State tax remains unpaid." Spec. stat. 1878, c. 97, § 5.

With the duties of the collector and town treasurer thus specifically defined in the statutes, the defendant (Lawrence,) treasurer of the plaintiff town, testifies in substance: That the collector furnished him with certain money, town orders, and lists of non-resident taxes, and requested him to appropriate them, together with the school fund and mill tax due to the town, to the payment of the town's State tax which was four hundred and seventy-eight dollars and sixty-five cents. That he accordingly obtained some bank checks to the amount of eighty dollars and eighty-four cents, which he sent to the State treasurer, together with his own official receipt for the school fund and mill tax (three hundred and ninety-seven dollars and eighty-one cents) and received from the State treasurer, the latter's receipt for the state tax, and passed the receipt over to the collector.

It also appeared that when the collector settled his collection account at the close of the municipal year, the State treasurer's receipt for the State tax was produced by the collector as a voucher for the payment of that tax, and was allowed to him.

The defendant now claims in defence to an action on his official bond, and in proof of his plea of performance of its conditions, that notwithstanding his receipt of the school funds, it ought not to be charged to him under the circumstances. But such an irregularity cannot be allowed. He loaned to the collector the money of the town to enable the latter to pay the State tax, and

must look to the collector for the money which he illegally accommodated him with. He has never accounted for it to the town, and he must be held on his bond therefor. If the collector had been desirous of paying the State tax without remitting the money to the State treasurer, he could have deposited the necessary sum with the town treasurer who might then substitute *pro tanto* his receipt for the school funds, and sending that to the State treasurer brought about the desired result. But instead of that, the defendant loaned to the collector the amount of the school funds, and hence is that much short in his account.

Moreover, the treasurer's omission to render his official account required by R. S., c. 3, § 31, constituted a nominal breach of his bond. *Monticello* v. *Lowell*, 70 Maine, 437.

On March 5, 1880, there was due from the treasurer, five hundred and eighty-nine dollars and twenty-three cents. Since then he has paid one hundred and eighty-three dollars and seventy-three cents, leaving a balance of four hundred and five dollars and fifty cents. To this balance should be added interest thereon from March 5, 1880, to date of judgment.

Judgment for plaintiffs accordingly.

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

DANIEL B. TITUS, administrator on the estate of CHARLES TITUS,

vs.

CHARLES W. BERRY, and another.

Knox. Opinion January 4, 1882.

Replevin Bond. Obligee not named.

An action cannot be maintained upon a replevin bond which does not contain the name of the obligee and in which all the places where the name of the obligee should occur are blanks, though it be annexed to the replevin writ.

The court remarks that where the defendant in replevin procures the action to be dismissed because the bond is invalid in that it does not contain the name of the obligee, and afterwards brings an action on the bond, he cannot then have leave to fill up the blanks so as to make the instrument a valid bond.

ON EXCEPTIONS AND REPORT.

Debt on replevin bond. Writ dated August 27, 1879.

The opinion states the case.

A. P. Gould, for the plaintiff.

C. E. Littlefield, for the defendants.

LIBBEY, J. To support his action the plaintiff put in evidence a blank replevin bond executed by the defendants. The places in the instrument where the name of the obligee should occur are all blank. The declaration in the plaintiff's writ describes the bond as given by the defendants to his intestate; but there is nothing upon the instrument put in evidence which tends to show that the plaintiff's intestate was intended as the obligee. True, it is attached to a replevin writ, in favor of the defendant Berry, and against the plaintiff's intestate, and was returned by the officer with the writ, but there is nothing in the bond referring to the writ by which the obligee can be ascertained. In its present form it does not support the plaintiff's declaration, and we are aware of no authority which holds that an action can be maintained upon such an instrument.

But as, if the exceptions are sustained, the action will stand for trial, and the motion for leave to fill up the blanks with the name of the plaintiff's intestate may be renewed, without intending to decide the question as it is not now before us, it is not improper that we should remark, that, looking into the record of the judgment in the action of the replevin, which is a part of the case, it appears that the action was dismissed on motion of the defendants, and one ground of the motion is that the plaintiff in that suit did not execute and deliver to the officer, serving the writ, a bond to said defendants as the law requires. If the bond was delivered to the officer with the name of the obligee in blank, he had the right to fill up the blanks with the name of the

defendant in the writ, and the defendant had the right, if he so elected to have the blank so filled; but if the defendant elected not to have the blanks so filled, but to treat the bond as void for that reason, and on his motion procured the dismissal of the action for that cause, the plaintiff, representing him, cannot now have leave to fill up the blanks so as to make the instrument a valid bond. The action of his intestate would estop him from so doing.

Exceptions sustained.

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

PAUL POOLER *vs.* WILLIAM F. REED.

Piscataquis. Opinion January 5, 1882.

Justice of the peace. Constable.

The appointment to and acceptance of the office of justice of the peace is a surrender of the office of constable by one who has been elected and qualified as such.

When an officer justifies his action as done by virtue of his office, the fact that he was such officer *de facto*, is not sufficient. He must show his legal title to the office.

ON REPORT.

Trespass in which damages are claimed for an alleged illegal arrest of the plaintiff by the defendant, at Bangor, in June, 1880.

Writ was dated December 8, 1880.

The opinion states the material facts.

H. L. Mitchell, for the plaintiff.

Barker, Vose and Barker, for the defendant.

LIBBEY, J. The defendant justifies the arrest and imprisonment of the plaintiff, as constable of Bangor, having a legal mittimus therefor. He thus puts directly in issue his legal capacity as such officer.

His appointment to and acceptance of the office of justice of the peace, after his election and qualification as constable, must

be held to be a surrender of the office of constable. *Stubbs* v. *Lee*, 64 Maine, 195.

He was an officer *de facto* when he made the arrest, and while acting as such officer, his acts would be valid as to third parties; and as between them his title to the office could not be tried; but when he is a party and justifies his acts as such officer, he must show that he has a legal title to the office. *Stubbs* v. *Lee*, 64 Maine, 195: *Fowler* v. *Bebee*, 9 Mass. 231; *Sheehan's Case*, 122 Mass. 445; *Green* v. *Burke*, 23 Wend. 490; *People* v. *Hopson*, 1 Denio, 574; *Reddle* v. *Bedford*, 7 Serg. & R. 386; *Parker* v. *Luffborough*, 10 Serg. & R. 249; *Keyser* v. *McKissan*, 2 Rawle, 139.

In accordance with the agreement of the parties,

The action must stand for trial.

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

JONATHAN P. CILLEY *vs.* JAMES CHILDS.

JAMES CHILDS in equity *vs.* ALEXANDER MONTEITH and another.

Hancock. Opinion January 6, 1882.

Deed.

It is only when after placing themselves in the situation of the grantor at the date of the transaction, with a knowledge of the surrounding circumstances and of the contemporaneous construction given by the parties, they find themselves unable to identify the premises intended to be conveyed with reasonable certainty from the language of the instrument, that the court will declare a deed void for uncertainty in the description of the property.

M owned a lot containing about thirty acres, and being the north-westerly part of Merchants' Island. Wherever it abutted upon adjoining land it was bounded by distinctly marked and specified lines extending from shore to shore on opposite sides of the island, with undisputed monuments. Elsewhere it was bounded by the waters of Deer Isle Thoroughfare. Having bargained it to C for a full and adequate consideration, he made a deed to C, in which he described it as "a parcel of land on Merchants' Island," butted and bounded by the aforesaid lines and monuments, (which divided it from the remaining portion of the island,) and "containing thirty acres more or less." The part of the island from which it was divided by these lines contained about one

hundred and ninety acres. M owned no other land on the island. C owned the land adjoining the thirty acre lot and on the execution of the deed went into the actual occupation of that also and has lived on it ever since. His deed was recorded January 1, 1867. In April, 1869, M's creditors levied on it as his property.

Held, in a suit brought by the grantee of the levying creditors against C, that C obtained a good title to the thirty acre lot by the deed, and that the natural boundaries supplied whatever was necessary to define the lot conveyed; and that there was enough in the deed, read in the light of the facts agreed, to constitute a sufficient description.

On report of facts agreed.

The first of these actions is a writ of entry to recover about thirty acres of land on Merchants' Island situated in Deer Island Thoroughfare.

The second action is a bill in equity to restrain the plaintiff in the first action from prosecuting the same and to reform the the deed under which the defendant in that action claims title to the locus.

The material facts are fully stated in the opinion.

H. A. Tripp, for Cilley.

The deed from Monteith to Childs conveyed nothing. It is impossible to ascertain the intention of the parties from the deed, and it fails. 3 Wash. R. P. (3d ed.) 344. In *Commonwealth* v. *Roxbury*, 9 Gray, 490, three sides of the land were given and the question was as to finding the fourth, and the remarks of Chief Justice Shaw, were made upon very different facts from those existing in the present case. *Pierce* v. *Faunce*, 37 Maine, 67, differs materially from the case at bar.

C. A. Spofford, for Childs, cited: *Commonwealth* v. *Roxbury*, 9 Gray, 490; 3 Wash. R. P. (4th ed.) 406; *Pierce* v. *Faunce*, 37 Maine, 67.

Barrows, J. These cases are reported together, this court to make such disposition of both, as shall be found proper upon the admitted facts.

The first is an action at law, to recover possession of a parcel of land containing about thirty acres, and constituting the northerly and north westerly part of an island called Merchants'

Island, situated in Deer Isle Thoroughfare. It was conveyed by one Matthews, by deed dated November 21, 1865, duly recorded, to one Monteith, and was therein described as "beginning at the head of the cove on the northeast side of the island, thence west northerly by land of Anthony Merchant, to a blue rock at the head of the field; thence southerly, by land of said Merchant, to a marked tree on the shore on the southwest side of the island; thence northerly, easterly, and southerly, by the shore to the bound begun at, containing about twenty-five acres."

Cilley has the legal title to it by deeds dated December 11, 1878, from creditors of Monteith, who levied on it as his property April 12, 1869, unless it passed from Monteith to Childs by his deed December 26, 1866, recorded January 1, 1867, in which the description runs thus: "a parcel of land on Merchants' Island . . . butts and bounds as follows: commencing at the head of the cove at the north side of said island, running to a blue rock in the stone wall; thence from said blue rock southwest, southerly, to a marked spruce tree, said lot containing thirty acres, more or less."

It is admitted that Childs, before receiving this deed, bargained with Monteith for the same parcel of land which Monteith had of Matthews; that both of them supposed the deed given by Monteith to Childs, was a valid conveyance thereof; that it would have been so if it had contained the following additional words which were in the deed from Matthews to Monteith, "thence northerly, easterly, and southerly, by the shore, to the bounds begun at;" that the line laid down in Monteith's deed to Childs, cuts the island into two parts, one containing about thirty acres, the other about one hundred and ninety; that Childs owned the land adjoining this parcel when he received this deed, and thereupon forthwith went into the occupation of the locus, and has lived on it ever since; that the levying creditors at the date of their levies, and Cilley, at the date of his deed from them, respectively knew of the existence of the deed to Childs, and that he was in possession of the land claiming it under said deed. Cilley's writ of entry is dated July 21, 1879.

On October 21, 1880, Childs brought the other suit, which is a bill in equity against Cilley and Monteith, based on the same

facts, asking that Cilley may be restrained from prosecuting his action at law, and that the deed may be reformed so as to declare more completely the intention of the parties to it, and for general relief. We are to deal with the admitted facts which the parties present, and are not called upon to consider questions as to their admissibility if any such could have been raised.

Moreover it is well settled law, that a deed shall not be held void for uncertainty, but shall be so construed wherever it is possible as to give effect to the intention of the parties and not defeat it; and that this may be done whenever the court placing itself in the situation of the grantor at the date of the transaction, with knowledge of the surrounding circumstances and of the force and import of the words used, can ascertain his meaning and intention from the language of the conveyance thus illustrated. Greenleaf's Cruise, vol. IV, p. 306; ed. of 1850, tit. XXXII, chap. XX, note to § 24. And this, even where it becomes necessary to reject parts of the description given as false and inconsistent. *Vose* v. *Handy*, 2 Maine, 322, 330, citing *Worthington* v. *Hylyer*, 4 Mass. 196; *Jackson* v. *Clark*, 7 Johns. 217. To the same effect are *Wing* v. *Burgis*, 13 Maine, 111, and *Vose* v. *Bradstreet*, 27 Maine, 156, 171.

In the deed of Monteith to Childs, there is nothing inconsistent or contradictory. Whatever ambiguity there is in the description of the lot intended to be conveyed, arises from incompleteness, and not from any false call. It must be supposed that Monteith intended to convey something that he himself owned, and the only questions that could possibly arise are, on which side of the lines given does it lie? What lines are to be supplied to get back to the bounds begun at? Does the language of the deed sufficiently indicate them?

We answer the last question first, affirmatively.

We think that standing in the place of the grantor and reading the deed in the light of the surrounding circumstances, we see with reasonable certainty that the only land answering to the description given, is that portion of the island which lies northerly and westerly of the lines specified in the deed, which divide the island from shore to shore, and that the waters of Deer Isle

Thoroughfare, the natural boundaries, are intended upon those lines where, but for them, the description would be incomplete. If one who owned the whole of Merchants' Island intended to convey it, he could grant it by that name without more, and it cannot be doubted that the island would pass, and the natural boundaries would suffice to define the extent of the grant. Monteith owned a part only of the island, less than one seventh, separated from the rest by well defined lines extending from shore to shore on opposite sides with undisputed monuments. By these lines the island is divided into two parcels, of about thirty, and one hundred and ninety acres, respectively.

His deed to Childs describes the parcel as "*on* Merchants' Island," bounded by these lines and containing "thirty acres more or less." We think that by a fair intendment this language applies to that part of the island which, when separated from the remainder by the lines specified, is found to contain the quantity mentioned as conveyed, rather than to any undefined portion of the larger tract, and that the natural boundaries (which may fairly be reckoned among the "surrounding circumstances,") supply all that is wanting to make the description complete. The remarks of SHAW, C. J., in *Com.* v. *Roxbury*, 9 Gray, 490, are fairly applicable here. "A deed is not to be held void for uncertainty, because the boundaries are not fully expressed, when by reasonable intendment it can be ascertained what was considered and understood by both parties to be embraced and intended to be embraced in the description." The mode which he suggests of perfecting the defective description by laying down a plan on the land according to ascertained abuttals and monuments, and giving their proper reasonable effect to natural (or otherwise well established) boundaries, where anything is wanting, would leave nothing uncertain here.

The parties in agreeing upon the facts here seem to have recognized the principle that is thus stated in *Stone* v. *Clark*, 1 Met. 380, — "When the construction of a deed is doubtful, great weight is to be given to the construction put upon it by the parties, especially in doubtful questions of boundaries which must

be presumed to be within their knowledge." See *Crafts* v. *Hibbard*, 4 Met. 452, and cases there cited.

It is agreed here that upon the execution of this deed by Monteith, Childs who was already the owner of the adjoining land, "went into the actual occupation of the locus and has lived on it ever since." A stronger case of contemporaneous construction by the acts of the parties could hardly be made out even without the additional statement that "both parties supposed the deed to be valid and efficient to convey the premises." Numerous cases might be cited illustrating the unwillingness of courts to declare deeds void for the uncertainty arising from defective description where by a resort to parol evidence the premises intended to be conveyed can be identified.

Thus in *Bybee* v. *Hageman*, 66 Ill. 519, where the premises were described as "one acre and a half in the north-west corner of section five together with the brewery, malt house, &c. thereon, situated in the county of McDonough and state of Illinois," though neither the township nor range nor specific boundaries of the lot were given, it was held that the quantity should be taken in the form of a square in the corner of the section mentioned, and that the omission of the number and range might be supplied by parol and the conveyance sustained.

Vide also, *Kronenberger* v. *Hoffner*, 44 Mo. 185; *Jennings* v. *Brizeadine Id*, 332; *Billings* v. *Kankakee Coal Co.* 67 Ill. 489; *Colcord* v. *Alexander*, *Id.* 581; *Ex parte Branch*, 72 N. C. 106.

We find no difficulty in saying upon the facts here presented, that although the description is not a model to be imitated, the locus passed by the deed from Monteith to Childs, which was duly recorded before the levies were made, and gives the tenant a good title as against the grantee of the levying creditors.

The result is that in the writ of entry there must be,

Judgment for defendant.

The bill in equity was tardy and needless.

Bill dismissed with costs.

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

ROBERT D. CARVILL and others, appellants from a decree of the judge of probate, *vs.* EZRA R. CARVILL.

Androscoggin. Opinion January 11, 1882.

R. S., c. 77, § 13. Law court, jurisdiction in probate cases. Costs.

Under the provisions of R. S., c. 77, § 13, the law court may properly consider and determine motions to set aside, as against law and evidence, verdicts rendered in probate cases upon issues framed at *nisi prius*, when reported by the presiding justice with all the evidence adduced at the trial.

REPORT on motions.

This was an appeal from a decree of the judge of probate approving and allowing the last will and testament of James Carvill.

The cause was submitted to a jury who returned the following verdict:

"(1,) Was James Carvill, said testator, of sound mind at the time he executed the said instrument which purports to be his last will and testament? *Answer.* — No."

"(2,) Was said testator induced to make and execute said instrument by fraud or undue influence. *Answer.* — Yes."

After the verdict the proponent, by his attorneys, N. and J. A. Morrill, and S. C. Strout, moved to set it aside as against law and evidence and the weight of evidence; he also moved that notwithstanding the verdict the instrument propounded should be proved and allowed as the last will and testament of James Carvill and that the decree of the judge of probate should be affirmed.

And the appellants, by their attorneys, Frye, Cotton and White, Hutchinson and Savage, and Webb and Haskell, moved the court for the disallowance of the said instrument and for the reversal of the decree of the probate judge.

S. C. Strout, H. W. Gage and F. S. Strout, and *N. and J. A. Morrill,* for the proponent, furnished elaborate briefs in support of the motion to set aside the verdict, contending that in the first place, that the final decree allowing or disallowing the will,

must be the judgment of this court upon the whole case. Neither party has a right to a jury trial, it is granted in the discretion of the presiding judge upon such questions as he chooses to submit. R. S., c. 63, § 26.

The verdict is to inform the conscience of the court. It has not the force of a verdict at common law. *Bradstreet* v. *Bradstreet*, 64 Maine, 204; *Larrabee* v. *Grant*, 70 Maine, 79; *Withee* v. *Rowe*, 45 Maine, 571.

Upon the question of jurisdiction, counsel claimed that the language of R. S., c. 63, § 21, does not change the nature, character or powers of the Supreme Judicial Court except to embrace in its jurisdiction matters of which the probate court has original jurisdiction, and cited *Stetson* v. *Corinna*, 44 Maine, 29; R. S., c. 77, §§ 2, 13; *Id.* c. 82, § 33.

Webb and Haskell, for the contestants.

The statute regulations governing, creating, or defining the jurisdiction of the supreme court of probate, (R. S., c. 63, §§ 21, 26,) do not in terms make any provision for a supreme court of probate sitting in banc; nor for exceptions from the rulings, decisions or decree of the court held by a single justice.

And in the provisions relating to the law court (R. S., c. 77, §§ 9, 10,) no allusion is made to the determination of questions of law arising in probate appeals, and no term of that court is provided which is consistent with the statute regulating probate appeals, for such appeals are to be to the next term of the supreme court in the same county.

The proper terms for the cognizance of probate appeals are held in the several counties by one of the judges as provided by R. S., c. 77, § 17. Unlimited jurisdiction is granted those terms save only the cases named in § 11 which come before the law court, the jurisdiction of which is limited to the cases enumerated in § 11, and probate appeals are not there named.

This court has not jurisdiction under § 3, of the same chapter, which gives general superintendence of all inferior courts, because the probate court is not an inferior court over which the superintendence extends. *Peters* v. *Peters*, 8 Cush. 538. The stat. 1852, c. 246, § 13, gave the right of exception to any matter of law decided and determined by the presiding justice in probate

appeals, and the decision in *Crocker* v. *Crocker*, 43 Maine, 562, was based upon that statute. But that provision was omitted from R. S., 1857, and the law was restored to its form and condition before the act of 1852. *Grinnell* v. *Baxter*, 17 Pick. 385; *Dean* v. *Dean*. 2 Mass. 150.

In *Gilman* v. *Gilman*, 53 Maine, 184, the question now presented was not considered. And we feel safe in saying that in no case has the jurisdiction of this court sitting in banc, over probate appeals, been challenged.

The Massachusetts cases of *Higbee* v. *Bacon*, 11 Pick. 424; *Wright* v. *Wright*, 13 Allen, 207; *McKeone* v. *Barnes*, 108 Mass. 344; *Lewis* v. *Mason*, 109 Mass. 169; *Nash* v. *Hunt*, 116 Mass. 237; *Newell* v. *Homer*, 120 Mass. 277; *Davis* v. *Davis*, 123 Mass. 590; *May* v. *Bradlee*, 127 Mass. 414; *Dorr* v. *Tremont Nat. Bank*, 128 Mass. 349, all depend upon statutes giving right of exception or appeal to the full court.

The counsel further argued against the proponent's motion to set aside the verdict.

APPLETON, C. J. This is an appeal from a decree of the judge of probate, affirming the last will and testament of James Carvill. The case comes before us on a motion to set aside the verdict. The evidence as reported, embraces four hundred and seventeen pages.

No exceptions have been taken to the rulings of the presiding judge as to the admission or exclusion of evidence, or to the principles of law as stated in his charge to the jury.

The jury found that the testator at the time he executed the instrument, purporting to be his last will and testament, was not of sound mind. The evidence upon that branch of the case, in our judgment, negatives the correctness of that finding. But the jury found that the testator was induced to execute the will in question, by undue influence. The evidence bearing on this issue was submitted under correct instructions to the jury, and we do not think it so preponderately in favor of the proponent, as to demand our interference on the ground that it was the result of bias, prejudice or mistake on their part.

It has been argued that the case is not properly before us. By R. S., c. 63, § 26, an appeal may be taken from the probate

court to this court, and this court may reverse or affirm the proceedings of the probate court, and "or take any order thereon, that law or justice may require; and, if upon such hearing, any question of fact occurs proper for a trial by jury, an issue may be framed for that purpose under the direction of the court, and so tried." This was done.

The trial by jury was had. All the incidents of such trial follow. A foreman must be chosen, unanimity is required. The verdict may be wrong. A motion may be filed for a new trial. The rulings of the presiding justice may be erroneous. Exceptions may be alleged, This must so be for the furtherance of justice, for wrong verdicts, whether from the mistaken judgment of the jury, or induced by the erroneous instructions on the part of the judge should be corrected.

By R. S., c. 77, § 13, motions for new trial upon evidence reported by the presiding judge, bills of exceptions, &c. come before the law court, and it matters little in what class of cases the jury trials were had. Whenever a jury trial is had, there may be a motion or exceptions for the correction of errors, whether of the court or jury.

It was the duty of the proponent to present the will for probate. He would have been liable to punishment for not so doing in case of its suppression.

By R. S., c. 63, § 2, costs may be allowed to either party to be paid by the other, or to either or both parties to be paid out of the estate, as justice requires. Under all the circumstances of the case, we think the verdict of the jury should stand, and the costs of both parties be paid out of the estate in controversy.

Motion overruled. Judgment on the verdict. The decree of the probate court reversed. The instrument purporting to be the last will and testament of James Carvill disallowed and rejected, and he be decreed to have died intestate, and the case remanded to the probate court for further proceedings. Costs of both parties to be paid out of the estate.

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

TRUSTEES OF MAINE CENTRAL INSTITUTE

vs.

ORREN S. HASKELL and another, executors of GOING HATHORN.

Somerset. Opinion January 11, 1882.

Subscription to a fund for educational purposes. Interest.

When the trustees of an institution incorporated for educational purposes are capable of receiving money and carrying out the design of a subscription wherein the subscribers promise to pay to the order of such trustees the sums set against their names in six years from date to make up a building fund for said institution, such trustees are amenable to law in case of negligence or abuse of their trust; and when such subscription is accepted, and still more, when the trust is entered upon there is an implied promise for its faithful execution, and that is a sufficient consideration for the promise of each subscriber, to the fund.

Interest when an incident to a debt, must stand or fall with it.

ON REPORT.

Assumpsit against the executors of Going Hathorn to recover the following subscription of the testator:

"Pittsfield, August 27th, 1867.

"We will pay to the order of the trustees of Maine Central Institute, the sums set against our names, in six years from date, to make up a building fund for said institution.

Names.	Dollars.
Going Hathorn,	$1000.00"
* * *	* * *

The material facts found by the court are stated in the opinion.

S. C. Strout, H. W. Gage and F. S. Strout, for the plaintiff, cited: *Cummings* v. *Dennett*, 26 Maine, 399; *Williams* v. *Hagar*, 50 Maine, 22; Private Laws, 1866, c. 17; *Ladies' Institute* v. *French*, 16 Gray, 201; *Williams College* v. *Danforth*, 12 Pick. 544; *Trustees of Fryeburg* v. *Ripley*, 6 Maine, 442; *Fisher* v. *Ellis*, 3 Pick. 321; *Trustees, &c.* v. *Stetson*, 5 Pick. 507; *Amherst Academy* v. *Cowls*, 6 Pick. 432; *Limerick Academy* v. *Davis*, 11 Mass. 113; *Boutell* v. *Cowdin*, 9 Mass.

254; *Forster* v. *Fuller*, 6 Mass. 59; Chitty Contr. 30; 1 Pars. Contr. 453; Met. Contr. 185; *Cottage Street Church* v. *Kendall*, 121 Mass. 528; *Train* v. *Gold*, 5 Pick. 385; *Trustees Williams College* v. *Danforth*, 12 Pick. 541; *Thompson* v. *Page*, 1 Met. 565; *Ives* v. *Stillson*, 6 Met. 310; *Athol Music Hall* v. *Carey*, 116 Mass. 471; *Berkeley Divinity School* v. *Jarvis*, 32 Conn. 421; *Barnes* v. *Perine*, 12 N. Y. 18; *Walker* v. *Eames*, 9 Cush. 539; *Cong. Society* v. *Perry*, 6 N. H. 164; *George* v. *Harris*, 4 N. H. 533; *First Religious Society* v. *Stone*, 7 Johns. 112; *M'Auley* v. *Bellenger*, 20 Johns. 89. Upon the question of interest: *Johnson* v. *Bland*, 2 Burr. 1086; *Dodge* v. *Perkins*, 9 Pick. 384; *Hall* v. *Huckins*, 41 Maine, 580; *National Lancers* v. *Lovering*, 10 Foster, 511; *Foster* v. *Bidwell*, 27 Conn. 370; *Adams* v. *Fort Plain Bank*, 36 N. Y. 261; *Swett* v. *Hooper*, 62 Maine, 55.

D. D. Stewart, for the defendants.

The only remedy, if it could be shown that money had actually been expended on the faith of this subscription, was by an action for money paid and expended. *Farmington Academy* v. *Allen*, 14 Mass. 175; *Limerick Academy* v. *Davis*, 11 Mass. 113; *Bryant* v. *Goodnow*, 5 Pick. 228; *Mirick* v. *French*, 2 Gray, 423; *Bridgewater Academy* v. *Gilbert*, 2 Pick. 579.

The alleged subscription is utterly barren of all consideration and the case falls exactly within the case last cited above and *Trustees Hamilton College* v. *Stewart*, 1 N. Y. 581.

No case is cited by counsel, and it is believed none can be found where proof of a consideration outside the subscription itself has been held admissible and sufficient except where the terms of the subscription itself authorized and laid the foundation for such outside proof as in the cases cited by counsel.

The plaintiffs must show that they have laid out and expended money on the faith of this subscription and equaling the whole of it, and that they have not done. *Mirick* v. *French*, *supra*.

The counsel further contended in an able argument that the subscription had been paid.

DANFORTH, J. The first three objections raised to the maintenance of this action have already been disposed of by this court

when it was considered upon demurrer. 71 Maine, 487. It was then held that the special counts in the writ in all respects with a single exception not now material, were sufficient. This view of the case seems to be fully sustained by the later, if not by the earlier authorities. In a class of cases where there was in the subscription paper no promisee by name or description and possibly in a few where all the consideration was in the future, and the action could, as was supposed, be maintained after the promisee was ascertained only on the ground of a ratification of the contract by the promisor, or a payment of money by the plaintiff, it was suggested that the proper action would be for money laid out on the ground of an implied promise; and some of the declarations were framed to conform to this view. *Farmington Academy* v. *Allen*, 14 Mass. 172. Here and in other cases of the like kind cited in the argument, the paper itself does not show a completed contract. It lacks both a payee and a consideration, hence it would not alone support an action. Nevertheless in the case cited and which was sustained, it was a material element in the defendant's liability and in fact a necessary element; without it no implied promise could be inferred from the subsequent conduct of the party. This being so there can be no harm arising from its insertion in the declaration as such element adding what other elements may be necessary to make the completed contract whether express or implied. It would indeed be something new in legal procedure if a special declaration sufficient to maintain an action cannot be made when it can be maintained under a general one. Such a declaration was made in the present case.

It necessarily follows that even if the subscription paper be without consideration and insufficient of itself to support an action, a consideration outside may be averred and proved. It is too well settled in our state that the consideration for a written promise may be shown outside the written instrument to require any citation of authorities and if it can be proved under a general count, as in *Farmington Academy* v. *Allen*, certainly it can be in a special count like that in the case at bar.

But we are not prepared to admit that the subscription paper in this case "is a bare, naked promise," without any considera-

tion whatever. It is true no consideration was actually received at the time of signing, but one is plainly implied, if not expressed, from the language used. The promise was of money for a specified purpose "to make up a building fund for said institution." This purpose was ever recognized by the law as a public charity. The promise was made to a definite payee by name, one legally competent to take, incorporated for the express purpose of carrying out the object contemplated in the promise and therefore amenable to law for negligence or abuse of the trust. It is not of course binding upon the promisor until accepted by the promisee and may up to that time be considered as a revocable promise. But when so accepted and much more when the execution of the trust has been entered upon, when money has been expended in carrying out the purpose contemplated, it becomes a completed contract binding upon both parties; the promise to pay and at least the implied promise to execute, each being a consideration for the other.

In *Amherst Academy* v. *Cowls*, 6 Pick. 427, the cases before that decided, were examined, and in the opinion, on page 438, it is said, "On this review of the cases which have occurred within this commonwealth, analogous in any degree to the case before us, we do not find that it has ever been decided, that when there are proper parties to the contract, and the promisee is capable of carrying into effect the purpose for which the promise is made, and in fact amenable to law for negligence or abuse of his trust, such a contract is void for want of consideration." Still later in *Ladies' Collegiate Institute* v. *French et als.* 16 Gray, 196, a case similar to this, after referring to several cases, CHAPMAN, J., on page 201, says, "It is held that by accepting such a subscription, the promisee, on his part, agrees with the subscribers, that he will hold and appropriate the funds subscribed in conformity with the terms and objects of the subscription, and thus mutual and independent promises are made, which constitute a legal and sufficient consideration for each other. They are held to rest upon a well settled principle in respect to concurrent promisees." The same in principle is *Athol Music Hall Company* v. *Carey*, 116 Mass. 471. A similar principle and one applicable to the

case before us, is recognized in *Church* v. *Kendall*, 121 Mass. 528, and is thus stated on page 530, "Where one promises to pay another a certain sum of money for doing a particular thing, which is to be done before the money is paid, and the promisee does the thing, upon the faith of the promise, the promise, which was before a mere revocable offer, thereby becomes a complete contract, upon a consideration moving from the promisee to the promisor; as in the ordinary case of an offer of reward."

In our own State these principles have become well settled law. True, in *Foxcroft Academy* v. *Favor*, 4 Green. 382, the action failed because it did "not appear that any monies have been expended by the trustees, or that any part of the subscription was ever paid, or offered to be paid." But in a later and more carefully considered case, *Parsonage Fund in Fryeburg* v. *Ripley*, 6 Green. 442, it was held that the acceptance of a similar promise was an engagement on the part of the trustees to perform the conditions and was a sufficient consideration for the promise. In the recent case of *Carr* v. *Bartlett*, 72 Maine, 120, the facts did not require any decision as to the effect of a mere acceptance, but it was held that a subscription without consideration in the first instance, and revocable until it became a completed contract, became such and was binding when the associates had "paid their subscriptions, made purchases, and entered into contracts necessary for the consummation of the common enterprise." In this latter case, the "common enterprise" was of a different kind from that in the case at bar, therefore the consideration differed in kind. Nevertheless each is a good consideration and equally recognized as such by the law.

That the subscription in the case before us, comes within these well settled principles, is evident. That it has been accepted is free from doubt; that the building therein contemplated has been erected is also certain; that it was erected by the trustees relying upon, and in conformity with the provision in the subscription paper, would seem to be sufficiently evident. The subscriptions were obtained for that purpose, a part of them were paid to the trustees, the building was erected with so far as appears, nothing to rely upon except these subscriptions and such others as might be obtained.

It is not necessary that the trustees should have relied alone upon the subscriptions then made, and if it is incredible that they should have made a contract for the erection of a building, involving an expense of nearly thirty thousand dollars when but a small proportion of that sum had been subscribed, it would certainly be no less incredible to suppose they would have made such a contract with no reliance upon such subscriptions. It is not only evident that these subscriptions were relied upon to the extent of what might be realized from them, but it is equally evident that all the amount then, or subsequently subscribed for the building, was necessarily expended for that purpose.

Upon the question of payment the burden of proof rests upon the defendants. After a careful examination of the evidence with the light afforded by the able and elaborate argument of counsel, we fail to see sufficient to satisfy us that the amount or any part of the subscription has been paid.

It is true that the treasurer's accounts show a large amount of money paid for building purposes in 1868 and 1869, and it may be true that Mr. Hathorn was "able, willing and desirous" of paying his subscription before it became payable by its terms. But of this we find no evidence in the case. But we do find in the same treasurer's account where the money was obtained to pay this large amount, and none of it appears to have come from this subscription.

It also appears from the records, that Mr. Hathorn had bills of considerable amount, for labor and materials furnished for the building upon which this subscription might have been allowed. But it was not then payable, and the same records show how these bills were paid, and no such allowance appears.

It may be singular that this subscription does not appear among the assets in the reports of the different treasurers. But the same is true of other subscriptions upon the same paper, particularly those of Vickery and Atkinson which were assets at the time the reports were made, and were paid a long time afterwards. It further appears that the alleged report of the first treasurer, the omission from which is so much relied upon, is a paper found in

his desk long after he had ceased to be treasurer, without any evidence that it was ever presented to or acted upon by the trustees. It cannot therefore be admissible in evidence against them. The inference to be drawn from these reports as an admission of payment, if they are admissible for that purpose, is very much weakened if not overcome, by the additional facts, that it must have been a part of the assets, if we may believe the uncontradicted testimony of the witness Gerrish, who says it was, with the assent of Hathorn himself, as late as 1870, reckoned among the assets in a statement made to the legislature. The statement of this witness that it was not on the treasurer's books, may serve to explain its omission from the reports. If its absence from the reports as an asset is significant as tending to show payment, the absence of any credit for money received upon it, is quite as significant the other way, and if the treasurer was guilty of fraud in not reporting it as an asset, he could be no less guilty in withholding the credit.

By the terms of the subscription, the amount was payable in six years from its date. From that time it would be on interest. Interest is an incident of the debt, and must stand or fall with it. A sufficient demand upon the executors for the debt as required, is admitted to have been made. This carries with it all the incidents. As the debt is recoverable, so must the interest be also.

Judgment for the plaintiffs for $1000, and interest from August 28, 1873.

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

LUTHER REDLON *vs.* GEORGE L. CHURCHILL and another.

Cumberland. Opinion January 10, 1882.

Promissory notes. Partnership.

When a member of a firm makes his individual note payable to his own order and indorses thereon his own name and the name of his firm, and receives and appropriates the proceeds thereof to his own use, the firm will be liable

therefor, being duly notified, to an indorsee who, in good faith, for an adequate consideration purchased the same before maturity, ignorant of all the circumstances affecting its validity.

The form of the note is not notice that it was given for the maker's accommodation and in fraud of the firm.

The purchase of the note of a broker furnishes no presumption that the broker was the agent of the maker.

ON REPORT from superior court.

Assumpsit on a promissory note against the firm of Churchill and Melcher.

The case is fully stated in the opinion.

George W. Verrill, for the plaintiff, cited: *Kellogg* v. *Curtis*, 69 Maine, 212; *Farrell* v. *Lovett*, 68 Maine, 326; Story on Partnership, § 133; *Waldo Bank* v. *Lumbert*, 16 Maine, 416; *Holmes* v. *Porter*, 39 Maine, 160; *Etheridge* v. *Binney*, 9 Pick. 274; *Wait* v. *Thayer*, 118 Mass. 473; *Nat. Bank* v. *Savery*, 127 Mass. 75.

Clarence Hale, for Holman S. Melcher, one of the defendants.

The form of the note itself is notice sufficient to put a third party on his inquiry, as it clearly suggests that the note was given for an individual debt and not for partnership uses.

The rule of law is laid down in *Angle* v. *N. E. Mut. Life Ins. Co.* 92 U. S. 341. "The holders of negotiable securities taken in the usual course of business, before the securities fall due are chargeable with notice, where the marks on the instrument are of a character to apprise one to whom the same is offered of the alleged defect." The case *Goodman* v. *Simonds*, 20 Howard, 365, is full of authorities on this subject. The rule as to the burden of proof is stated in the last case cited, as it is also stated in Daniels on Chancery, § 815, namely, that when there is any thing in the form of the instrument to put a third party on inquiry, the burden shifts and it is for plaintiff to show that he made due inquiry. See also, *Bank of Commerce* v. *Seldon*, 3 Min. 155, and 1 Am. Leading Cases, 406 *et seq.*; *Eastman* v. *Cooper*, 15 Pick. 276; *Williams* v. *Walbridge*, 3 Wendall, 415; Parsons on Bills and Notes, p. 128.

Following in the line of these authorities, see *Sherwood* v. *Snow*, 46 Iowa, 485, where the note was signed by a partner with

name of partnership below and the court say that this was a circumstance to show that note was for individual benefit of the partner; notice the resemblance of case at bar. In *Rollins* v. *Stevens*, 31 Maine, 454, where the face of note indicated that partnership signed as sureties it was held that this fact charged holder with knowledge, — that "the form of the contract was information to him that the firm had no interest in it." See also cases cited. In a note from partnership to one of the firm it is held that the form of the note is sufficient to indicate that it is not a regular business note but relates to matters between the partners and puts holders on inquiry. *Thompson* v. *Hale*, 6 Pick. 259. See also, *Bank* v. *Winship*, 5 Pick. 11; *Livingston* v. *Roosevelt*, 4 Johns. 265; Collyer on Partnership, 468 *et seq.*; 3 Bing. 963; *Little* v. *Rogers*, 1 Met. 108. A partner is not an agent to indorse other than partnership paper and in a note to order of himself indorsed by other parties above his own indorsement, the form is held to be *prima facie* evidence that paper is merely the individual paper. *Bowman* v. *Cecil Bank*, 3 Grant, Pa. Cas. 33. Indorsers of a note made in the name of a firm by a member without assent of co-partners, for his individual debt, are not liable for payment. *Williams* v. *Walbridge*, *supra*. In *Bank* v. *Law*, 127 Mass. 72, the case turned on a statute. But the reasoning is in the same direction. These principles are also recognized in *Wail* v. *Thayer*, 118 Mass. 474; and *Blodgett* v. *Weed*, 119 Mass. 215, though the facts are not like case at bar.

"If from the form of note or from other facts, holder has reason to believe that note was for partner's use, he acquires no right from the attempted prostitution of the firm." *N. Y. F. Ins. Co.* v. *Bennett*, 5 Conn. 574.

APPLETON, C. J. This is an action of assumpsit against the defendants as indorsers of the following described note.

"$200.00. Portland September, 29, 1880.

Four months after date I promise to pay to the order of myself two hundred dollars at any bank in Portland. Value received.

No. 2672. Due January 29. George L. Churchill."

Indorsed on the back of the note is, "George L. Churchill."

"Churchill and Melcher."

The note not being paid at maturity was protested and the defendants were seasonably notified.

The defence set up was, that Churchill made the note and the indorsements thereon and obtained the money on the note for his own use and without the knowledge or consent of his partner.

The evidence shows that the plaintiff purchased the note before its maturity, of a broker and paid for the same in good faith and ignorant of any facts affecting its validity.

The general rule as laid down in Collier on Partnership, § 447, is "that a partnership security negotiated through the fraud of one of the partners, is nevertheless binding on the firm, in the hands of an indorsee for a valuable consideration without notice of the fraud." The evidence clearly shows the plaintiff to be such indorsee.

The remarks of LORD, J., in the *Atlas National Bank* v. *Savery*, 127 Mass. 75, are applicable to the case at bar: "The notes were obtained by the plaintiff in the market, with no evidence that the party from whom they were obtained was not a *bona fide* holder of them for value. The fact that the party from whom they were obtained was a broker, if from that fact it is to be inferred that he was not the owner, raises no presumption that he was the agent of Law (here Churchill,) for the negotiation of the notes. If any presumption could arise from that fact that he was the agent to any party to the notes it would be that he was the agent of the last indorser of the notes." So that if the broker was not the owner of the note the inference would be that he was the agent of the defendants — the last indorsers — who would in that case be indisputably liable.

When one of a firm makes his own note payable to his own order and indorses thereon the name of his firm and receives and appropriates to his own use the proceeds thereof, the firm being duly notified, will be liable therefor to an indorsee, who in good faith, for an adequate consideration purchased the same before maturity and in ignorance of any circumstances affecting its validity. The form of the note is not notice that the note is given for the maker's accommodation. In *Wait* v. *Thayer*, 118 Mass. 474, one Warner made and indorsed a note payable to the firm of

which he was a member, for his own use. In delivering the opinion of the court, WELLS, J., says, "Warner being a member of the firm whose indorsement appeared upon the note, the fact that he was also the maker of the note in his individual capacity did not give rise to any conclusive presumption, that it was an accommodation indorsement, or that he negotiated the original loan and received the money for his own private use, and as a copartner." In *Parker* v. *Burgess et al.* 5 R. I. 277, a note made by a copartner payable to his own firm, was indorsed by him in the copartnership name to another in payment of his individual debt, with notice that he had no authority to use the firm name, and the note indorsed by the party, who received it in blank, was purchased by the plaintiff from a broker before maturity, for full value, and without notice of the transaction in which the note originated. *Held*, that the plaintiff was entitled to recover of the firm, as indorsers, the amount of the note, the paper not indicating, and he having no notice of the fraud practised upon the firm by its copartner. The form of the note is no notice of an intended or accomplished fraud on the firm by one of its members. These views have long since received the sanction of this court. *Waldo Bank* v. *Lumbert*, 16 Maine, 416; *Waldo Bank* v. *Greeley*, 16 Maine, 419.

That Churchill made the note payable to his own order and then indorsed the name of the firm cannot change the result. It is immaterial whether the note was made originally payable to the firm or to the maker's order, and then indorsed with the firm name.

It is sufficient that the plaintiff is a purchaser for value, in good faith and without knowledge of any defect of title. A suspicion of defect, or a knowledge of facts which might excite in the mind of a cautious person, or even negligence not amounting to fraud or bad faith will not defeat the rights of the purchaser. Such is the universally recognized law on this subject. *Farrell* v. *Lovett*, 68 Maine, 326; *Kellogg* v. *Curtis*, 69 Maine, 212; *Hobart* v. *Penny*, 70 Maine, 248; *Smith* v. *Livingston*, 111 Mass. 342; *Freemans National Bank* v. *Savery*, 127 Mass. 79;

Murray v. *Lardner*, 2 Wall. 110; *Cromwell* v. *Sac. Co.* 96 U. S. 51.

Defendants defaulted.

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

ORRIN H. BUTLER *vs.* GEORGE MOORE.

York. Opinion January 11, 1882.

Promissory notes. Fraudulent conveyance.

In an action against the maker of a promissory note given as the consideration of a conveyance received for the purpose of aiding the grantor to delay his creditors, the fraud cannot be set up in defence.

ON REPORT.

Assumpsit on the following note;

"$1000. March 26th, 1874.

For value received I promise to pay Casper E. Marshall or order, one thousand dollars on demand with interest annually.

Geo. Moore."

Indorsement thereon, "Without recourse,

C. E. Marshall."

The plea was general issue and the following:

"And the defendant comes and defends, &c. when, &c. and says that the note declared upon in plaintiff's declaration, was obtained by Casper E. Marshall, payee in said note, for the purpose of aiding the said Marshall, in hindering, delaying and defrauding the creditors of said Marshall, and for no other purpose, and this he is ready to verify. Wherefore he prays judgment and for his costs.

By his attorneys, COPELAND & EDGERLY."

The opinion states the material facts.

G. C. Yeaton and *H. V. Moore*, for the plaintiff, cited: *Nichols* v. *Patten*, 18 Maine, 231; *Ellis* v. *Higgins*, 32 Maine, 34; *Thompson* v. *Moore*, 36 Maine, 47; *Andrews* v. *Marshall*,

43 Maine, 272; *S. C.* 48 Maine, 26; *Mathews* v. *Buck*, 43 Maine, 265; Bump, Fraud, Cono. 475; *Quirk* v. *Thomas*, 6 Mich. 76; *Carpenter* v. *McClure*, 39 Vt. 9; *Harvey* v. *Varney*, 98 Mass. 118; *Springer* v. *Drosch*, 32 Ind. 486; *Clemens* v. *Clemens*, 28 Wis. 637; *Sherk* v. *Endress*, 3 Watts & S. 255; *Neely* v. *Wood*, 10 Yerg. (Tenn.) 486; *Douglas* v. *Dunlap*, 10 Ohio, 162; *Bobb* v. *Woodward*, 50 Mo. 95; *Sumner* v. *Murphy*, 2 Hill, (S. C.) 488; *Capin* v. *Pease*, 10 Conn. 69: *Silverman* v. *Bullock*, (98 Ill.) Reporter, June 15, 1881; *Hendricks* v. *Mount*, 2 South (N. J.) 738.

Copeland and Edgerly, for the defendant.

Defendant claims that the note declared upon in this action is without consideration, and was taken by Marshall, the original payee, as part of a transaction to hinder, delay and defraud his creditors. That it was expressly understood between defendant and said payee that said note was not to be held as a valid note against defendant. That instead of being an innocent holder of the note, the plaintiff appears in the suit for the sole purpose of assisting the original payee in enforcing a contract which is illegal and void. Evidence may be received to show that a note was given without consideration and executed upon the agreement that it should be cancelled when desired, to assist the payee in protecting his property against creditors. 28 Am. Report, 780.

Whatever the parties to an action have executed for fraudulent or illegal purposes, the law refuses to lend its aid to enable either party to disturb. Whatever the parties have fraudulently or illegally contracted to execute the law refuses to compel the contractor to execute or pay damages for not executing; but in both cases leaves the parties where it finds them. *Smith* v. *Hubbs*, 10 Maine, 76.

No court will ever lend its aid to a man who founds his cause of action upon an immoral or illegal act. *Holman* v. *Johnson*, Cowp. 341.

When the illegal consideration is set forth upon the record the objection may be taken either by demurrer or in arrest of judgment. But when it does not appear on the record, the defendant

may show that the claim is in reality founded upon an illegal and noxious agreement. Starkie, vol. 2, 86.

When two persons agree in violating the laws of the land, the court will not entertain the claim of either party against the other for the fruits of such an unlawful bargain. If one holds the obligation or promise of the other to pay him money, or to do any other valuable act, on account of such an illegal transaction the party defendant may expose the nature of the transaction to the court, and thus defeat the action. *Inhabitants of Worcester* v. *Eaton*, 11 Mass. 368.

The Supreme Court of Tennessee in *Walker* v. *McConnice*, 10 Yerg. 229, decided that a note having been made and the deed of trust executed to defraud creditors, the defendant cannot resist the execution of the trust according to the terms of the deed. But as the note was without consideration and was executed to hinder and delay creditors, the promise to pay being executory cannot be enforced. This opinion is confirmed by *Jones* v. *Read*, 3 Dana, (Ky.) 541; *Harvin* v. *Weeks*, 11 Rich, (S. C.) 601; *Powell* v. *Inman*, 7 Jones, (N. C.) 28; *Hoover* v. *Pierce*, 27 Miss. 13; *Hamilton* v. *Scull, Adm'r*, 25 Mo. 166; *Gouty* v. *Gelhart*, 1 Ohio St. 263; *Church* v. *Muir*, 33 N. J. 319. *McCausland* v. *Ralston*, 28 Am. 793.

A party to a negotiable note is a competent witness to prove that the note was fraudulent, and without consideration, even though such note is in the hands of an innocent holder. *Abbott* v. *Rose*, 62 Maine, 194; *Piper* v. *Gilmore*, 49 Maine, 149; *Wood* v. *Pennell*, 51 Maine, 52; *Sullivan* v. *Park*, 33 Maine, 438; *Allum* v. *Perry*, 68 Maine, 232.

VIRGIN J. One view of the facts in this case as they are testified to by the defendant, that in receiving the deed from Marshall he did not intend any wrong, that he never expected to pay the note which he gave to Marshall as a consideration for the deed, that it was distinctly understood that it was not to be paid and that the deed was to be given back, is so like those in *Bryant* v. *Mansfield*, 22 Maine, 360 as to render the language of the court in the latter case peculiarly apt here. "If the transaction," says SHEPLEY, J., "be considered with reference to the parties

alone, it presents the case on paper of a conveyance of real estate and a payment for it by note, with an alleged verbal agreement that the note should be returned to one party and the estate be reconveyed to the other. And such a parol agreement to destroy the effect of the deed of conveyance and of the note could no more be received in equity than in law."

Again, taking the testimony of the defendant to be true, there was no such fraudulent conveyance as even creditors of Marshall could impeach. For the defendant unqualifiedly denies all wrongful intent on his part in accepting the deed from Marshall and giving him his note. Nor is there any evidence of Marshall's indebtment to any creditor. And whatever the original transaction may have been, the defendant has never been solicitous to rescind the contract. The parties being tenants in common after the conveyance caused it to be taxed to them both ever after and each paid one-half of the taxes as they were assessed. In 1876, they sold a house lot, they both agreeing upon the price and dividing the sum received therefor; and in like mannar they sold three other house lots, thus disposing of three of the ten acres. We perceive no fraud upon creditors or upon each other here. At any rate no creditor has ever undertaken to disturb the defendant's title which is still in him except as to the portion sold.

There is still another view of the case. Assuming the note in suit to have been dishonored before it was indorsed to the plaintiff, and taking the same view of the testimony as the court did in *Bryant* v. *Mansfield*, *supra*, that and the defendant's second plea presents the question: Whether one who has received a conveyance of land and in consideration thereof has given his negotiable promissory note to the grantor, for the purpose of aiding him in delaying his creditors, can set up the fraud in defense to an action on his note brought by the grantor. And after a careful examination of the numerous cases on the subject in the various jurisdictions where it has been considered, we think the better opinion is opposed to such defense.

We derived our law in relation to conveyances fraudulent as to creditors from the stat. 13 Eliz. c. 5, which has been adopted

here as common law. *Howe* v. *Ward*, 4 Maine, 196, 199. This statute, declaring that conveyances made with intent to "delay, hinder or defraud creditors" shall be "deemed and taken (only as against creditors, etc.) to be clearly and utterly void, frustrate and of none effect," has been invariably construed as plainly implying that they are valid as between the parties and their representatives (*Nichols* v. *Patten*, 18 Maine, 231; *Andrews* v. *Marshall*, 43 Maine, 274; Benj. Sales, (3d Am. ed.) 476 and note); and can be avoided only by creditors on due proceedings (*Miller* v. *Miller*, 23 Maine, 22; *Thompson* v. *Moore*, 36 Maine, 47; *Stone* v. *Locke*, 46 Maine, 445); or their representatives, such as assignees in bankruptcy or insolvency of the grantor (*Freeland* v. *Freeland*, 102 Mass. 475, 477), and the executors or administrators of grantors since deceased whose estates have been declared insolvent. *McLean* v. *Weeks*, 65 Maine, 411, 418. And notwithstanding the words "utterly void," etc. applied to such conveyances, they are not, even as to creditors void but voidable. (*Andrews* v. *Marshall supra*); and all the courts concur in holding that if the fraudulent grantee convey the premises to a *bona fide* purchaser for a valuable consideration before the creditor moves to impeach the original conveyance, the purchaser's title cannot be disturbed. *Neal* v. *Williams*, 18 Maine, 391; *Hoffman* v. *Noble*, 6 Met. 68; *Bradley* v. *Obear*, 10 N. H. 477.

It is generally true that the law will not aid parties violating its express or implied rules, in executing their unlawful contracts, or afford them relief from their effects when executed. In such cases the old maxims, *ex turpi causa* and *in pari delicto*, stand like walls against the parties. The implication of the statute of 13 Eliz. declares that as between the parties to a conveyance made to prevent creditors of the grantor from attaching or seizing his property, and thereby securing their debts, the transaction is not to be regarded void or voidable, but valid. And if valid, we fail to see why the note given in payment is not also valid. The transaction is not a *turpis causa*, and neither do the parties stand in *pari delicto*. In the case at bar, each of the parties deliberately entered into the contract. Each received a full

consideration, the one for his land and the other for his note. Neither of them was defrauded. So far as their intention backed up by their acts affected any creditor of the grantor, the creditor thereby defrauded has full remedy; for he may attach the property before it is sold to a *bona fide* purchaser, or he may recover twice its value not exceeding twice the amount of his debt in an action on the case under the provisions of R. S., c. 113, § 51.

The decisions in Massachusetts, repeatedly made, sustain actions like this. See the two opinions of MORTON, J., and of SHAW, C. J., after the second trial in *Dyer* v. *Homer*, 22 Pick. 253; *Butler* v. *Hildreth*, 5 Met. 49, 50. *Bailey* v. *Foster*, 9 Pick. 139, recognizes the same doctrine. See also, *Harvey* v. *Varney*, 98 Mass. 118, where the cases are reviewed and the doctrine adhered to. See also, the elaborate opinion of the Chief Justice of Wisconsin, in *Clemmens* v. *Clemmens*, 28 Wis. 637, and the well reasoned opinion of the court in *Carpenter* v. *McClure*, 39 Vt. 9. See also, the numerous cases cited on the plaintiff's brief.

We are aware that the early decisions in our own State are somewhat inconsistent. *Smith* v. *Hubbs*, 10 Maine, 71; *Nichols* v. *Patten*, 18 Maine, 231; *Ellis* v. *Higgins*, 32 Maine, 34; *Andrews* v. *Marshall*, *supra;* S. C. 48 Maine, 26. But in none of these cases was this precise question presented although it was discussed. We think, however, the better doctrine is the one held by the cases above cited.

In *Ellis* v. *Higgins*, and *Andrews* v. *Marshall*, 48 Maine, 26, the question was raised (though not by counsel in this case) as to the effect of R. S., c. 126, § 2, which makes parties to a conveyance fraudulent as to creditors liable to fine and imprisonment, and is therefore prohibitory in its character. And it was decided that it did not make such conveyances void as to parties. This provision first came into the statute in 1841, R. S., 1841, c. 161, § 2. It is substantially a transcript of St. 13 Eliz. c. 5, § 4, and hence was common law here before it was adopted by the legislature. The two rules should be construed together now, the same as if both were statute provisions, or both rules of the common law, and the construction given them to harmonize them so

that they both shall stand, which results from holding that while one impliedly prohibits conveyances, fraudulent as to creditors, the other limits or restricts the invalidating effect of the prohibition to the creditors or their representatives, whose debts are attempted to be avoided. *Carpenter* v. *McClure*, *supra*, where the statute of Vermont having both sections of 13 Eliz. c. 5, is discussed and construed.

We perceive no legal reason for deducting from the amount of the note, the sum of four hundred and twenty-five dollars, received for sales of the four lots of land.

Judgment for the plaintiff for the amount of the note sued on.

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

WILLIAM G. JONES *vs.* WILLIAM J. SUTHERLAND, and others.

Piscataquis. Opinion January 12, 1882.

Amendment. Costs.

A writ which has not the name of any plaintiff is not amendable.

When an action is dismissed on motion of the defendant because no plaintiff is named in the writ, no costs are allowed.

ON EXCEPTIONS.

The case is stated in the opinion.

Henry Hudson, for the plaintiff.

D. L. Savage, for the defendants.

APPLETON, C. J. The writ in this case contained no name of a plaintiff. The counsel for the defendants moved its dismissal for that cause. The plaintiff moved to amend by the insertion of the name of William G. Jones as plaintiff. The amendment was allowed, to which exceptions were alleged.

In *Ayer* v. *Gleason*, 60 Maine, 207, the writ contained the name of Ayer as plaintiff, leaving a blank for the name of copartner. It was there held that the writ could not be amended

by the insertion of the name of such copartner. Here there is no plaintiff. Neither the statute nor the common law will sanction such an amendment.

The act of 1874, c. 197, presupposes a writ with one or more plaintiffs or defendants and permits the number of either to be increased or diminished, but in no way sanctions an amendment by inserting a plaintiff or defendant where there is none in the writ.

The amendment disallowed, and the writ without a plaintiff, there is no one against whom an execution for costs could issue. Certainly not against Jones, for the defendant has the action dismissed because his name is not in the writ, though he desired its insertion. The writ, therefore, the amendment being disallowed, remains without the name of a plaintiff. No judgment can be rendered which the law will warrant. *Tibbetts* v. *Shaw*, 19 Maine, 204.

Exceptions sustained, action dismissed without costs.

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

MICHAEL MAHAN *vs.* WILLIAM J. SUTHERLAND and others.

Piscataquis. Opinion January 12, 1882.

Pleadings. Demurrer. Abatement.

A mistake or omission of the place of residence of the defendants is only pleadable in abatement. Jurisdiction where persons reside out of the State, is obtained by attachment of their property within the State and to the extent of the property attached.

When non-residents enter an appearance and demur, they thereby submit to the jurisdiction of the court.

When the form of writs as prescribed by c. 63, of the acts of 1821, is not followed, a part of the form being omitted, advantage is to be taken of the omission by plea in abatement.

A demurrer for a mere defect of form to avail the party demurring must be special.

ON EXCEPTIONS.

Assumpsit for labor in manufacturing slate and to enforce a lien on the same.

The writ was dated March 21, 1878, and entered at the September term, 1878.

At the September term, 1881, the defendants filed the following demurrer:

"And now the said Sutherland, Loring and Baker, come and defend the force and injury, when, &c. where, &c. and say that the said plaintiff as aforesaid ought not to have and maintain his action aforesaid thereof against them, because they say that the writ and declaration aforesaid and the matter therein contained are insufficient at law to have and maintain the action of the plaintiff against them, to which writ and declaration, they, the said Sutherland, Loring and Baker, have no necessity, nor are by the law of the land bound in any way to answer, and this they are ready to verify. Wherefore, for want of a sufficient writ and declaration in this behalf, they, the said Sutherland, Loring and Baker, pray judgment of the plaintiff's writ, and that the plaintiff may be barred from having his action thereof against them, and that they may be allowed their costs.

"By D. L. Savage, their attorney."

"And the said defendants, Sutherland, Loring and Baker, demur specially to the said plaintiff's writ and declaration, because:

"It is not alleged in said writ that a contract was made and entered into between the said plaintiff and the said defendants for the labor of the plaintiff for the defendants;

"It is not alleged in said writ that the plaintiff labored for the defendants at the request of the defendants;

"It is not alleged in said writ that the plaintiff labored for the defendants in consideration that the defendants would pay the said plaintiff for said labor;

"It is not alleged in said writ that the plaintiff labored for the defendants at their request, and in consideration thereof, defendants became liable and promised plaintiff to pay him for said labor;

"No promise is alleged in plaintiff's writ in consideration of labor performed by plaintiff for defendants;

"It is not alleged in said writ that the action was commenced within thirty days after labor performed on the slate commanded to be attached in said writ, the action being to enforce a lien on the slate on which plaintiff claims to have labored;

"It is alleged in plaintiff's writ that the defendants are copartners in quarrying slate, and plaintiff claims to have labored in quarrying, mining and manufacturing slate for defendants;

"It is alleged in said writ that Sutherland, Loring and Baker, are copartners in quarrying slate under the name of Oakland Slate Quarry Company, and the account annexed to the writ sets out the work of plaintiff to have been done for Oakland Slate Company, instead of Oakland Slate Quarry Company;

"The said writ is not sealed;

"On inspection of said writ, no seal can be seen and read;

"The seal of this court is not on said writ so that on inspection it can be legally ascertained that it is the seal of this court.

"By D. L. Savage, their attorney."

The demurrer was overruled, and the defendants alleged exceptions.

The defects and omissions in the writ, as found by the court, are stated in the opinion.

Henry Hudson, for the plaintiff.

D. L. Savage, for the defendants.

In the commencement of actions each party should be designated by his name at full length with the name of the town and county in which he resides. 2 Stra. 889; 10 East. 83. The officer's return shows no service on these defendants, their residence is not named in the writ and the writ is not "in a plea of" anything, hence the court has no jurisdiction, as neither the person nor case can be understood.

The words "in a plea of—" are given in the form of writs prescribed by the statute. They form a matter of substance and when not inserted the defect is fatal and will abate the writ. Story's Pl. 24, and cases there cited; 5 Dane's Abr. c. 176, art. 9, § § 3, 4.

Either party may demur at any stage of the proceedings. R. S., c. 82, § 19.

APPLETON, C. J. The defendants demurred specially to the plaintiff's declaration, which being adjudged good, they filed exceptions to such ruling.

1. The defendants are described as copartners and doing business in Monson under the name of the Oakland Slate Quarry Company. The residence of the defendants is nowhere stated. A mistake or omission of their place of residence is only pleadable in abatement and cannot be taken advantage of by demurrer whether general or special.

2. Jurisdiction, where persons reside out of the State, is obtained by attachment of their property within the State and only to the extent of such attachment. In the case at bar, the defendants by appearing and demurring submit to the jurisdiction of the court.

3. The declaration sets forth a good cause of action. It follows the words of the statute in claiming a lien for labor done in mining, quarrying and manufacturing roofing slate as given by R. S., c. 91, § 26.

4. The forms of writs are prescribed in c. 63 of the acts of 1821, and they have been continued by subsequent enactments to the present time. In the form there given for a *capias* or attachment the defendant is required to answer to the plaintiff "in the plea of—." The blank is to be filled in accordance with the nature of the action. It is not so filled in the plaintiff's writ. The nature of the action is nowhere stated, though what it is, is obvious from the declaration, which is in assumpsit and states a good cause of action, which the demurrer admits.

The omission is not specially assigned as a cause of demurrer. Had the defendant pleaded the general issue and a verdict been found in his favor it would not for that cause have been arrested. The variance is one as to form and is amendable by R. S., c. 82, § 9.

A special demurrer as to formal defects not specially assigned, is to be regarded as a general demurrer. *Tucker* v. *Randall*, 2

Mass. 283. The defect is one of form. It does not prevent the case from being fully understood. It is one of omission. It is not like the case where the declaration is not in accordance with the nature of the action adopted. "Whether the writ is good or not, no advantage" says SEDGEWICK, J., "can be taken of its defects under a demurrer to the declaration. If the defendant would object to the plaintiff's writ, he must do it by plea in abatement."

The omitted word is part of the form provided by statute. The omission should have been pleaded in abatement. The authorities cited in the defence show that a variance between the writ and the statutory form is to be taken advantage of by a plea in abatement. According to the form given in Story's Pleadings after the usual commencement, the defendant "prays judgment of the *writ* aforesaid, because he says that the writ aforesaid does not agree with the form of original writs in such case made and provided by the law of this commonwealth, because the said writ wants these words," (reciting them) &c. To the same effect is the law as stated in 5 Dane's Abr. c. 176, art. 9, § 4, where this plea was filed by James Otis for a variance between the writ and the established form. The constitution of Massachusetts requires that writs have the *teste* of the first justice of the court, who is not a party. In *Ripley* v. *Warren*, 2 Pick. 597, the writ did not bear the *teste* of the first justice of the court, who was not a party and a demurrer was filed and joined as in the present case. It was held that the objection was taken too late. PARKER, C. J., says, "that all dilatory pleas or those which amount only to an exception to the form of the process, are required to be exposed to the view of the court in the first instance, in order to save expense; and it is justly considered, that when the opportunity is passed, the party, who might have taken the advantage, has chosen to submit to an investigation of the merits of his cause, having waived the exceptions, which he might have taken. The books are full of cases to this effect and it is hardly necessary to cite them. . . All irregularities in process must be taken advantage of by motion or plea in abatement in the first stage of the process, as appears by the following

cases: *Gordon* v. *Valentine*, 16 Johns. Rep. 145; *Gilliland* v. *Morrell*, 1 Caines' Rep. 154; *Hart* v. *Weston*, 5 Burr. 2586." So a defect in the service is cured by pleading to the merits or by demurrer, *Richardson* v. *Rich*, 66 Maine, 249. The service of a writ by one not authorized to serve must be taken advantage of the first term, or the irregularity will be deemed to have been waived. *Smith* v. *Robinson*, 13 Met. 165.

If the variance were a matter to be taken advantage of by demurrer, it can only be done by a special demurrer. By § 1, 27 Eliz. c. 5, and 4 Anne c. 16, it is provided that the judges "shall give judgment according as the very right of the cause and matter in law shall appear unto them, without regarding any imperfection, omission, defect or want of form, except those only which the party demurring shall *specially* and particularly set down and express, together with his demurrer, as causes of the same." No mere matter of form can be objected to on general demurrer, but the objection must be specifically stated.

This objection being formal, advantage should have been taken of it by plea in abatement. It is not for the defendant to lie by for years and then spring a trap upon his adversary.

Exceptions overruled.

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

HENRY WILLIAMSON, Judge of Probate,

vs.

SAMUEL WOODMAN.

Somerset. Opinion January 13, 1882.

Probate bonds. Estoppel. Guardian's deed.

The obligors who have voluntarily entered into a bond, given by a guardian upon receiving license to sell real estate, are estopped by the recitals in the bond, which admit a due appointment of the guardian and full authority to sell and convey the real estate of the ward.

Informalities in the recitals of a guardian's deed given in good faith, mistakes of the guardian in stating the date of the issuing of authority, authority having been given, or the insertion of irrelevant matter should not be regarded as sufficient to avoid such deed.

Where a ward brings his suit in affirmation of a sale of his real estate by his guardian, it is neither for the guardian nor his surety to set up the invalidity of the sale or deed.

ON REPORT.

Debt on a bond, given by Laura J. Lyford, as guardian of Charles F. Lyford, upon receiving license to sell certain real estate, signed by the defendant as surety.

Plea, general issue, with brief statement alleging that Laura J. Lyford was never the legal guardian of Charles F. Lyford, that her license to sell real estate was entirely void, and that the bond in suit is therefore wholly void.

The opinion states the material facts.

The law court were to determine the law and the facts, and render judgment according to the legal rights of the parties.

C. A. Harrington, for the plaintiff, cited: *Doe* v. *Oliver*, 2 Smith's Lead. Cas. (6th ed.) 673; *Cutler* v. *Dickinson*, 8 Pick. 386; *Cordis* v. *Sager*, 14 Maine, 477; *Judge of Probate* v. *Cook*, 57 N. H. 450; Schouler, Dom. Rel. 485; R. S., c. 71, § 31; *Webster* v. *Calden*, 53 Maine, 203; *Knox* v. *Jenks*, 7 Mass. 491; *Kenniston* v. *Leighton*, 43 N. H. 309; *White* v. *Weatherbee*, 126 Mass. 450.

Folsom and Merrill, for the defendant.

Mrs. Lyford was administratrix on the estate of her husband, the law presumes that she continued as such until legally discharged. *Sawyer* v. *Knowles*, 33 Maine, 210; *Conkey* v. *Kingman*, 24 Pick. 115.

She could not be appointed guardian. R. S., 1857, c. 67, § 1.

True she had settled an account as administratrix, entitled first and final, but that showed seventy-nine dollars and thirty-four cents remaining in her hands.

If there was no legal appointment of guardian, the acts of the judge of probate were void, and this action cannot be sustained. Chit. Contr. 692; *Corwin* v. *Merritt*, 3 Barb. 341.

It should be shown to the court affirmatively, that the probate court had authority to make the decree. *Dakin* v. *Hudson*, 6 Cowens, 221; *Bloom* v. *Burdock*, 1 Hill, 130; *Jackson* v. *Esty*, 7 Wendell, 148.

In order to render a recital an estoppel, it must be shown that the object of the parties was to make the matter recited, a fixed fact as the basis of their action. Bigelow on Estoppel, 280.

A mere recital induced by a mutual mistake of a fact, cannot operate by way of an estoppel. *Conant* v. *Newton*, 126 Mass. 109. See also, 2 Greenl. Ev. 339; *Farrar* v. *Cooper*, 34 Maine, 401.

In order to give effect to a guardian's deed of real estate sold under license from probate court, it must appear that all the statutory provisions in relation thereto, have been strictly complied with. 3 Wash. R. P. 193; *Campbell* v. *Knights*, 26 Maine, 227; *Jackson* v. *Esty*, *supra*; *People* v. *Barnes*, 12 Wend. 493; *Williams* v. *Morton*, 38 Maine, 47.

APPLETON, C. J. At the December term, 1861, of the probate court in this county, Laura J. Lyford entered upon the discharge of her duties as administratrix of the estate of Charles W. Lyford, to which she had been duly appointed.

On the seventh of July, 1863, she petitioned to be appointed guardian of her minor son, Charles F. Lyford, "she having settled her final account as administratrix of the estate of said deceased," (her husband) as was set forth in her petition.

At the probate court held on the first Tuesday of July, 1863, the judge decreed "that said Laura J. Lyford be discharged from her trust as administratrix of said Charles W. Lyford, and that she be and hereby is appointed guardian to said minor," she giving bonds to the amount specified in the decree. She filed the required bond, and was appointed guardian.

On the seventh of July, 1863, the guardian petitioned to sell certain real estate to John Wyman, for four hundred and seventy-five dollars, and at a probate court held on the first Tuesday of August, 1863, the license was granted "upon her filing bond, with sufficient sureties in the sum of nine hundred and fifty dollars."

The required bond was given, which the defendant signed as surety. The land was conveyed on the fifth of September, 1863, to Rubie M. Wyman, the wife of John Wyman, and the money paid. It is upon the bond that it is claimed to hold the guardian liable for her official neglects.

The bond in suit recites that Laura J. Lyford had been duly appointed by the judge of the court of probate, guardian of Charles W. Lyford, and as such, had been authorized and empowered to sell and convey certain real estate belonging to her said ward, at a probate court held at Norridgewock, on the seventh of July, 1863.

The bond was voluntarily entered into. The obligors are estopped by the recitals in the bond, which admit a due appointment of the guardian, and full authority to sell and convey the real estate of the ward. *Cutler* v. *Dickinson*, 8 Pick. 387. The obligors on a bond are estopped to deny the facts therein stated. *Cordis* v. *Sager*, 14 Maine, 475. In *White* v. *Weatherbee*, 126 Mass. 451, it was held after a decree of distribution of an intestate estate in the probate court, ordering A, the administrator, to pay a certain sum to B, as administrator of C, that the surety of A's bond, in an action against him for the benefit of B, for such neglect could not show that B was not duly appointed administrator of C. "Such decree," observes MORTON, J., "is conclusive upon the sureties, and they cannot impeach it collaterally."

A sale was made under the license given. In the petition for license to sell, it is said that the offer was made by John Wyman. The deed was given to Rubie M. Wyman, the wife of John Wyman. The guardian returned the sale as made, and charged herself with the price. The grantee, for aught that appeared, has been in undisturbed possession of the premises conveyed, to the present time. So far as regards the ward, it is immaterial to him to whom the land was conveyed, and from whom the price was received.

Mrs. Lyford, in her deed, released her right of dower in the premises, but she charged herself with the full price. It was her voluntary act. The deed recites that the land, (irrespective of

dower) was sold for the price at which she was authorized to sell the same.

The deed erroneously recites the license as having been given on the seventh of July, 1863, the date of the petition, instead of the first Tuesday of August, when in fact, the license was granted. How the error of date occurred is obvious by the records before us.

So the deed recites the oath required by law to have been duly taken, but the fact no otherwise appears. The probate records do not show an oath to have been taken.

The ward for whose benefit the estate was sold, sanctions and affirms what has been done by this suit to recover what has been unaccounted for of the proceeds of the guardian's sale. The grantee, who purchased and paid for the land, interposes no objection to the validity of the proceedings, by and under which she enjoys the premises conveyed. The license was granted by a court of competent jurisdiction, and the deed was duly executed and recorded. It is wise policy to sustain judicial sales, and they should not be declared void for slight and trivial defects. Informalities in the recital of a deed given in good faith, mistakes of the guardian in stating the date of the issuing of authority, authority having been duly given, or the insertion of irrelevant matter should not be regarded as sufficient to avoid such deed. It is a general rule that when the ward arriving at age, with a knowledge of the facts, and in the absence of fraud, receives and retains the purchase arising from his guardian's sale of his land, he cannot afterwards question its validity. Schouler on Domestic Relations, 510. Here the ward brings her suit in affirmation of this sale, and it is neither for the guardian nor his surety to set up its invalidity.

Judgment for plaintiff.

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

HELEN A. ROBINSON *vs.* JOHN J. PERRY.

Kennebec. Opinion January 20, 1882.

Promissory notes. Set-off.

In an action by the indorsee of a promissory note indorsed and transferred after it is due, the defendant, the promisor, may file an account which he had against the promisee at the time of the transfer of the note in set-off, as a defence thereto.

ON EXCEPTIONS from superior court.

Assumpsit on a promissory note for fifty dollars, dated March 3, 1874, payable to J. G. Durgin or order six months after date.

The case was tried by the presiding justice without the intervention of a jury, subject to exceptions in matters of law.

The justice found that the note was not indorsed and delivered by Durgin to the plaintiff until February or March, 1876, and the amount then due upon it was fifty-six dollars and fifty-four cents, and that at the same time Durgin was indebted to the defendant on an account, which had been seasonably filed in set-off in this case, in the sum of fifty-seven dollars and forty-five cents; and the justice ruled as a matter of law that the defendant was entitled to the benefit of the balance due him on the account in set-off in defense of this action although there was never any agreement between Durgin and the defendant that such balance should be appropriated to the payment of the note; and to this ruling the plaintiff excepted.

S. S. Brown, for the plaintiff.

The question here is, what kind of equities are open to the maker of a note where it was transferred to an indorsee, after maturity, who brings the suit? It seems to be confined only to such equities as existed and attached to the paper itself, and not to equities arising out of collateral transactions. *Robinson* v. *Lyman*, 10 Conn. 30; *Steadman* v. *Jillson*, 10 Conn. 55; *Fairchild* v. *Brown*, 11 Conn. 39; Story, Prom. Notes, § 178;

Oulds v. *Harrison*, 28 Law and Eq. 524; 1 Daniels, Neg. Instr. § 725; *Burroughs* v. *Moss*, 10 B. and C. 558.

A careful examination of the opinion in *Sargent* v. *Southgate*, 5 Pick. 312, will disclose elements of fact entirely wanting in this, as on p. 316, where the court expressed the opinion that "there can be but little doubt that it [set-off] was in fact paid by the defendant and received by Watson towards payment of the debt." That is, the court there must have found as a fact that the set-off was regarded and treated by the original parties thereto as a payment, and if it was, then it was equity connected with the note, and comes within the rule I am contending for.

John J. Perry, the defendant, *pro se*.

LIBBEY, J. The question in this case is whether the defendant's account against the payee of the note in suit, filed in set-off, is admissible as a defence to the action on the note by the plaintiff, an indorser who took it after it was dishonored.

The rule established in England will not allow it. The rule there is that the plaintiff in such cases is liable only to the equities arising out of the note itself, or the consideration for it; or to the allowance of such demands due the maker of the note from the payee as might be found by either express or implied understanding of the parties to have been agreed to be applied in discharge of it. *Burroughs* v. *Mass.* 10 Barn. and Cressw. 558.

The same rule has been held in several of the states where the terms of the statutes regulating set-off, were held not to be broad enough to permit the set-off. In New Hampshire, *Chandler* v. *Drew*, 6 N. H. 469. In Connecticut, *Stedman* v. *Gillson*, 10 Conn. 55; *Robinson* v. *Lyman*, 10 Conn. 30. In New York, *Johnson* v. *Bridge*, 6 Cowen, 693; *Raymond* v. *Wheeler*, 9 Cowen, 295; *Bridge* v. *Johnson*, 5 Wend. 346; *Haxton* v. *Bishop*, 3 Wend. 13; *Driggs* v. *Rockwell*, 11 Wend. 504. In Illinois, *Gregg* v. *James*, 1 Breese, 107. In New York the rule established in the cases cited has been changed by a statutory provision allowing the set-off.

The question received a very full and careful consideration by the court in Massachusetts, in *Sargent* v. *Southgate*, 5 Pick.

312; and it was there held, that where the note in suit was indorsed and transferred to the plaintiff by the payee after it was dishonored, any demand which the maker held against the payee before the transfer, which he had a right to set-off as against the payee, might be set-off in a suit by the plaintiff.

The doctrine of *Sargent* v. *Southgate* has been repeatedly recognized by this court as sound law. *Shirley* v. *Todd*, 9 Maine, 83; *Barney* v. *Norton*, 11 Maine, 350; *Burnham* v. *Tucker*, 18 Maine, 179; *Wood* v. *Warren*, 19 Maine, 23.

It may now be regarded as the settled law of this state.

Our statute regulating set-offs, (R. S., c. 82, § 60,) recognizes the right of set-off as a defence in cases like this, of claims not between the parties to the suit, and provides that, in such case, no judgment shall be recovered against the plaintiff for any balance due the defendant.

Exceptions overruled.

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

JOSEPHINE E. T. ROBINSON, in equity,

vs.

SILAS W. ROBINSON and HATTIE R. VERRILL.

Cumberland. Opinion February 16, 1882.

Equity pleadings. Bill. Demurrer.

A bill in equity is multifarious when it contains a claim for a deed of one defendant to replace a lost deed from him on the ground of a promise to give such a deed; and a charge against another defendant that she holds the premises under a deed fraudulent as to the complainant, or in effect a mortgage, and asking that if it be fraudulent it be decreed void and such defendant be required to release, or if given as security for advances it be decreed a mortgage, the amount due determined by the court, and such defendant be ordered to execute a release to the complainant upon payment of the amount thus determined.

A bill in equity cannot be maintained against one upon a promise to give a deed to replace a lost deed when no consideration is alleged for the promise, nor any facts alleged that would furnish ground for claiming a duty to fulfill such promise.

Where a bill charges in the alternative, that the defendant holds the title by a deed which is fraudulent, or a mortgage, and a decree is asked in the alternative, it is objectionable as a matter of pleading.

A bill cannot be maintained against a defendant who holds under a fraudulent deed when there is no allegation that the complainant is in possession. It is not the province of equity to try titles to real estate, and put one party out of possession and another in.

On demurrer to a bill in equity.

The bill alleges that the complainant was married to the defendant Robinson, at Fitchburg, Massachusetts, September 25, 1877; that prior to the marriage and on the same day the defendant Robinson, for a valuable consideration made, sealed, executed, acknowledged and delivered to her a warranty deed of certain premises in Portland; that she accepted the deed and has never parted with her right, title or interest, in any portion of the premises; that at the request of defendant Robinson, she retained the deed in her possession without causing it to be recorded; that the deed has been taken from her possession by some person unknown whom she believes to be the defendant Robinson, that she has been unable to find it and has repeatedly demanded of the defendant Robinson, another deed of like tenor to replace the lost deed and he promised and agreed so to do, but has neglected and now refuses so to do.

The bill also alleges that a pretended deed of said premises from defendant Robinson to defendant Verrill, purporting to have been made, &c. December 1st, 1875, was recorded April 12th, 1879.

"And your oratrix further complaining sheweth unto your honors that she is informed and believes that said pretended deed to said Hattie R. Verrill, although a warranty deed in form was made, executed and delivered, and intended by both parties thereto as security for payment of certain sums of money, before the execution thereof advanced by said Hattie R. Verrill to said Silas W. Robinson, the amounts and dates of which advances if any such were made as aforesaid, are to your oratrix unknown, or that said pretended warranty deed last mentioned was not in fact made, executed or delivered until long after the execution and delivery of first above mentioned deed, and was in fact fraudu-

lently made, sealed, executed and delivered by said Silas W. Robinson, if ever so delivered, for the purpose of enabling it to be placed upon record before said first mentioned deed, or any that might be given to supply its loss could be placed upon record, to thus enable said Hattie R. Verrill to acquire, for the benefit of said Silas W. Robinson, and herself an apparent legal title to the real estate described in said deed, in fraud of the rights of your oratrix."

"And your oratrix further sheweth unto your honors that if said pretended deed to said Hattie R. Verrill was so made as aforesaid without consideration and in fraud of the rights of your oratrix, the same is null and void and should be so decreed by this honorable court to remove an apparent cloud upon the title of your oratrix, and that if the same was made, executed and delivered, and received by the pretended grantee as security for advances, the same should, in equity and good conscience, be decreed by this honorable court to be a mortgage, so that your oratrix might pay to said Hattie R. Verrill whatever might be legally and equitably due her as such mortgagee, which your oratrix is ready and willing to do."

And praying that the defendant Robinson, be ordered to give the complainant the deed promised "and that the pretended warranty deed from said Silas W. Robinson to said Hattie R. Verrill herein before named, if made, sealed, executed and delivered and accepted fraudulently and without consideration as aforesaid, may be decreed to be null and void, and that said Hattie R. Verrill may be ordered and directed by this honorable court sitting in equity to make, seal, execute, and deliver to your oratrix a good and sufficient quitclaim deed of said real estate, or if said pretended warranty deed from said Silas W. Robinson to said Hattie R. Verrill shall be found by this honorable court to have been given and intended as security for advances as hereinbefore alleged that the same may be decreed to be a mortgage, and that the amount due thereon may be fixed and determined by the court, that she the said Hattie R. Verrill may, upon the tender from and by your oratrix of the amount so found to be due upon and on account of such advances, which amount when so deter-

mined your oratrix is ready and willing to pay, be ordered and decreed to release to your oratrix by good and sufficient deed of quitclaim all her, the said Hattie R. Verrill's right, title and interest in and to said real estate."

Charles P. Mattocks, for the complainant.

In *K. and P. R. R. Co.* v. *P. and K. R. R. Co.* 54 Maine, 173, this court say: "To support this objection (multifariousness) two things must concur; 'First, the different grounds of suit must be wholly distinct; secondly, each ground must be sufficient as stated to sustain a bill; if the grounds be not entirely distinct and unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing all tending to one end, if one connected story can be told of the whole, the objection does not apply.'"

If the bill can be sustained against any of the defendants, those only can demur who are improperly joined. Story, Eq. Pl. § 544.

The bill relates entirely to connected matters, in every one of which Charles W. Robinson is interested and took part; hence it is not multifarious. *Weston* v. *Blake*, 61 Maine, 455, and cases there cited; Story, Eq. Pl. § 541, *a*; *Dimmock* v. *Bixby*, 37 Mass. 368; 20 Pick. 368.

It is impracticable to lay down any general rule as to what constitutes multifariousness as an abstract proposition, but such case must depend upon its own circumstances, and much must necessarily be left to the sound discretion of the court. *Warren* v. *Warren*, 56 Maine, 360; *Bugbee* v. *Sargent*, 23 Maine, 269; Story Eq. P. § 284, *a*, and cases there cited; *Varick* v. *Smith*, 5 Paige, 137; *Foss* v. *Haynes*, 31 Maine, 81; *Newland* v. *Rogers*, 3 Barb. C. R. 432. *Gaines* v. *Chew*, 2 How. 642; *Campbell* v. *Mackay*, 7 Simon, 564, and in 1 Mylne and Craig, 603.

The object of the rule against multifariousness is to protect a defendant from unnecessary expense; but it would be a great perversion of that rule if it were to impose upon the plaintiffs and all the other defendants two suits instead of one.

There seems to be, upon the authorities, no inflexible rule established as to what constitutes multifariousness.

The general principle is that the court will not, on the one hand, encourage an unnecessary multiplicity of actions, and, on the other hand, will not allow the plaintiff to join in his bill a multiplicity of different and distinct matters so as to embarrass the defendant in his defence, or to produce a confusion, or to render the case complicated and difficult to be understood. *Robinson* v. *Guild*, 53 Mass. 323; Cooper, Eq. Pl. 182; 1 Daniel, Ch. Pr. 394.

"It is the great object of courts of equity to put an end to litigation, and to settle, if possible, in a single suit, the rights of all parties interested or affected by the subject matter in controversy." *Rowell* v. *Jewett*, 69 Maine, p. 302; 2 Story's Eq. Jur. 745, § 1526; *Attorney General* v. *The Corporation of Poole*, 4 Myle and Craig, 17, 31; Daniell's Ch. Pl. and Pr. 337; *Oliver* v. *Piatt*, 3 Howard, 333; Adams, Doctrine of Eq. 602, and cases cited; *Many* v. *Beekman Iron Co.* 9 Paige, 188.

At law, a disputed issue is alone contested, the immediate disputants alone are bound by the decision; and they alone are the proper parties to the action. In equity, a decree is asked and not a decision only, and it is, therefore, requisite that all persons should be before the court whose interests may be affected by the purposed decree or whose concurrence is necessary to a complete arrangement. Adams' Doc. of Eq. p. 607; *Bailey* v. *Myrick*, 36 Maine, 50; Story's Eq. Pl. § 72; *K. and P. R. R. Co.* v. *P. and K. R. R. Co.* 54 Maine, 184.

It is a settled principle in equity that all persons to be affected by the result of a suit must be made parties. *Pierce* v. *Faunce*, 47 Maine, 507.

S. C. Strout, *H. W. Gage and F. S. Strout*, for the defendant Verrill, cited: *Telegraph Co.* v. *Chillicother*, 7 Federal Reporter, 353; *Sawyer* v. *Noble*, 55 Maine, 228; Story's Eq. § 271; *K. and P. Railroad* v. *P. and K. R. R.* 54 Maine, 183; *Swampscot Machine Co.* v. *Perry*, 119 Mass. 123; *Boardman* v. Jackson, 119 Mass. 161; *White* v. *Thayer*, 121 Mass.

227; *Lewis* v. *Cocks*, 23 Wal. 469; *Pratt* v. *Pond*, 5 Allen, 59; *Woodman* v. *Saltonstall*, 7 Cush. 181; R. S., c. 90, § 13; 2 Jones on Mortgages, § 1095; *Hilton* v. *Lothrop*, 46 Maine, 297; *Bailey* v. *Myrick*, 36 Maine, 50.

DANFORTH, J. There are two distinct and separate causes of relief set out in this bill; one against each of the defendants and in which the other defendant has no interest whatever. The first sets out a conveyance from the defendant Robinson to the complainant, a loss of the deed before it was recorded and a promise on the part of Robinson to give a duplicate. On this part of the bill the decree is asked for against Robinson alone as it necessarily must be. The relief sought must be founded alone upon the alleged promise of Robinson, a contract in which the other defendant can have no interest whatever. Nor do the allegations show any liability resting upon her in regard to it, but negative any such liability. Such a duplicate deed if given would not affect her title or interest in the premises in the least degree. She is not therefore interested in the contract set out, or in the subject matter to which it refers.

The other cause of relief is a charge against the defendant Verrill in substance that she holds the premises under a deed fraudulent as to this complainant, or in effect a mortgage. The relief asked is that if the deed be fraudulent it be decreed void and Mrs. Verrill be required to release, or if given as security for advances it may be decreed a mortgage, the amount due determined by the court, and upon payment Mrs. Verrill be ordered to execute a release to the complainant.

Here the charge is against Mrs. Verrill and the relief is sought from her alone. It is true that if the deed is fraudulent the defendant Robinson may be a participator in the fraud. But if so, he can now do nothing, nor is he asked to do anything to repair the mischief. The title is what the complainant wants and that has passed from him and so far as this allegation shows is in Mrs. Verrill alone. If the deed is decreed a mortgage the result is the same. Robinson has no interest so far as this case shows in the amount which may be found due, nor is a release, or any action on his part required in relation to it. In any event

under the allegations in the bill the whole title and interest have passed from him and therefore he should not be made a party. *Bailey* v. *Myrick*, 36 Maine, 50; *Hilton* v. *Lothrop*, 46 Maine, 297. Thus the bill is multifarious within the principles laid down by all the authorities as shown by the cases cited in the argument upon both sides.

There are other reasons why this bill cannot be maintained. So far as it claims anything of the defendant Robinson it is upon the ground of his promise. But no consideration for any such promise is alleged, and the facts as they are set out seem to negative such consideration. From the bill we learn that he had conveyed to the complainant. Another and duplicate deed would add no strength to the title, nor was he under any legal obligation by reason of the loss to furnish another. If he were to do so it would not restore the lost deed or give to it any vitality which it does not now possess. If the object is to get it recorded, even that would not relate back, and besides, R. S. c. 73, § 25, affords abundant provision for that purpose. If he took the former deed as intimated, he would be under obligation to restore that, but he is not asked to do so, and in any event the contest as to the title is and must be between the complainant and the other defendant.

As to the other defendant there is no allegation that the complainant is in possession of the premises. If, therefore, the allegation of fraud is relied upon, the law affords a complete and adequate remedy. It is not the purpose of equity to try titles to real estate and put one party out of possession and another in. This must be done under the forms and principles of law which are sufficient for that purpose. *Lewis* v. *Cocks*, 23 Wallace, 466; *Boardman* v. *Jackson*, 119 Mass. 161; *White* v. *Thayer*, 121 Mass. 226.

The claim for a redemption as from a mortgage is undoubtedly a matter within the jurisdiction of equity. But in this case the allegations are not sufficient to maintain the bill on that ground even as against the defendant Verrill. There are in fact no allegations that her deed was taken as security. The bill says the complainant has been informed and believes that the deed

was taken as security or is fraudulent. But which? Here is statement of a charge founded only on information and belief, inconsistent with the rules of pleading, and stated in the alternative, leaving the defendant in entire uncertainty whether one, or both, and if one which is relied upon. The complainant may undoubtedly aver facts of a different nature, which will equally support his application where the title to relief will be the same in either case; or he may pray for an alternative relief depending upon the conclusion to which the court may come upon a given state of facts. But here an alternative decree is asked upon an alternative and inconsistent state of facts, not directly stated but alleged upon belief only. This, it is believed, is without authority. It is not allowable even upon a direct assertion, when that assertion is, as here, in the disjunctive form, even though one of the alternatives may be a ground of relief. Story Eq. Pl. § 42, b, and note.

Demurrer sustained.

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

INHABITANTS OF BRUNSWICK *vs.* SAMUEL SNOW, and others.

Cumberland. Opinion February 18, 1882.

Taxes. Bond of collector. Sureties. Damages for breach.

One of the duties of a collector of taxes is to pay the treasurer all the money received upon the taxes committed, though received under a defective warrant. A neglect to do so is a breach of his bond, conditioned to secure a faithful performance of his duties as collector of taxes; and the sureties in the bond, having entered into the same covenant as the principal, are equally liable for a breach of it.

In a suit against the sureties in a collector's bond for money actually received as taxes by the collector under a defective warrant, and not paid over, the measure of damages is the amount actually collected as taxes and interest, and interest on the same from date of demand, deducting all payments made by the collector to the treasurer (not including orders and receipts for discounts or abatements) and any amount collected on a warrant of distress,

and paid over, also deducting such compensation as the collector is entitled to receive for his services for the collections actually made and paid over by him.

ON REPORT.

The opinion states the case.

Weston Thompson, for the plaintiffs, cited: *Wendell* v. *Fleming*, 8 Gray, 613; R. S., c. 6, § § 97, 100; c. 82, § 9; Stat. 1874, c. 223; *Colton* v. *Stanwood*, 68 Maine, 482; *Morrell* v. *Sylvester*, 1 Maine, 248; *Gould* v. *Monroe*, 61 Maine, 544; *Gorham* v. *Hall*, 57 Maine, 58; *Great Barrington* v. *Austin*, 8 Gray, 444; *Police Jury* v. *How*, 2 La. 41, (20 Am. Dec. 294); *Ford* v. *Clough*, 8 Maine, 334; *Kellar* v. *Savage*, 20 Maine, 199; *Bethel* v. *Mason*, 55 Maine, 501; *Johnston* v. *Wilson*, 2 N. H. 202; (9 Am. Dec. 50); *Trescott* v. *Moan*, 50 Maine, 347; *Orono* v. *Wedgwood*, 44 Maine, 49; *Boothbay* v. *Giles*, 68 Maine, 160; *Kellar* v. *Savage*, 17 Maine, 444; *Johnson* v. *Goodridge*, 15 Maine, 29; *Hancock* v. *Hazzard*, 12 Cush. 112; *Union* v. *Smith*, 39 Iowa, 9; (18 Am. Rep. 39); *Caldwell* v. *Hawkins*, 40 Maine, 526; *Nowell* v. *Tripp*, 61 Maine, 426; *Judkins* v. *Reed*, 48 Maine, 386; 61 Maine, 400; *Carville* v. *Additon*, 62 Maine, 459; *Sprague* v. *Bailey*, 19 Pick. 436; *Sandwich* v. *Fish*, 2 Gray, 298; *Farmington* v. *Stanley*, 60 Maine, 472; *Scarborough* v. *Parker*, 53 Maine, 252.

S. C. Strout, *H. W. Gage and F. S. Strout*, for the defendant sureties.

The warrant to the collector is invalid, in that it exempts from distress, "animals" "and other goods and chattels" exempted from attachment, and imposed no duty upon the collector, and consequently the defendant sureties are not liable for uncollected taxes. R. S., c. 6, § 94; *Orneville* v. *Pearson*, 61 Maine, 552; *Boothbay* v. *Giles*, 64 Maine, 403.

The obligation assumed by the sureties was that Snow, the collector, should perform his legal obligations. It would seem to follow that an illegal commitment of taxes, as all these commitments were, imposed no liability upon the sureties as to any of the taxes. We are aware that there are some decisions of

this court, which seem to imply that in such case the sureties may be liable for moneys actually collected by the collector, but we submit that the sureties, who have no control over the collector, ought not to be liable to the town, which has made an illegal commitment for anything done under such illegal act of the party complaining. Against an innocent party, the town ought not to derive a benefit, when itself guilty of neglect and illegal proceeding in the matter, which is the foundation of the claim.

If the sureties can be held liable for the collected taxes not paid over by Snow, then the court, in determining the principles upon which damages are to be assessed, must allow, in favor of defendants, the amount of uncollected taxes, the amount collected on warrant of distress, and the unpaid commissions due Snow for collection, which will be on whole amount committed to him, as the town can only be entitled to the assessed amount less his commissions.

DANFORTH, J. This is an action upon a bond given to secure the fidelity of the principal as collector of taxes for the town of Brunswick. It is admitted in the bond that he was duly appointed as such. The principal makes no defence. The sureties defend on the ground that the warrant under which the taxes were committed was defective, and therefore illegal; that this was the fault of the town, and that "the town ought not to derive a benefit against an innocent pary, when itself guilty of neglect and illegal proceeding in the matter which is the foundation of the claim." The defect in the warrant is admitted; but that defect is not the foundation of the claim made here. The taxes not collected, are not claimed, but those which have been. The defect excuses the collector from collecting, but does not excuse him from paying over what is paid to him. This still remains a duty devolved upon him by virtue of his office. It was optional for him to proceed in the collection of the taxes, and exhaust what authority was given him for that purpose, or decline to do so. But electing to proceed as he did in this case, he must proceed as collector, and can do so in no other capacity. Whatever money he receives upon the taxes, he receives as collector. The condition of the bond is "that if the principal shall well and faithfully perform

the duties of his said office, then this obligation to be void, otherwise to remain in full force." If then there has been a failure to pay over the money collected, there has in that respect been a failure to perform the duties of his office, and a breach of his bond. If there has been a breach on his part, the sureties must be equally liable with the principal. That is the covenant which they made, the contract to which they became parties. In *Boothbay* v. *Giles*, 68 Maine, 162, it is said that "a bond conditioned for the faithful performance of the duties of collector, will hold him and his sureties to pay over money which he has collected after the delivery of the bond." This principle is fully sustained by the cases cited, as well as by later ones. If there is such a failure to pay over as is claimed in this case, and which the evidence tends to show, the action can be maintained against the sureties as well as against the principal, and by the provision of the report it only remains to settle the principles upon which damages are to be assessed.

The defendants are to be charged for all moneys received upon the taxes, including the school district tax, committed to the collector for the year 1875. This will include the interest received upon taxes tardily paid, as well as interest chargeable to the collector for non payment of money received after it became payable by reason of a demand, or from the date of the writ.

They are to have credit for all payments made by the collector to the treasurer. This does not include orders or receipts given for discounts made by vote of the town, or for abatements.

The amount collected on the warrant of distress, and credited on the school district tax, must also be allowed. Whether the treasurer was guilty of trespass in issuing such warrant, is a matter not to be decided in this action. That issue is pending between other parties. If the treasurer committed a wrong, he alone must bear the consequences whatever they may be. But at present we see no occasion for supposing a double payment of the damages to be one of the consequences. If the amount so paid should prove to be a greater amount than was due from the collector upon that assessment, there would seem to be no good reason why the excess should not be refunded. So far as it is a

payment of a valid claim against the collector, if the treasurer fails in his defence of the action against him, it may be proved in mitigation of damages. *Pierce* v. *Benjamin*, 14 Pick. 361; *Lovett* v. *Pike*, 41 Maine, 340.

The compensation for collecting in the first instance, was fixed by express contract. That contract has been fulfilled by neither party. It was a necessary part of it that the collector should have the legal warrant, as well as a valid assessment. The warrant was defective, and for this reason the assessors failed on their part. Whether this resulted in injury to the collector, does not appear, for there is no evidence to show whether the failure to collect, so far as there was a failure, resulted from his own neglect, or from his inability to collect, on account of the defect. On the other hand there was not only the failure of the collector to collect all the tax, or exhaust all the authority he did have for that purpose, but especially in not paying over the money he did collect as it was his duty to do. Whatever then he is entitled to receive, if anything, is the actual value of his services to the town, by virtue of an implied contract. He should not suffer on account of the delinquency of the assessors, but must bear the responsibility of his own. But whether this compensation whatever it may be, if anything, can be deducted from the liability of the collector in a case like this, is a more serious question. It is evident that it is a distinct demand against the town. His pay is to come from the town, and through the municipal officers. The treasurer has nothing to do with fixing the amount or paying it, except as he does so upon the orders of the proper officers. The collector has no right to retain it. By his warrant as well as by the provisions of the statute, he is required to pay over to the treasurer all the money he collects. R. S., c. 6, § § 94, 95, 99, 130; laws of 1874, c. 162, § 2. It has not been filed in set-off in this case, nor could it have been, for, if for no other reason, it is not a demand due from the plaintiffs to all of the defendants. But this action is for damages for a breach of the bond. These services grew out of, are connected with, and incident to this claim. The damages to the town are lessened just so much as the services, under all the circumstances, were worth to the town.

They may be said to be diminished to that extent. If so, it would certainly seem that the sureties ought to have the benefit of such mitigation, rather than that they should be deprived of it and give it to the principal in a claim against the town. What the value of the services rendered, is, if anything, can be ascertained upon a further hearing, and such amount allowed, if in excess of what has been paid. It certainly cannot include commissions upon money forced from him by warrant of distress, or discounts or abatements, but must be confined to the money actually received and paid over.

Action to stand for assessment of damages.

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

SARAH J. H. MAYO *vs.* GEORGE H. HAMLIN.

Penobscot. Opinion February 20, 1882.

Dower. Levy. Redemption.

The time for redeeming the levy of an execution on real estate may be extended by the creditor by parol.

When so extended, a payment by the debtor and acceptance by the creditor of the amount due under the levy, operates as a waiver of the forfeiture and an extinguishment of the title under the levy.

Where a levy was made on the homestead of the debtor prior to his marriage with the demandant and the debtor subsequently conveyed by deed of warranty the premises to a third person, who in accordance with his agreement with the grantor, paid to the levying creditor the amount due under the levy, but took a release to himself from the levying creditor of his interest in the premises. In an action of dower by the debtor's widow; *Held*, the levy was extinguished and the demandant's husband thereby became seized during the coverture of the demandant, and that she is entitled to dower in the land levied on.

ON REPORT.

The opinion states the case.

E. C. Brett, for the plaintiff, cited: *McLeery* v. *McLeery*, 65 Maine, 177; *Knight* v. *Mains*, 12 Maine, 41; *Randall* v. *Farn-*

ham, 36 Maine, 86; *Cutts* v. *York M'f'g Co.* 18 Maine, 190; *Batchelder* v. *Robinson*, 6 N. H. 12; *Converse* v. *Cook*, 8 Vt. 164; 2 Hilliard Mortgages, 282, 283, 318 *et seq.*; *Chase* v. *McLellan*, 49 Maine, 375; *Hatch* v. *Palmer*, 58 Maine, 271; *Freeman* v. *Paul*, 3 Maine, 260; *Bolton* v. *Ballard*, 13 Mass. 227; *Carll* v. *Butman*, 7 Maine, 102; *Hatch* v. *Kimball*, 16 Maine, 146; *Pillsbury* v. *Smyth*, 25 Maine, 427; *Forster* v. *Mellen*, 10 Mass. 421; *Freeman* v. *McGaw*, 15 Pick. 83; *Grover* v. *Flye*, 5 Allen, 543; *Jewett* v. *Whitney*, 43 Maine, 242.

Charles P. Stetson, for the defendant.

The plaintiff is not entitled to dower because her husband was not seized of the premises during the marriage. The attachment and levy were before the marriage, the time of redemption expired and the title became absolute in the bank; the bank conveyed the premises—an absolute title to Blake; it was not a release of the levy, but a sale and conveyance of the premises. *Brown* v. *Williams*, 31 Maine, 403; *Mann* v. *Edson*, 39 Maine, 25; *Hamlin* v. *Hamlin*, 19 Maine, 141.

The defendant does not claim under Gideon Mayo and is not estopped to deny his seizin of the premises by Mayo's warranty deed to Blake. *Foster* v. *Dwinel*, 49 Maine, 44; *Hamlin* v. *Hamlin*, 19 Maine, 146.

The title of the Orono bank by the levy becoming absolute, Blake's title came from the bank, not from Mayo. Mayo's warranty deed conveyed nothing of the premises to him.

The advertisment, and conversations of Hamlin with Wilson are inadmissible as evidence and cannot affect the title. The advertisment was no act of Hamlin, the conversations were before the sale to him, were *res inter alios*. *Hamlin* v. *Hamlin*, 19 Maine, 145.

Mayo did not intend that there should be a release of the Orono Bank's title by levy, he procured the conveyance to be made to Blake. His acts throughout show that he did not intend to have the legal title—the legal seizen in himself; there was no merger of the titles in him or in Blake. *Simonton* v. *Gray*, 34 Maine, 50.

VIRGIN, J. The widow of the late Gideon Mayo demands her dower in certain real estate comprising what formerly were three parcels of land, viz: (1,) Her husband's original homestead, of about twenty-four acres with buildings; (2,) the "Palmer lot," of seven acres; and (3,) "White acre." The defendant admits the demandant's right of dower in the second and third parcels, but denies it in the first.

The demandant's marriage, on October 14, 1861, the death of her husband, on December 25, 1876, and a seasonable demand are admitted. The case comes up on report, the court "to draw such inferences from the evidence which is admissible as a jury might, and determine the legal rights of the parties."

The principal contention is, whether the husband had such a seizin in the original homestead, at any time after the marriage, as would entitle the demandant to dower therein. To sustain the allegation of the husband's seizin, the demandant put in evidence a quit-claim deed of the homestead, from one Van Damme to her husband, dated January 22, 1849, with testimony that she and her husband occupied the premises from the time of the marriage until his decease, thus establishing a *prima facie* case. *Knight* v. *Mains*, 12 Maine, 41; *Mann* v. *Edson*, 39 Maine, 25.

While the defendant does not deny Mayo's seizin before the marriage, he does contend that he was not seized at any time during the coverture of the demandant; and as tending to establish it, the defendant put into the case the legal evidence of an attachment of the homestead, made on December 16, 1857, on a writ in favor of *Orono Bank* v. *Gideon Mayo*, judgment thereon August 27, 1861, and a levy of the execution September 25, 1861, twenty days prior to the marriage. Assuming, therefore, that the levy was legal and that it has never been redeemed, there would seem to have been no seizin in Mayo since the marriage, the statute conveyance having been made prior thereto. *Brown* v. *Williams*, 31 Maine, 403.

Was the homestead ever redeemed from the levy and the claim under it extinguished? We have no doubt it was, and that it was so understood by all the parties connected with the negotiations.

We find the facts touching this matter to be as follows: The levy was made on September 25, 1861, and, in the absence of any intervention by the parties, the time of redemption would have expired September 25, 1862, and the bank's title become absolute. R. S., c. 76, § 22. But before the expiration of the year for redemption, the time for redemption was extended indefinitely by the officers of the bank, "Mayo having the liberty to redeem at his convenience." This agreement was ratified by the directors, at a meeting thereof. Accordingly, after the expiration of the year, viz: on December 31, 1862, at Mayo's instigation, the amount due to the bank under the levy from Mayo was computed, and the president of the bank, who had all along agreed to extend the time of redemption, was expressly authorized by the directors, to release the interest which the bank then had to the land levied upon on payment of $1482.51, found due. That Mayo agreed to convey by deed of warranty and did so convey the premises covered by the levy, together with several other parcels of land, to Blake; and as a part, at least, of the consideration of that deed, Blake agreed to and did pay to the bank the $1482.51, and took a release from the bank to himself, all done on the same day, December 31, 1862. In all the succeeding conveyances and negotiations among the parties the levy is nowhere mentioned and Blake speaks of his having redeemed the levy.

Applying well settled law to the foregoing facts, we conclude that the demandant is entitled to dower in the homestead of her husband. The bank directors could extend by parol the time of redeeming the levy. *Chase* v. *McLellan*, 49 Maine, 375. And having received the sum due under the levy, though after the expiration of the year, vacated the levy if paid by Mayo or his agent. *Randall* v. *Farnham*, 36 Maine, 86, 88. But whether Blake was or not the agent of Mayo in paying the money to the bank, he paid it in accordance with his agreement and as a part of the consideration of the deed of warranty, and such payment operated as a discharge of the levy notwithstanding he took a release to himself. *Bolton* v. *Ballard*, 13 Mass. 227; *Hatch* v. *Palmer*, 58 Maine, 271, 273; *Wedge* v. *Moore*, 6 Cush.

8; *Kilborn* v. *Robbins*, 8 Allen, 471; *McCabe* v. *Swap*, 14 Allen, 191, and cases there cited. And when the levy was discharged Mayo was seized so as to vest a right of dower in this demandant; for when the levy was discharged, the estate was as if it had never been incumbered by it. This result was understood by Blake, who through his auctioneers advertised and sold the premises "subject to the widow's right of dower;" and the defendant purchased them at a price less the estimated right of dower. Thus the decision works out justice to all parties, and there must be,

Judgment for dower.

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

W. F. WILLIAMS *vs.* JOSEPH E. ROBINSON.

Kennebec. Opinion February 20, 1882.

Statute of frauds. Contracts. Evidence. New trial. Practice.

To take a contract for the sale of more than thirty dollars' worth of goods, out of the statute of frauds, (R. S., c. 111, § 4,) "the note or memorandum thereof" need not contain a recital of the consideration, but that may be proved by parol.

The memorandum need be signed by one only of the parties, but it must mention the other.

The memorandum must contain within itself or by some reference to other written evidence the names of vendor and vendee, and all the essential terms and conditions of the contract expressed with such reasonable certainty as may be understood from the memorandum or other written evidence, referred to, if any, without the aid from parol testimony.

When a memorandum containing the names of the vendor and vendee is made, signed and delivered by the vendor to the vendee, and accepted as and for a completed memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties, and parol evidence is not competent to vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them.

Parol evidence identifying the subject matter of a contract does not destroy the sufficiency of the memorandum.

A new trial cannot be granted upon a question not raised at *nisi prius*.

ON EXCEPTIONS from superior court.

Assumpsit for damages for alleged breach of contract.

At the trial the plaintiff offered in evidence the following paper, which was objected to by the defendant as insufficient, under the statute of frauds, because it shows no consideration, and is indefinite as to the amount to be delivered; but it was admitted by the court:

"Augusta, June 8, 1880. I hereby agree to furnish M. F. Williams of New Haven, (post office address West Haven,) eight hundred to one thousand tons of ice, delivered on board vessels at Augusta, Maine, properly packed for a voyage to New Haven, for the sum of two dollars per ton.

Bond Brook Ice Company,
J. E. Robinson, Augusta, Maine."

The presiding judge iustructed the jury as follows: That "it was incumbent upon the plaintiff to satisfy the jury by a preponderance of the evidence, that the contract set out in the writ was entered into substantially as therein set forth by this defendant, and at the time of the alleged breach, it was a valid, binding contract on the part of this defendant. When he thus establishes the defendant's liability under that contract, the burden will be upon the defendant to satisfy you that he has performed, or in some way relieved himself from the obligation thus established."

The court instructed the jury that "the day of the breach of the contract was the time when the ice should have been delivered after demand made by plaintiff and notification from him that he was ready to receive the ice."

The defendant, having introduced testimony tending to prove the facts assumed in the instructions asked for, requested the court to instruct the jury as follows:

1. "That if the jury found it was agreed upon by the parties that the ice was all to be delivered by the last of July, the memorandum introduced by the plaintiff not containing such a stipulation, it was insufficient, and the plaintiff cannot recover."

2. "That if the jury was satisfied from the evidence that the forwarding a draft for the sum of seven or eight hundred dollars by the plaintiff immediately upon his return to New Haven, and before any ice was shipped, was one of the conditions of the

bargain, the memorandum relied upon, was insufficient, and the plaintiff could not recover."

3. "That if the jury find that the ice was to be delivered by successive shipments, at different times, and that a draft for a sum covering any such shipments was to be sent before any such shipment was made,—no such condition or stipulation appearing in the memorandum, it is insufficient, and the plaintiff cannot recover."

In relation to the Bond brook ice referred to in the judge's charge, *William W. Ward*, called by plaintiff, testfied:

Question. Did you observe the quality of the Robinson ice?

Answer. I did. It was ice I should say, cakes about twenty-two to twenty-four inches through, about the same thickness, and about four feet long, and the handsomest ice I ever saw. There was not a particle of snow on it, and they were just as square as bricks, as handsome ice as I ever saw, that was then loading at the vessel. And afterwards I went up to the house and saw it there.

Question. How did that correspond with the ice you have just described?

Answer. It was the same I saw at the dock.

Daniel B. Snow, called by defendant:—I went to Robinson's with the plaintiff. Plaintiff said he would like to see the ice, and Robinson told me to go with him and show him the ice. I went with him, and he saw it. I showed him the ice at the ice house. He said it was good ice.

The court instructed the jury as follows: "I instruct you, that the plaintiff, as well as the defendant, must be bound by the language in this contract. It does not call for first quality of ice. It does not call for Bond brook ice. The defendant might have gone into the market and fulfilled his obligation imposed by this contract, by furnishing any merchantable ice in this market."

The several instructions requested by the defendant, were not given, except as appears in the charge.

To the above instructions and rulings, and refusals to rule and instruct, the defendant alleged exceptions.

The following is so much of the charge of the presiding justice as related to matters stated in the requested instructions:

"'No contract for the sale of any goods, wares, or merchandise, for thirty dollars or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain, or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent.'"

"And obviously the clause in controversy here, is whether there was some note or memorandum of the contract alleged to have been made in this case, made and signed by this defendant, the party to be charged. This, you will perceive, is simply a note or memorandum of the contract which is requisite to take the case out of the statute of frauds, as it is called; that is, in order that a party who has entered into a contract of this kind, who has been a party to it by word of mouth, may have a remedy at law to enforce a contract thus made by word of mouth. The defendant claims in the first place, that this is not a valid and sufficient memorandum within the meaning of this statute, because it does not comprise, he says, all of the essential elements and terms of the contract which was, in fact, entered into by these parties. In order that a note or memorandum should be sufficient and valid within the meaning of this statute, it is requisite, gentlemen, that it should contain all of the essential elements and terms of the contract entered into by the parties. And parol evidence, as has been ruled in this case, may be received, that is, the statements of the parties or their witnesses who were present at the time the contract was made, may be received to show that there was some other element in the contract, some other proposition or condition insisted upon by the parties, by the one side or the other, as essential, which was not, in fact, incorporated into this memorandum, and in such a case the memorandum would not be valid and sufficient within the statute of frauds, and the party could not be charged by it. It is claimed here on the part of the defendant, in the first place, that this is not sufficient, because, it is said, there was some discussion, there was an agreement, in fact, it is claimed, between these parties, not appearing in this memorandum in reference to the mode and time of payment."

"Nothing whatever is said, you will have observed from the reading of this memorandum, in reference to the mode or time of payment. The memorandum reads: . . . Now what is the legal effect of an instrument like that, in reference to the mode and time of payment? Where the parties have failed to make any stipulation in reference to it, the law comes in and says that the party shall be compelled to pay when the goods are delivered. Cash on delivery, in other words, is the concise expression of the rule of law which is presumed to exist where the parties fail to make any written stipulation in regard to it. As the rule has been very well expressed in an approved work, (this, however, is a citation from a prominent authority), I will read to you a few sentences: 'The promise to deliver, involved in an agreement of sale, and the promise to pay the purchase money, are mutually dependant.'"

"'Neither party is bound to perform without contemporaneous performance by the other. Payment of the price is the condition upon which alone the purchaser can require the seller to complete the sale, by delivery of the property. But it is so at the option of the seller. If he proceeds to deliver without insisting upon payment, and without qualifying the act in some way, the condition or mutual dependence is waived or severed. . . . If, however, the delivery and payment are to be simultaneous, and the goods are delivered in the expectation that the price will be immediately paid, the refusal to make payment will be such a failure on the part of the purchaser to perform the contract as to entitle the vendor to put an end to it and reclaim the goods.' This explains the rights of the parties under this contract in reference to the payment."

"Now if you find, as matter of fact, under the evidence in this case, that there was an agreement between these parties in reference to the mode and time of payment, essentially and materially different from this presumption of law which I have explained to you, that that was insisted upon by the defendant as an essential element of the contract and made a condition of the contract, then that not appearing in this memorandum, I instruct you as matter of law that the memorandum would not

be sufficient, and the defendant could not be charged by it. And you will consider what the evidence was in relation to that point; whether the agreement, if any agreement was made by the minds of these two parties mutually meeting upon any proposition, definitely, in reference to the mode and time of payment, was any different in effect from this presumption of law, namely, cash on delivery, to which I have called your attention. And that does not mean delivery at West Haven, but means delivery according to the defendant's own proposition, 'on board vessel at Augusta.' If, therefore, you should find upon this rule of law that this was a sufficient memorandum in that respect, then the defendant claims still further that there was no consideration for this as a contract. None is expressed in it."

"I instruct you as matter of law, that if you find that the parties made this parol contract, that this plaintiff, by word of mouth, agreed to pay two dollars per ton for this ice delivered on board ship at Augusta, that parol agreement to pay the price on his part, would be a sufficient consideration for that contract, although it does not appear in this memorandum of the contract signed by the defendant to be charged by it. And so far as that point is concerned, the defendant would be liable."

Baker and Baker, and *L. C. Cornish*, for the plaintiff, cited: R. S., c. 111, § § 1, 4; *Wain* v. *Warlters*, 5 East. 10; *Saunders* v. *Wakefield*, 4 B. and Ald. 595; *Egerton* v. *Mathews*, 6 East. 307; *Allen* v. *Bennett*, 3 Taunt. 169; *Sievewright* v. *Archibald*, 17 Q. B. 103; *Packard* v. *Richardson*, 17 Mass. 122; *Levy* v. *Merrill*, 4 Maine, 180; *Gilligham* v. *Boardman*, 29 Maine, 79; *Cummings* v. *Dennett*, 26 Maine, 397; Browne Stat. Frauds, § § 389–400; *Hawes* v. *Armstrong*, 1 Bing. N. R. 565; *Raikes* v. *Todd*, 8 Ad. and E. 546; *Stadt* v. *Lill*, 9 East. 543; *Caballen* v. *Slater*, 23 L. J. C. P. 68; *Church* v. *Brown*, 21 N. Y. 315; *Benedict* v. *Sherill*, Hill and D. (N. Y.) 219; *Williams* v. *Ketchum*, 19 Wis. 231.

S. and L. Titcomb, for the defendant.

1. The paper offered in evidence by the plaintiff, and admitted was insufficient under the statute of frauds, and the essential

requisites cannot be supplied by parol evidence. *Wain* v. *Warlters*, 5 East. 16; *Wright* v. *Weeks*, 3 Bosw. 372; *Hagan* v. *Domestic S. M. Co.* 16; N. Y. Sup. Ct. 73; 25 N. Y. 153; *Stocker* v. *Partridge*, 2 Robertson, 202; *Emerson* v. *Slater*, 22 Howard, U. S. 42; *Moore* v. *Campbell*, 10 Excheq. 323; *Goodwin* v. *Griffith*, 1 Hurd and Norw. 57; *Nesham* v. *Shelby*, 2 Moak's (Eng.) R. 315; *Horton* v. *McCarty*, (and note) 53 Maine, 394; *Grace* v. *Denison*, 114 Mass. 17; *Lang* v. *Henry*, 54 N. H. 57; 2 Greenl. Ev. § 268; *Boston and Maine R. R.* v. *Babcock*, 3 Cush. 228; *Smith* v. *Webster*, 17 Moak's (Eng.) 797 (and note); *McElroy* v. *Buck*, 35 Mich. 434.

2. The memorandum purports to bind one party only, and recent decisions do not favor sustaining a contract where one party is bound and the other is not. *Nesham* v. *Shelby*, 2 Moak's (Eng.) R. 315.

In *Vantassel* v. *Hathaway*, 53 Maine, 18, on a memorandum signed by the plaintiff: "This is to certify that I will let T. J. Vantassel have the house he built and formerly occupied, any time by his paying me within one hundred dollars what it cost me." The court say "It is obvious that there is no mutuality. The plaintiff was under no obligation to take the house and pay for the same. . . . . Nor does the case show that there was any consideration whatever for the alleged promise. Being without consideration it could not be enforced."

3. By the R. S. of Maine of 1840, c. 136 § 2, "The consideration of any such promise, contract or agreement, need not be set forth, or expressed, in the writing signed by the party to be charged therewith, but may be proved by any other legal evidence." The R. S. of 1857, c. 111, § 2, contained the same provision. But in the revision of 1871, all the chapters of the R. S., of 1857 were repealed, by the repealing act, approved March 24, 1870, and this provision was not retained or included in the R. S., c. 111 of 1871. In the re-enactment of the R. S., of 1836 by the Gen. Stat. of 1860, c. 105, § 2, in Massachusetts, this provision was inserted. All decisions by the courts in Massachusetts thus far to the effect, that the consideration need not be expressed in the memorandum but may be proved *aliunde*,

as well as those in Maine, rendered when this statute was in force, and prior to the repeal of this section in 1870, can have no binding force or authority in the decision of cases arising since its repeal. In *Wain* v. *Warlters*, 5 East. 10, cited with approval in Benjamin on Sales, § 232, and in Brown on Stat. of Frauds, § 387, the court say: "It seems necessary for effectuating the object of the statute, that the consideration should be set down in writing as well as the promise." And the doctrine of *Wain* v. *Warlters*, has been followed in the English courts to the present time. *Smith* v. *Webster*, (1876) 17 Moak's (Eng.) R. 789.

4. The instructions requested by the defendant were specific, clearly pertinent, were not covered by the charge, were necessary, under the evidence for the guidance of the jury, and should have been given. *Linscott* v. *Trask*, 35 Maine, 150; *Whipple* v. *Wing*, 39 Maine, 424.

5. Although exceptions may not lie to a statement made by the judge to the jury of what facts the evidence in his view, proves, still the instruction given under the evidence admitted, was erroneous. If the parties were bound by the language of the contract, and evidence was admitted without objection, by which the subject matter of the contract, to wit: Bond Brook ice, was distinctly identified by the parties, and by which Bond Brook ice was called for; but not being named in the memorandum, such evidence being admitted, would prove a different contract from that indicated in the memorandum, and the jury under the instruction, given, would be left in doubt, whether they should regard the verbal or written contract.

VIRGIN, J. At common law, mutual executory contracts for the sale and purchase of goods, wares and merchandise, of whatever value, and however provable, were binding and enforceable. The statute of frauds intervened and prescribed the kind of evidence by which alone they might be established, by entailing upon the parties of certain specified classes of contracts the disability of enforcing them so long as their essential terms remained in mere unwritten words. The statute did not declare

such contracts illegal, or void, but simply said they should not be actionable, with certain exceptions, unless evidenced by written evidence.

Thus the section invoked by this defendant provides, in substance, that when an oral executory contract for the sale and purchase of goods, wares and merchandise, valid at common law, involves property of the value of thirty dollars or more, and the purchaser receives and accepts no part of it, nor gives anything by way of earnest or in part payment thereof, it shall not be valid for the purpose of enforcement, unless some note or memorandum thereof be made and signed by the party to be charged thereby, or by his agent. R. S., c. 111, § 4. The "note or memorandum" of the contract, cannot, of course, be the contract itself, but the evidence by which it is to be proved, if the defendant requires it, in the trial of an action at law brought to recover damages for its breach, or of a bill instituted to enforce specific performance. *Lawrence* v. *Chase*, 54 Maine, 196; *Bird* v. *Munroe*, 66 Maine, 337, 343–4; *Middlesex Co.* v. *Osgood*, 4 Gray, 447.

The memorandum need be signed by one only of the parties—the party to be charged. *Barstow* v. *Gray*, 3 Maine, 409; *Getchell* v. *Jewett*, 4 Maine, 350, 366; or by both, *Atwood* v. *Cobb*, 16 Pick, 227; or counterpart memoranda may be made and signed by the respective parties. *Small* v. *Quincy*, 4 Maine, 497. So that if a mutual oral executory contract, valid at common law, be made, and one of the parties obtain from the other the "note or memorandum" thereof contemplated by the statute, but does not give a corresponding one, he may enforce it although the other cannot, the former having secured, while the other has not, the evidence which the statute has made indispensable to its enforcement. *Rogers* v. *Saunders*, 16 Maine, 92, 97; *Laythoarp* v. *Bryant*, 2 Bing. N. C. (29 E. C. L.) 469.

At common law, while every simple contract, whether oral or written, must be founded on a legal consideration, it need not be expressed in the writing itself, for parol evidence is admissible to prove it. *Cummings* v. *Dennett*, 26 Maine, 397; *Bean* v.

Burbank, 16 Maine, 458. Nor did the statute of frauds, even before the amendment expressly declaring it unnecessary, ever require the consideration to be recited in the note or memorandum signed by the party to be charged. *Packard* v. *Richardson*, 17 Mass. 122; *Levy* v. *Merrill*, 4 Maine, 180, 189; *King* v. *Upton*, 4 Maine, 387; *Getchell* v. *Jewett*, 4 Maine, 350, 366; *Gilligan* v. *Boardman*, 29 Maine, 81. In *Bean* v. *Burbank*, *supra*, and *Vantassel* v. *Hathaway*, 53 Maine, 18, no acceptance of the contract or other consideration was attempted to be proved. The distinction between § § 4 and 17 of the St. 29 Car. II, c. 3, corresponding to R. S., c. 111, § § 1, 4, set up in the English courts and followed by some of the courts of some of the States, was never recognized in this state, the question having been settled in Massachusetts in *Packard* v. *Richardson*, *supra*.

But while, as before seen, the memorandum need not necessarily mention the consideration, that being provable by parol testimony, nevertheless, in order that the court may ascertain the rights of the parties from the writing itself without resort to oral testimony (*Riley* v. *Farnsworth*, 116 Mass. 223, 225–6), to satisfy the statute, the memorandum must contain within itself or by some reference to other written evidence, the names of the vendor and vendee and all the essential terms and conditions of the contract, expressed with such reasonable certainty as may be understood from the memorandum and other written evidence referred to, (if any) without any aid from parol testimony. *O'Donnell* v. *Leeman*, 43 Maine, 158; *Jenness* v. *Mt. H. I. Co.* 53 Maine, 20; *Horton* v. *McCarty*, 53 Maine, 394, 396; *Washington I. Co.* v. *Webster*, 62 Maine, 341. And when a memorandum is made and signed and delivered between the parties as and for a complete memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties and parol evidence is incompetent to contradict or vary its terms or construction; and if, in fact, some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them. *Small* v. *Quincy*, 4 Maine, 497; *Coddington* v. *Goddard*, 16 Gray,

436; *Hawkins* v. *Chace*, 19 Pick. 502; *Ryan* v. *Hall*, 13 Met. 523; *Warren* v. *Wheeler*, 8 Met. 97; *Cabot* v. *Winsor*, 1 Allen, 546, 551; *Remick* v. *Sandford*, 118 Mass. 102, 106, 2 Whart. Ev. § 901, and notes.

Such is the general rule governing written contracts; and the statute of frauds leaves it together with its exceptions as it found them. Benj. Sales, § 205.

By the enactment of this statute, the legislature interposed a few safeguards against mistakes and frauds in certain kinds of contracts, by making certain additional things indispensable to the remedy. The security thereby afforded makes the remedy depend upon proof which shall not rest upon the recollection or integrity of witnesses, but upon something reliable to which the parties may resort for a solution of all their doubts and disputes, the signature thereto, serving *inter alia*, to identify the evidence by which the signer is to be bound. And when a memorandum, like the one now before us, has been deliberately made, executed and delivered in conformity with the statute, and its terms are sensible and free of all ambiguity, it cannot be varied as to its substance by parol; otherwise the great purpose of the legislature would be thwarted.

Applying these principles to the case at bar, and the exceptions so far as the question of consideration and the three requested instructions are concerned, must be overruled.

The jury must have found under the charge, that the memorandum was made, signed and unconditionally delivered by the defendant to the plaintiff, as and for a complete memorandum of the contract, so far as the matters contained in the request go, and that the consideration was proved. Its terms are clearly expressed and contain all the elements necessary to give it legal effect as a written contract.

The instruction in relation to the kind of ice to be delivered, related wholly to the question of damages (as will be seen by the latter part of the charge where it occurs), and was favorable to the defendant, wherefore he was not aggrieved. Moreover the question which he now raises was not made at the trial. And if it had been, we do not think the memorandum need state in

totidem verbis that the ice intended by the parties was Bond brook ice; for that is implied by the signature to the memorandum. *Johnson* v. *Raylton*, (L. R.) 7 Q. B. D. 438; S. C. 24 Al. L. J. 470. Moreover parol evidence identifying the subject matter of the contract does not destroy the sufficiency of the memorandum, but when the subject matter is thus ascertained, the memorandum may be construed to apply to it. *Mead* v. *Parker*, 115 Mass. 413; *Slater* v. *Smith*, 117 Mass. 96; *Swett* v. *Shumway*, 102 Mass. 365.

Exceptions overruled.

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

JOHN H. RAMSDELL *vs.* JESSE B. TEWKSBURY.

Piscataquis. Opinion February 20, 1882.

Chattel mortgage, assignment of. Replevin.

The indorsee of a negotiable promissory note secured by a chattel mortgage which was transferred at the same time the note was indorsed but not assigned in writing, cannot maintain replevin in his own name for the mortgaged property against the mortgagor.

Replevin for a wagon. The wagon was sold by the warden of the state prison to defendant, who gave to the warden a mortgage of the wagon to secure notes given as a consideration for the sale. The warden sold and delivered the notes and mortgage to the plaintiff, indorsing the notes, but not indorsing or assigning the mortgage by any writing. The wagon itself was never delivered to the plaintiff, and was never in his possession. The ruling was that the action could not be maintained, because the mortgage had not been assigned in writing to the plaintiff, he having had a delivery of the mortgage but not of the wagon; and a nonsuit was entered upon that ground. For a decision of the point raised by the ruling the case was reported for the full court.

J. B. Peakes, for the plaintiff.

The mere delivery of a real estate mortgage and notes with an assignment in writing conveys no title in the land, it gives only an equitable interest, *Stanley* v. *Kempton*, 59 Maine, 472. But the same rule does not apply to mortgages of personal property because the title to that passes by a mere delivery, real or constructive.

Here warden Rice had the title to the wagon and could complete the sale to plaintiff without a delivery. *Ludwig* v. *Fuller*, 17 Maine, 162; *Webber* v. *Davis*, 44 Maine, 147; *Cartland* v. *Morrison*, 32 Maine, 190; *Parsons* v. *Dickinson*, 11 Pick. 354; *Lanfear* v. *Sumner*, 17 Mass. 113; *Stewart* v. *Hanson*, 35 Maine, 506; *Flanders* v. *Barstow*, 18 Maine, 357.

The New Hampshire court has several times held that the indorsement and delivery of the notes secured by mortgage of personal property and delivery of the mortgage passed the title to the mortgaged property. See also, 2 Burrows, 979; *Green* v. *Hart*, 1 Johnson, 589; Powell on Mortgages, 1115, 1116; *Washburn* v. *Jacobs*, Somerset Co. December term, 1876, (not reported.)

The plaintiff was subrogated to all the rights of the warden. *Smith* v. *Porter*, 35 Maine, 287.

C. A. Everett, for the defendant, cited: *Crain* v. *Paine*, 4 Cush. 487; 2 Hilliard, Mort. 454, 455.

VIRGIN, J. Can the indorsee of a negotiable promissory note secured by a chattel mortgage, transferred at the same time but not assigned in writing, maintain replevin for the mortgaged property in his own name against the mortgagor? Our opinion is that he cannot; but that being owner of the debt and equitable, though not legal assignee of the mortgage, he may, in the absence of any express or implied stipulation to the contrary, bring such an action in the name of the mortgagee who holds, in such case, the legal title in trust for such assignee's benefit.

The remark is quite common in the books that a mortgage of chattels vests the title thereof in the mortgagee. But an executed mortgage, even when recorded as provided by R. S., c. 91, § 1, does not convey the absolute title to the mortgagee.

In the absence of any express or implied stipulation to the contrary, he has the right of immediate possession of the mortgaged property; *Pierce* v. *Stevens*, 30 Maine, 184; and may maintain replevin therefor even before condition broken; *Pickard* v. *Low*, 15 Maine, 48; but his interest is such that before foreclosure it cannot be attached, or seized on execution; *Lincoln* v. *White*, 30 Maine, 291; *Prout* v. *Root*, 116 Mass. 410; and tender of performance of the condition, *ipso facto*, puts an end to his interest, and restores the right of immediate possession to the mortgagor, who may enforce this right by replevin and recover damages for withholding it. R. S., c. 91, § 3; stat. 1880, c. 193, § 3. The property may also be attached on a writ against the mortgagor and possession thereof taken from the mortgagee by the officer, and the mortgagee cannot interfere with it, until he has given the officer forty-eight hours written notice of the true amount due on the mortgage, nor then, nor ever after, if the amount due is tendered him within that time. R. S., c. 81, § 42. To be sure the mortgagee may assign his mortgage and sell the property to a third person, subject to the mortgagor's right of redemption; *Homes* v. *Crane*, 2 Pick. 610; and by so doing he simply sells his interest in, and not the property; but the only mode by which a mortgagee can acquire absolute title is by the statute foreclosure. R. S., c. 91, § § 3, 4 and 5.

While the mortgagee has a right of property defeasible on performance of the condition, his interest vests in him wholly by virtue of his mortgage which represents the property. If he had not taken the mortgage in the case at bar, he would have no title or interest whatever in the wagon. He sold and delivered it to the defendant for an agreed price and accepted the negotiable note in payment therefor. The sale was thereby consummated and the defendant thereby acquired the absolute title. The defendant then having the full title, mortgaged the wagon to secure the payment of the note. This act conveyed to the mortgagee and his assigns a conditional title, a title subject to the condition subsequent, which would ripen into an absolute title after breach of the condition and foreclosure.

The note in nowise had any effect upon the title to the wagon. Its office was limited to that of payment of the consideration

given for the wagon; and the assignment or indorsement of it could not affect the legal title to the wagon it was given to pay for. The title resting in the mortgagee, nothing but an assignment of the mortgage could transfer the legal title of the mortgagee to the assignee.

The statute contemplates an assignment and a record thereof where the mortgage itself is recorded. R. S., c. 91, § § 3, 4. It could not be recorded unless in writing. The assignment is for the benefit of all parties; to inform the mortgagor and his voluntary or involuntary assigns to whom tender shall be made for redemption; and to relieve the mortgagee of all trouble after he has parted with his interest.

The assignment of the debt, as held by all the authorities, gave to the assignee an equitable interest at least in the mortgage, the mortgagee holding it in trust for the holder of the debt. Such equitable interests are protected by the courts of law, and may be enforced in the name of the party holding the legal as distinguished from the equitable title. *Vose* v. *Handy*, 2 Maine, 322; *Robbins* v. *Bacon*, 3 Maine, 346, 349.

We are sustained by the opinion of WILDE, J., who said: "The delivery of a note of hand, or other chose in action, to an assignee, for a valuable consideration, without an assignment in writing, is a valid assignment in equity, which courts of law will take notice of and protect. And the assignment of a mortgage of personal property by delivery stands on the same footing and is entitled to the same protection. By such an assignment, however, the legal estate did not pass to the plaintiff, and this action could not be maintained in his own name, before the assignment in writing; yet he might maintain an action for conversion of the property so equitably assigned in the name of the assignor, which action" the assignor "would have had no right to discharge." *Crain* v. *Paine*, 4 Cush. 483, 487. And also by that of COLT, J., who, speaking of a personal property mortgage, said: "An assignment of the mortgage carries the title to the property, and an assignment of the debt without the mortgage, by operation of law, carries with it, in the absence of any controlling agreement or waiver of the right, an equitable lien

on the property which attaches to it in the possession of the mortgagee." *Prout* v. *Root*, 116 Mass. 410, 413.

The case of *Smith* v. *Porter*, 35 Maine, 287, is not in conflict with the foregoing.

We are aware that there are numerous authorities holding a different doctrine, but we adhere to the doctrine held here and in Massachusetts.

Plaintiff nonsuit.

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

REBECCA N. BRAGG *vs.* WILLIAM B. DOLE and another.

Penobscot. Opinion February 20, 1882.

Lease. Covenant.

The plaintiff, mortgagee in possession of certain premises, having recovered a conditional judgment therefor, March 5, 1877, but not taken out her writ of possession, leased the premises to the defendants "for the term of three years from May 9, 1877, subject only to the legal right of redemption from said mortgage by any one having the right of redemption," the lessees to pay therefor $400 per annum, "so long as said term shall last, or until the premises shall be so redeemed;" and the lessees covenanted to pay the rent monthly in advance, "and at the expiration of said term or so soon as the said lessor shall acquire an absolute title to said premises and be able to convey the same, to buy the same and to pay therefor the sum of $5000, in cash, in which case the rent above stated shall cease at the time of the purchase, and to quit and deliver up the premises . . at the end of the term aforesaid." The possession of the premises was delivered to plaintiff on the writ of possession, June 7, 1877. On June 4, 1880, the plaintiff tendered a deed and demanded performance on the part of the defendants who refused.

Held, plaintiff's tender was not seasonable, that the time stipulated in the lease was at or before the expiration of three years from May 9, 1877.

ON REPORT.

Action for breach of covenant contained in a lease whereby the lessees agreed to purchase.

(Lease.)

"This indenture, made the ninth day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

"Witnesseth, that I, Rebecca N. Bragg, of Boston, in the county of Suffolk, and Commonwealth of Massachusetts, widow, and mortgagee under a mortgage of the premises hereafter described, given by Joseph C. White of Bangor, Maine, do hereby lease, demise and let unto William B. Dole, and James Albert Dole, both of Bangor, Penobscot county, Maine, the premises on the easterly side of Ohio street, in said Bangor, which were formerly occupied by the late Carlton S. Bragg, as a homestead, and more recently by Joseph C. White, as a homestead.

"To hold for the term of three years from said May 9, A. D. 1877, subject only to the legal right of redemption from said mortgage by any one having the right to redeem, the said Doles yielding and paying therefor the rent of four hundred dollars per annum so long as said term shall last, or until the premises shall be so redeemed, and the said lessees do covenant to pay the said rent in monthly payments, in advance, and at the expiration of said term or so soon as the said lessor shall acquire an absolute title to said premises and be able to convey the same, to buy the same and to pay therefor the sum of five thousand dollars, in cash, in which case the rent above stated shall cease at time of purchase, and to quit and deliver up the premises to the lessor or her attorney, peaceably and quietly at the end of the term aforesaid, except in case of purchase as aforesaid, in as good order and condition (reasonable use and wearing thereof, inevitable accident excepted,) as the same are or may be put into, by the lessor and to make all repairs upon the premises which may be necessary to keep them in a good, tenantable condition, and to protect them from decay, and not to make or suffer any waste thereof, and that they will not assign or underlet the premises or any part thereof, without the consent of the lessor in writing, upon the back of this lease. And the lessor may enter at any and all times to view, and make improvements, and suitable repairs. And if the said monthly payments herein named, or either of them, whether the same be demanded or not, are not paid when they become due, or if said leased premises shall be appropriated to any other purpose or use than as a

dwelling house, or if any waste or strip shall be made therein, or if any part of said demised premises are underlet without the consent of the lessor as above named, or if any condition or covenant of this lease to be by said lessees performed, shall be violated or neglected, then and in either of said cases the said lessor, her agent, attorney, heirs or assigns, may in any manner she or they may see fit, re-enter into the leased premises, and if he please terminate and annul this lease, so far as regards all future rights of said lessees, and the same to have again, retain, repossess and enjoy, as in his or their first estate, anything herein to the contrary notwithstanding.

"All glass broken in said premises during this lease, to be replaced by said lessees, said glass now being whole. All taxes upon the premises to be paid by lessor until lessees shall purchase as they above agree, and lessor agrees that so soon as she shall acquire absolute title to the premises and be able to convey them, she will sell and convey the same by a good and sufficient warranty deed to lessees for the sum of five thousand dollars, cash, to keep the premises insured against fire, and in case of loss and subsequent purchase by lessees to account to them for proceeds of insurance received by her.

"And the premises shall not be occupied, during said term, for any purpose usually denominated extra hazardous, as to fire, by insurance companies. In case of the refusal of either party to carry out the agreement to buy and sell the premises, the party so refusing shall pay the other one thousand dollars, which is hereby agreed upon as liquidated damages. In witness whereof, the parties have hereunto interchangeably set their hands and seals, the day and year first above written."

Rebecca N. Bragg,
William B. Dole,
James Albert Dole."

"Signed, sealed and delivered in presence of F. A. Wilson."

At the time of the execution of the lease, plaintiff's mortgagor was in bankruptcy.

Plaintiff had brought a suit to foreclose her mortgage, in which a conditional judgment had been rendered March 5, 1877.

The amount then ascertained as due or to become due under her mortgage being upwards of six thousand dollars. The writ of possession based upon said judgment, did not issue until May 22, 1877, and possession of the premises was delivered to plaintiff on the fourth day of June, 1877, plaintiff's title thus becoming absolute June 4, 1880. No payment had been made to plaintiff on her mortgage debt between the date of the judgment and said June 4, 1880.

On the fourth day of June, 1880, the plaintiff made, executed, and tendered, to the defendant a warranty deed, as an offer of performance on her part of their agreement to sell contained in the lease, and demanded of defendants a performance of their agreement to purchase contained in the lease. Defendants refused to accept the deed, claiming that they were not then bound to do so, the term of three years from the date of the lease having expired.

By the terms of the report, if the defendants were liable in this action for a breach of their covenant and agreement to purchase, a default was to be entered for one thousand dollars and interest from the date of the writ, otherwise a nonsuit was to be entered.

Wilson and Woodward, for the plaintiff.

The plaintiff claims that the defendants were bound to purchase the premises leased as soon as the plaintiff acquired an absolute title thereto, and was able to convey, whether that was before, at, or subsequent to the expiration of the term of the lease.

The agreement so to do was unambiguous, reasonable and complete, and "there can be no reason for refusing to admit the meaning which the words naturally import." *Millett* v. *Marston*, 62 Maine, 477.

Nothing appears in the instrument to show how plaintiff was to acquire absolute title. She was not restricted in this. She could acquire it in any way, and when she acquired it, then was the time when she was bound to sell and the defendants to buy. That was evidently the intent of the parties as indicated by examination of the whole context. 1 Chit. Contr. (11 Am.

ed.) 117; *Chase* v. *Bradley*, 26 Maine, 531; *McLellan* v. *Cumberland Bank*, 24 Maine, 566.

J. Varney, for the defendants.

VIRGIN, J. When were the defendants obliged to accept a deed of the premises leased to them, or pay the liquidated damages stipulated for their refusal?

Their covenant answers: "At the expiration of said term, or so soon as the lessor shall acquire an absolute title to said premises and be able to convey the same,"— thus fixing upon one intended to be specific and certain, and another, different and uncertain, but both really contingent upon the redemption of the mortgage under which alone the lessor held.

When was the "expiration of the term?"

Shephard's ninth rule "to be universally observed for exposition of all kinds of deeds and of all parts thereof," requires, "that the construction be made upon the entire deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none be rejected." Law Com. Assur. c. 3, § 2. This rule variously expressed has been universally recognized.

Applying the rule and seeking for the intention of the parties exclusively within the language adopted by them in their deed, "*ex antecedentibus et consequentibus*," we find the recital that the lessor's title is that of mortgagee. The term of the lease is therein expressly limited to the period of "three years from May 9, 1877, subject only to the legal right of redemption from said mortgage by any one having the right to redeem." This modification evidently rendered the "term" potentially less, but not more than the number of years specified. In harmony with this the next succeeding clause limits the time for paying rent to "so long as said term shall last, or until the premises shall be redeemed." And after providing for a purchase of the premises by the lessees, the parties add another limitation and modification of the time during which rent shall be paid, to wit, that "the rent above stated shall cease at time of purchase,"—both obviously predicated, in the minds of the parties, of a time not exceeding at

most three years mentioned as the term of the lease. Moreover, in perfect accord with the foregoing, the lessees covenant that they will "quit and deliver up the premises . . at the end of the term aforesaid, except in case of purchase aforesaid." A construction that would date the purchase mentioned in this clause after the "end of the term" would be absurd.

Thus far the minds of the parties were evidently fixed upon three years as the extreme limit of their relation of landlord and tenant. And in our opinion the phrase "or so soon as the said lessor shall acquire an absolute title to said premises and be able to convey the same," read in the light of the other clauses already mentioned, do not extend the time, and that this was the sense in which those terms were understood by the parties when they adopted them to express their intention.

The subsequent provision that "all taxes upon the premises to be paid by lessor until lessees shall purchase as they above agree," does not conflict with this view, and neither does the covenant of the lessor "that so soon as she shall acquire title to the premises and be able to convey the same, she will sell, etc. to the lessees" for the sum named. They both have reference to the three years.

If this be not the proper construction, then the phrase "at the expiration of said term" would be without meaning for the clause "so soon as the lessor shall acquire an absolute title and be able to convey the same," would cover all the time both before, at, and after the expiration of the term.

Moreover looking outside of the instrument at the subject matter, the actual state of the title and the situation of the parties as the rules of construction authorize us to do, (*Robinson* v. *Fiske*, 25 Maine, 401; *Littlefield* v. *Winslow*, 19 Maine, 394; *Richardson* v. *Palmer*, 38 N. H. 212,) and we find not only nothing inconsistent with this construction but some things significantly pointing in the same direction. The mortgagee was in possession. More than two months prior to the date of the lease she had recovered a conditional judgment and could take possession by due diligence under her writ of possession in season to "acquire an absolute title at the expiration of said term;" or she could

have foreclosed under the third mode prescribed in R. S., c. 90, § 3, and brought about the same result. These circumstances, together with the fact that, at the execution of the lease, the parties had in mind a prospect of the plaintiff's acquiring absolute title by purchase of the outstanding interests before the expiration of the foreclosure satisfy us of their real intention as they expressed it in the lease, especially when we consider that they made no provision in it for an extension of it under any circumstances.

Plaintiff nonsuit.

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

UNION SLATE COMPANY *vs.* JOSIAH TILTON.

Somerset. Opinion February 20, 1882.

Liens on State. R. S., c. 91, § 26. "Port of shipment." Attachment.

A person who labors in manufacturing slate at a place other than "in the quarry," has no statute lien thereon for the wages of his labor.

Where slate was quarried at Mayfield, and carried thence to Skowhegan, to a shop one-half mile from the railroad station, and there cut and finished for mantels, and boxed and placed in a store-house near the shop, when not required to be immediately hauled to the station to be shipped to purchasers; *Held*, that the shop or store-house whence mantels were sold and delivered, must be considered "their port of shipment," within the meaning of R. S., c. 91, § 26, and that when the mantels were completed and ready for delivery either at the shop or store-house, they had arrived at their port of shipment and the thirty days began to run.

When a suit is brought to enforce the lien upon slate, under R. S., c. 91, § 26, it must be shown affirmatively that the attachment was made within thirty days next after the slate arrived at the port of shipment.

Where suits are brought to enforce statute liens upon manufactured slate, and the liens cannot be upheld, the attachments may still be considered valid, as those of general attaching creditors, not seeking to enforce liens.

ON REPORT.

Replevin of a quantity of slate mantels.

Plea, was *non cepit*, with a brief statement, alleging that the mantels were not the property of the plaintiff, but were held by

the defendant as sheriff of the county, by virtue of four attachments made by him as the property of the Mayfield Slate Company, on four writs against that company, in favor of Peter Cunningham, Michael B. Mahar, Peter Martin and Charles S. Robbins, respectively, brought to enforce statute liens thereon.

The claims of Cunningham and Martin were assigned, and the name of W. H. Ward, assignee, was indorsed on the back of those writs, and the name of Anson W. Goodrich, as assignee of Mahar's claim, was indorsed on the back of that writ.

The material facts, so far as the limits of a report will allow, are stated in the opinion.

C. Record, for the plaintiff, cited: *Treadwell* v. *Salisbury M'f'g Co.* 7 Gray, 393; *Sargent* v. *Webster*, 13 Met. 504; *Frost* v. *Ilsley*, 54 Maine, 351; *Gray* v. *Bennett*, 3 Met. 522; *Simpson* v. *McFarland*, 18 Pick. 427; *Parks* v. *Crockett*, 61 Maine, 489.

Walton and Walton, for the defendant.

The case shows that as to nineteen mantels, called the Tibbetts mantels, the plaintiffs had no title. S. C. 69 Maine, 247. Consequently as to these plaintiffs, the action must fail. *Gordon* v. *Harper*, 7 T. R. 9; *Wyman* v. *Dorr*, 3 Maine, 186; *Wingate* v. *Smith*, 20 Maine, 287; *Johnson* v. *Neale*, 6 Allen, 228.

Then there should be an order for return. *Gates* v. *Gates*, 15 Mass. 310; *Quincy* v. *Hall*, 1 Pick. 357; *Collins* v. *Eames*, 15 Pick. 65. In *Ingraham* v. *Martin*, 15 Maine, 373, and *Wheeler* v. *Train*, 4 Pick. 168, the property was shown to be in the plaintiff at the time of the commencement of the action.

The laborer's lien on slate is enforced the same as mechanic's lien, *Bryant* v. *Parker*, 65 Maine, 576, and the lien on logs before notice was required. *Parks* v. *Crockett*, 61 Maine, 491.

Robbins' labor was not in fact performed in the quarry. His labor was performed in manufacturing the slate, which, it is a matter of general knowledge, is not and cannot be done in the quarry. This was known by the legislators when they used the words "in the quarry" in the statute. They clearly meant to give a lien to the laborer who worked at the manufacturing as well as

to him who worked at mining and quarrying, but if the language is construed literally, then the laborer at manufacturing can have no lien. The statute evidently intended to embrace slate from the particular quarry.

As to the other three laborers there is no question.

"Arrival at the port of shipment," means arrival at the place or port from which they are to be shipped by water or rail, *i. e.* at a sea port or depot. *Sheridan* v. *Ireland*, 66 Maine, 69. The statute presupposes the mining, quarrying and manufacturing to be all done before it is to be moved to the "port of shipment."

Hence the shop at Skowhegan where the slate was manufactured, could not be called the port of shipment; it must be removed from there, and arrive at a port of shipment after its manufacture.

But some of the slate had not been at Skowhegan thirty days at the time of the attachments, and it was mixed with the other slate. See *Spofford* v. *True*, 33 Maine, 283.

The counsel further ably argued the question of fraud, in the purchase by the plaintiff, citing: *Perkins* v. *Pike*, 42 Maine, 141; *Redington* v. *Frye*, 43 Maine, 587; Bump, Fraudulent Conveyances, 254, 258, 453; *Johnson* v. *Whitwell*, 7 Pick. 71; *Wheelden* v. *Wilson*, 44 Maine, 20; *Drury* v. *Cross*, 7 Wall. 303; Field, Corporations, 187, 421; *Parker* v. *Vose*, 45 Maine, 60; *E. & N. A. Ry. Co.* v. *Poor*, 59 Maine, 277; *Crowninshield* v. *Kittridge*, 7 Met. 520.

VIRGIN, J. Replevin of certain slate mantels. The plaintiff corporation claims title by virtue of an alleged sale from the Mayfield Slate Company, on December 31, 1875.

The defendant, as sheriff of the county, justifies under four writs, dated January 21, 1876, in favor of as many plaintiffs against the Mayfield Slate Company, in which they severally claim a lien upon the property replevied, under the provisions of R. S., c. 91, § 26, for their personal labor upon it.

The court are to render such judgment as the law and evidence warrant.

The plaintiff corporation having come into possession on December 31, 1875, by virtue of the sale, and the property not having been attached by the defendant until January 21, following, the plaintiff's *prima facie* title must prevail, unless: (1,) The attaching plaintiffs had liens thereon, and had taken seasonable and appropriate steps to enforce them by their attachments; or (2,) The alleged sale was fraudulent as to the attaching plaintiffs, and their attachments can be upheld as those of general attaching creditors, even though their liens fail for any cause.

1. There is no pretense that Robbins ever "mined, or manufactured" any of the slate "in the quarry," at Mayfield. He was a "cutter," and did all of his work in the shop, at Skowhegan, twenty-five miles from the quarry.

The original statute (1860, c. 131,) was enacted when the only slate quarry in the State was in Brownville, which was worked for the sole purpose of manufacturing "slates" for roofing. And the legislature enacted a statute adapted to the facts, by providing that "every person who labors in mining, quarrying, or manufacturing slates in any quarry, has a lien for the wages of his labor on all the slates mined, quarried and manufactured in the quarry by him or his co-laborers, for thirty days after the slates arrive at their port of shipment." The revision commissioners dropped the form of the noun, but retained the plural form of the verb and adjective pronoun in the latter clause. But admitting that this alteration worked a change in the law and made the lien apply to all slate material, still whatever articles of slate are manufactured even now, the mining, quarrying and manufacturing must be done "in the quarry," to entitle the laborer to a lien, the same as before the revision. Our opinion, therefore, is that Robbins never had any statute lien on the mantels which were attached on his writ.

The three other lien claimants performed all of their labor "in the quarry;" and each of them therefore had "a lien on all the slate mined, quarried and manufactured by him or his co-laborers," and he has it now, provided he seasonably and legally secured it by his writ of attachment.

By the terms of the statute, his lien continued for the period of "thirty days after the slate arrived at their port of shipment."

It is immaterial, therefore, when the labor was performed upon it in the quarry, provided that, within thirty days after its arrival at the port of shipment, he caused the slate mined, quarried or manufactured in the quarry by himself or his co-laborers, to be duly attached on a writ containing a "declaration showing the action was brought to enforce his lien," with "the other forms and proceedings therein, the same as in ordinary actions of assumpsit." R. S., c. 91, § § 26, 36.

The mantels were cut and finished at the company's shop, in the village of Skowhegan, one-half mile from the railroad station in that village. They were not all marbleized, some of them being simply cut in the desired style, and polished; and when completed, they were boxed up and deposited in a store-house near to the shop. Some of them, however, were sold and delivered at the shop, and never went to the store-house; while others were hauled to the station and shipped by rail to the purchasers. We are of the opinion that the shop or store-house whence mantels were sold, and delivered, must be considered "their port of shipment." That is their place of deposit awaiting sale and shipment, and they are never deposited at the station for any such purpose, there being no place of deposit there, but were simply unloaded there directly into the cars. If the station should be considered their port of shipment, the lien upon all those sold and delivered to vendees at the shop or store-house, would never lapse, for they would never "arrive." When mantels are completed and ready for delivery, either at the shop or store-house, they have arrived at their port of shipment, and the thirty days begin to run.

The manufacture of mantels was begun in 1873; and while we have no doubt from the evidence that each of these laborers in the quarry attached the mantels which they and their co-laborers mined and quarried, it nowhere appears affirmatively that they attached them within the thirty days next after they thus arrived. And having failed to establish this material fact, their liens cannot be upheld.

2. Can their attachments be considered valid as those of general attaching creditors not seeking to enforce liens? We perceive no good reason to the contrary. With the exception of

the additional allegation that the actions are brought to enforce liens, the declarations and proceedings are the same as in ordinary actions of assumpsit; and having been commenced before the enactment of St. 1879, c. 136, the judgments are *in personam*, and not *in rem*, R. S., c. 1, § 3. Dropping the additional allegation as surplusage, and a simple action of assumpsit remains between the owner and laborer. In the numerous cases wherein laborers have sued owners for labor on their buildings, but failed to secure liens by reason of including in their judgments non-lien items, or because no lien-claim was set out in the declarations, the judgments have been considered valid as those of general creditors. *First Nat. Bank* v. *Redman*, 57 Maine, 405; *Perkins* v. *Pike*, 42 Maine, 141; *Redington* v. *Frye*, 43 Maine, 578.

Whether or not the assignment of the claims after actions brought, and attachments made, carried the liens to the assignee, we have no occasion to decide, since we do not sustain the liens and the point becomes immaterial. But we remark in passing, that the court have recently decided a similar question in the affirmative. *Prescott* v. *Adams*, 71 Maine, 113.

3. The remaining principal question is, whether the sale of December 31, 1875, was fraudulent as to these creditors. As preliminary to that question, it is urged that the assignees are the real creditors, and that they cannot be considered as prior creditors, since they did not purchase the claims, and thereby become creditors until after the sale. But the design of the statute against fraudulent sales, was to make them void as against all demands liable to be affected thereby. The right to hold them void is not personal; but the debt, whoever may become the owner of it, can be enforced against the property, the same as if not sold. *Warren* v. *Williams*, 52 Maine, 343, 348-9.

The sale, so far as it was affected by Tibbetts being the managing director of the Mayfield Slate Company, to sell, and the general agent of the plaintiff corporation to buy, was settled for the plaintiff in 69 Maine, 244, except so far as it may affect the question of fraud.

We have carefully weighed the evidence bearing on the question of fraud, together with the nineteen reasons urged by the

learned counsel of the defendant upon that branch of the case. But bearing in mind that fraud is to be proved and not presumed, our opinion is, that while many of the facts are more or less consistent with the defendant's theory, the more significant and leading facts are consistent with an honest intention on the part of the insolvent Mayfield Slate Company, to prefer its main creditors, rather than to delay or hinder others. The sale having taken place prior to the time when the insolvent act took effect, the Mayfield Slate Company had a legal right to prefer creditors. *Sargent* v. *Webster*, 13 Met. 503. Neither do we see how it could do otherwise; for their real estate was under mortgage, and both real and personal, were under attachment to the amount of fifteen thousand dollars, at the suit of the Auburn Savings Bank. They could not continue business; they failed to raise money on their bonds; and the only alternative was to sell out for what the property would bring, and pay off the debts so far as the property would go, and close up. This the corporation had a right to do, and could sell to another corporation having the same officers. *Treadwell* v. *Salisbury M'f'g Co.* 7 Gray, 405; *Sargent* v. *Webster*, *supra*. There is no evidence that the property was not sold for its full value, and the proceeds applied to the payment of its debts, so far as it went.

When this action was commenced, the plaintiff had no title to the mantels purchased of the Mayfield Slate Company, by Tibbetts, on August 3, 1875, and by him sold to the company on March 6, 1876. And as to those, this action cannot be maintained. But if the sale by the company to Tibbetts was *bona fide* as to the attaching creditors, the defendants can have no judgment for a return. As to the other mantels, there must be,

Judgment for the plaintiff, for all the property replevied, except the mantels purchased of the Mayfield Slate Company, by Tibbetts, on August 3, 1875.

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

BARROWS, J., did not concur.

GEORGE W. GILCHRIST and others

vs.

A. V. PARTRIDGE and others.

Waldo. Opinion February 25, 1882.

Shipping. Contract. Consideration. Recoupment. Evidence.

When stores are furnished a vessel, about to depart on a foreign voyage, under an agreement with the owners that the bill is to be paid at the completion of the voyage, and the parties furnishing agree to keep the vessel insured to the amount of the bill of stores, the agreement to insure is binding only during that voyage, or to the time when it was agreed that the payment of the bill was to be made; and if at the completion of the voyage (the bill not being paid) the same parties agree to keep the bill insured, such agreement would in no way be a part of the original contract, and damages sustained by reason of its breach would not be a proper matter of recoupment in an action against the owners for the amount of the bill.

The deposition of a party may be offered in evidence to show an admission of his liability though the deponent is present in court.

ON EXCEPTIONS and motion.

Assumpsit against the owners of the bark, Emma L. Partridge, on account annexed for ship stores, etc. amounting to $2708.11.

Plea, general issue, with brief statement setting up an agreement on the part of plaintiffs to keep the vessel (which had been lost) insured to the amount of the bill.

Verdict for plaintiff, $1908.86.

The material facts are stated in the opinion.

A. P. Gould, and *Joseph Williamson* for the plaintiff, cited: *Bowen* v. *Peters*, 71 Maine, 463; *Sawyer* v. *Mayhew*, 51 Maine, 398; *Folsom* v. *Merchant's Ins. Co.* 38 Maine, 414; *Winthrop Bank* v. *Jackson*, 67 Maine, 570; Sedg. Damages, 541 [444]; *Sawyer* v. *Wiswell*, 9 Allen, 39; *Bartlett* v. *Farrington*, 120 Mass. 284; *Mayberry* v. *Leach*, 58 Ala. 339; *Foster* v. *U. S. Ins. Co.* 11 Pick. 85; *Blanchard* v. *Waite*, 28 Maine, 51; *Sawyer* v. *Freeman*, 35 Maine, 542.

Wm. H. Fogler and *Geo. E. Johnson*, for the defendants.

The defendants claimed that by the original contract the plaintiffs agreed to keep their bill insured, and the time was not

stated. The plaintiffs claimed that they agreed to keep the bill insured only during the voyage. Here was a question of fact for the jury which was taken from them by the instruction of the presiding justice to return a verdict for the plaintiff. *Heath* v. *Jaquith*, 68 Maine, 433.

The defendants can recoup or set-off the damages they sustained by the failure of the plaintiffs to insure. *Sawyer* v. *Wiswell*, 9 Allen, 42; *Dorr* v. *Fisher*, 1 Cush. 275; *Harrington* v. *Stratton*, 22 Pick. 517; *Carey* v. *Guillow*, 105 Mass. 18; *Hill* v. *Southwick*, 9 R. I. 299.

The deposition of Partridge was not admissible as a deposition for he was in court. R. S., c. 107, § 17.

Nor as an admission of a part owner. *Wallace* v. *Cox*, 36 Maine, 95; *Page* v. *Swanton*, 39 Maine, 400; 1 Greenl. Ev. § 177.

LIBBEY, J. A. V. Partridge, master and part owner of the bark Emma L. Partridge, being about to sail from New York on a foreign voyage, bought of the plaintiffs, on account of the owners of the bark, the goods for which this action is brought. After the evidence was out on both sides there ceased to be any controversy as to the plaintiffs' right to recover unless the defendants had a defence on the ground claimed by them.

They claimed that when the bill of goods was bought, as a part of the transaction—a part of the consideration for the purchase—the plaintiffs agreed to keep the bark insured to the amount of their account, as security for its payment, till it should be paid; and that on her last voyage from Liverpool to Matanzas, when she was lost, they did not insure her. They claim to recoup the damages which they sustained thereby.

The presiding judge ordered a verdict for the plaintiffs. The defendants claim that there was evidence for the jury upon the issue raised, and that, therefore, they are aggrieved by the direction of the judge. If there was any evidence, which, if true, giving it its full probative force, would authorize the jury to find for the defendants, in whole or in part, the direction was wrong. *Heath* v. *Jaquith*, 68 Maine, 433.

At the time the goods were bought the bark was to sail to Port Natal, thence to Java, and then return to Boston, and it

was agreed that the goods should be paid for on the termination of the voyage. Partridge, the only witness called to support the defendants' theory, testified in substance that White, one of the plaintiffs, with whom the contract of purchase was made, wanted to assume the right to insure the bill himself, so that, in case of loss, he would not have any trouble to get his pay; but that nothing was said as to the length of time or voyages for which the insurance was to continue. Assuming this testimony to be true we think it would not authorize the inference that, if the defendants declined or refused to pay the bill on the return of the bark to Boston, the plaintiffs would be bound to continue to insure indefinitely till the defendants might see fit to pay. It could not have been in the contemplation of either party that the insurance should thus be continued. At most it could bind the plaintiffs to insure only to the termination of the voyage when the bill become payable. There is no claim made that the plaintiffs did not insure during that voyage.

On his return to Boston in April, 1878, Partridge was requested to pay the bill, but declined to do so, alleging want of funds, and by letter requested the plaintiffs to keep the bill insured. The defendants claim that the plaintiffs agreed to do so, but this the plaintiffs deny. Whether there is any evidence that would warrant the jury to find that the plaintiffs did so agree it is unnecessary to inquire, for, if they did it would be a new and independent agreement, and in no way a part of the consideration for the original contract; and damages sustained by reason of its breach would not be a proper matter of recoupment. *Sawyer* v. *Wiswell*, 9 Allen, 42; *Dorr* v. *Fisher*, 1 Cush. 275; *Winthrop Savings Bank* v. *Jackson*, 67 Maine, 570.

Exception is taken to the admission of the deposition of Partridge on the ground that he was present in court. It was offered and admitted as an admission by him of his liability. As such it was clearly admissible.

The motion to set aside the verdict is not relied upon.

Exceptions and motion overruled.

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

PRINCE BESSEY *vs.* BARTHOLEMEW K. VOSE.

Waldo. Opinion February 25, 1882.

Attachment. Officer's return. Evidence. Amendment. Practice.

The legal evidence of an attachment of real estate is the officer's return on the writ. Such return creates no lien unless the officer makes to the register of deeds the return required by the statute.

The officer's return on the writ was dated October 5, 1876, at one o'clock, P. M. and the certified copy returned to the register of deeds is of a return bearing date October 18, 1876; *Held*, that the attachment created no lein.

The officer's return of an attachment of real estate cannot be amended as against an intervening purchaser by deed of warranty, for value.

Changing and altering a writ and officer's return after they had performed their function of creating a lien upon the debtor's real estate and continuing it for six months, for the purpose of giving them new vitality, is a practice not to be encouraged, if it can be sanctioned.

ON REPORT.

Real action. Plea, the general issue.

73 217
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The facts are stated in the opinion.

Thompson and Dunton for the plaintiff, cited: *Parsons* v. *Shorey*, 48, N. H. 550; *Dearborn* v. *Twist*, 6 N. H. 44; *Eastman* v. *Morrison*, 46 N. H. 136; *Lyford* v. *Bryant*, 38 N. H. 88; *In re Marson*, 70 Maine, 513; *Means* v. *Osgood*, 7 Maine, 146; *Berry* v. *Spear*, 13 Maine, 187; *Fairfield* v. *Paine*, 23 Maine, 498; *Drew* v. *Alfred Bank*, 55 Maine, 450; *Farrin* v. *Rowse*, 52 Maine, 409; R. S., c. 81, § 56; Maine Civ. Off. (4th ed.) 103, 104.

William H. Fogler, for the defendant.

It is claimed that the writ was *functus officio* at the time of the attachment of October 18, 1876. The defect, if there was one in the writ, could only have been taken advantage of in abatement. *Richardson* v. *Rich*, 66 Maine, 249; *Maine Bank* v. *Hervey*, 21 Maine, 38. The objection is not open to this plaintiff.

The mistake of the officer in his return did not affect the attachment. There was enough to charge the subsequent purchaser, this plaintiff, with constructive notice of the attachment.

The true rule in such cases is stated in *Whittier* v. *Varney*, 10 N. H. 301, as follows: "And we are of the opinion that these considerations indicate the true rule on this subject. The subsequent purchaser or creditor being chargeable with constructive notice of what is contained in the record, if he has sufficient to show him that all the requisitions of the statute have probably been complied with, and he will, notwithstanding, attempt to procure a title, under the debtor, he should stand chargeable with notice of all the facts, the existence of which is indicated and rendered probable by what is stated in the record, and the existence of which can satisfactorily be shown to the court. And in such cases amendments should be allowed notwithstanding the intervening interests of such purchaser or creditor. He must be held to have purchased or levied, taking the chance whether the officer could in fact show that he had fully performed his duty, and subject to a right in the officer to amend by leave of court, upon satisfactory evidence, showing that amendment may be truly made.

The same rule obtains in this state. *Buck* v. *Hardy*, 6 Greenl. 162; *Fairfield* v. *Paine*, 23 Maine, 498; *Knight* v. *Taylor*, 67 Maine, 591.

In Massachusetts the law has been so held by repeated decisions of the court of that state. *Haven* v. *Snow*, 14 Pick. 28; *Johnson* v. *Day*, 17 Pick. 106; *Hovey* v. *Wait*, *Id.* 196.

LIBBEY, J. The officer's return upon the writ is the only evidence of a valid attachment of real estate. *Carlton* v. *Ryerson*, 59 Maine, 438. The return required to be made to the registry of deeds and its record are notice of the attachment to the public. By the officer's return on the writ, (*Vose* v. *Banton*,) and his return to the registry of deeds, it does not appear that any lien was created by the attempted attachment, because it appears that no attested copy of the officer's return of

the attachment upon the writ was deposited in the registry of deeds.

But the defendant asked leave in the court below for the officer to amend his return on the writ by making it conform to his return to the registry of deeds, which it is claimed is in accordance with the fact, and if the court is of opinion that the amendment is allowable it is to be regarded as made, and the action is to stand for trial.

We think the amendment should not be allowed for two reasons: 1. Any person having occasion to examine Banton's title, finding the officer's return to the registry on record, was referred directly to the writ and the officer's return of the attachment theron, to enable him to determine what claim was in suit, to secure which the attachment was made, and whether the officer's return showed a valid attachment. The return to the registry purported to be a copy of a return of an attachment on the eighteenth day of October, 1876. If the plaintiff examined the writ and officer's return, as he had a right to do, he found no such attachment upon it, but one purporting by the return to have been made on the fifth of October, 1876, "one hour P. M."

We think the rule well established that the officer's return of an attachment of real estate, or of a levy upon it, cannot be amended to affect the title of an intervening purchaser, for full value, unless there is sufficient appearing by the return to give third parties notice that all the requirements of law have probably been complied with. *Berry* v. *Spear*, 13 Maine, 187; *Fairfield* v. *Paine*, 23 Maine, 498; *Milliken* v. *Bailey*, 61 Maine, 316.

Cases may occur where some fact which the technical rule of law requires should affirmatively appear, may not be directly stated in the return, and still enough may appear to give third parties reasonable notice that the law in that respect was complied with. *Knight* v. *Taylor*, 67 Maine, 591. But this is not a case of a failure of the officer to state an essential fact in his return; it is a case where the fact is affirmatively and positively stated. True the officer's return to the registry may be admitted to impeach his return upon the writ, by showing that the return to the registry is not a copy of the return of attachment upon the writ,

and that therefore no lien was created, (*Dutton* v. *Simmons*, 65 Maine, 583) but it cannot be admitted as evidence of a valid attachment. That can only be shown by the return upon the writ.

To require the plaintiff to take notice that in fact the attachment was on the eighteenth of October, and not on the fifth of October, at one o'clock, P. M. would require him to believe the pretended copy to be true, and the original return false. The plaintiff had a right to assume, that, if an attachment had been made on the eighteenth of October, it had been made on another writ between the parties, as the return upon the writ in evidence showed that no such attachment had been made upon it.

2. The other reason is found in the facts disclosed in the case. The writ, *Vose* v. *Banton*, was first dated April 5, 1876, returnable on the third Tuesday of October; and an attachment was made and duly returned upon it by Tucker, deputy sheriff, on the fifth of April, 1876, "*1 hour P. M.*" The writ was not served on Banton, but was kept till October, when it was altered by making it returnable on the first Tuesday of January, 1877, and dated October 5, 1876. The date of the officer's return of attachment upon it, was changed to "October 5, 1876, 1 hour P. M." It does not appear in the statement of facts, that the date of the return was altered by the officer. If it was altered by him, it would be evidence that he then had the writ in his hands, and intended to make the second attachment of that date; and in such case he ought not to be allowed to make the proposed amendment. But the original writ is made a part of the case, and by an examination of it, and of the hand writing in which the writ, the alteration of the return day and date, and of the officer's return, and the alteration of its date,—the writ and all the alterations appear to have been made by the same hand, but not by the counsel who now represents the defendant. The alteration of the date of the return does not appear to be in the hand writing of the officer. The return of the first attachment April 5, 1876, was the official return of the officer on the writ as it was first made; and if its date was afterwards altered by the plaintiff or some one in his behalf, after the writ was changed, it

was not the official return of the officer of a new attachment, and the writ had no official return of attachment upon it. If such is the fact, the officer should not now, as against the plaintiff, be permitted to make a valid return of an attachment as of the eighteenth of October, 1876.

Indeed, the practice disclosed in this case, of changing and altering the writ and officer's return after they had performed their function of creating a lien upon the debtor's real estate, and continuing it for six months, for the purpose of giving them new vitality, is not to be encouraged, if it can be sanctioned.

Judgment for the plaintiff.

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

ALVAN MCKENNEY and another, appellants from decree of JUDGE OF PROBATE, *vs.* ABIGAIL ALVORD.

York. Opinion March 2, 1882.

Practice. Probate cases.

The law court may properly consider and determine motions to set aside as against law and evidence verdicts of juries rendered in probate cases upon issues framed at *nisi prius*, when reported by the presiding justice with all the evidence adduced at the trial.*

ON MOTION to set aside the verdict.

An appeal from a decree of the judge of probate approving and allowing the will and codicil of Aaron McKenney.

The case is stated in the opinion.

R. P. Tapley, for the appellants.

In the trial of causes of this character the judge sits as supreme court of probate. The proceedings before the jury are simply advisory to inform the conscience of the court. *Bradstreet* v. *Bradstreet*, 64 Maine, 205; *Larrabee* v. *Grant*, 70 Maine, 79.

The verdict is not to be set aside, it is simply to be disregarded. It is the opinion of twelve men, who heard the case, of more or

* See *Carvill* v. *Carvill*, *ante* p. 136.

less value according to the intelligence of the jury, but not binding upon any court. How can it be set aside? Of what utility to undertake the task of setting aside or undoing a nullity?

The power given the court to set aside an act is given as a remedy for some evil which the act works.

There is no authority for substituting an opinion of law court for that of the jury. That is practically what this motion calls for.

The statute nowhere authorizes the law court to withdraw from the judge of supreme court of probate an opinion or finding of a jury rendered at his request to inform his conscience.

H. Fairfield and *Ayer and Clifford*, were also for appellants.

Augustus F. Moulton and Ira T. Drew for the proponents, cited: *Bradstreet* v. *Bradstreet*, 64 Maine, 204; 2 Story, Equity, § § 1447, 1479, a; *Grant* v. *Larrabee*, 70 Maine, 79; R. S., c. 63, § 21; *Higbee* v. *Bacon*, 11 Pick. 423; *Barnes* v. *Barnes*, 66 Maine, 286; *Robinson* v. *Adams*, 62 Maine, 369; *Small* v. *Small*, 4 Maine, 220.

BARROWS, J. On the fifth day of January, 1878, Aaron McKenney, a childless widower, at that time more than one hundred years old, executed a will revoking previous testamentary dispositions of several parcels of real estate in favor of certain of his kindred and friends, and devising to Abigail Alvord, his housekeeper, the appellee, his homestead farm with the buildings thereon, including the Haines field of five acres, more or less, and all the stock, farming utensils and tools, furniture and household goods, with the exception of one clock; also the Libby farm, near the Heath meeting-house in Saco; and appointing said Abigail Alvord executrix of the will, with a request to the judge of probate that no bond be required of her. Some time afterwards the plain one story farm house in which he had lived for many years was consumed by fire; and in his one hundred and second year he (or those who had the management of his affairs) proceeded to erect upon the homestead farm, thus devised to his housekeeper, a somewhat costly dwelling house after the modern style. Some of his kindred and expectant

heirs instituted proceedings in probate court for the appointment of a guardian for him, and upon inquisition made, the municipal officers of Saco, June 2, 1879, certified to the judge of probate their opinion that he was "of unsound mind and incompetent to manage his own estate or protect his rights thereto," and upon notice issued from the probate court and hearing had, the probate judge so decreed, on the first Tuesday of August, 1879, and appointed a guardian to whom letters of guardianship were issued. The attorney who appeared for Aaron McKenney before the probate court, took an appeal from the decree of the probate judge, which was pending at the time of McKenney's death in February, 1880. But in August, 1879, shortly after the decree of guardianship in the probate court, he had executed a codicil to his will in which he says, "I hereby will and direct that my relations and heirs, except Aaron McKenney of Buxton and Charles W. McKenney of Hollis, shall have no part of my property. With the exception of said Aaron and Charles they have nearly all acted as enemies to me, or have given me no proof of their friendship or sympathy." Whereupon he devises to his grand-nephew, Charles, a ten acre wood lot in Buxton, to be received by Charles in satisfaction of what the testator owed him; and as he says his nephew Aaron "has a good property of his own, I therefore leave him only an expression of my grateful feelings for his kindness to me." It is noticeable that he makes no exception in favor of those of his kindred who took no part in the petition for guardianship or those who signed his remonstrance against it; but hereupon devises all the remainder of his property, real and personal, to his housekeeper, Abigail Alvord, a woman already past seventy years of age, to whom, in the will, he had previously given the homestead and the Libby farm.

Some of the heirs at law appealed from the decree of the judge of probate approving and allowing these instruments, and, upon issues framed in the Supreme Judicial Court, the jury at the January term, 1881, found that at the time of executing the will in January, 1878, the testator was of sound mind and not unduly influenced by Abigail Alvord or any other person; but that at the time of executing the instrument purporting to be a codicil,

in August, 1879, he was not of sound mind and was under undue influence. Thereupon the executrix of the will, who is the principal devisee, moves to set aside the findings respecting the codicil as against law and evidence, and presents the case here upon that motion and a report of the evidence certified by the presiding justice, with the proviso that if the moving parties are entitled to have the consideration of the full court upon such a motion against objection interposed by the other side, the full court is to pass upon the motion, and if the findings of the jury are set aside the case is to stand for trial; otherwise a decree to be entered, approving and allowing the will, and disallowing and rejecting the codicil, and remanding the case to the probate court.

We have no doubt of the power of this court to consider and pass upon the motion. By R. S., chap. 63, § 21, the Supreme Judicial Court, which, according to R. S., chap. 77, § 1, consists of a Chief Justice and seven associate justices, is made the supreme court of probate, and has appellate jurisdiction in all matters determinable by the several judges of probate, and while appeals from the probate courts are cognizable in the first instance at a *nisi prius* term held by one member of the appellate court, and his decision may in some cases be final, in very many cases his doings are subject to revision, according to the ordinary course of proceeding by the law court, and any errors in law, into which he may fall, may be corrected, or any questions which he may see fit to present by report to the law court are cognizable by it upon proper proceedings to bring them before it.

The present case is one which falls directly within the first specification in § 13, c. 77, of cases that come before the court as a court of law, viz: "cases in which there are motions for new trials upon evidence reported by the judge." And, indeed, counsel in presenting this point, denies not so much the power of the court to pass upon such a motion as the propriety of its exercise in a case where the findings of the jury are advisory merely, and the court might go on to pronounce a decree *non obstante veredicto*. The suggestion is more plausible than sound. Construing all the statute provisions regulating the proceedings of this court at *nisi prius* and as a law court together, it cannot be doubted that, either upon exceptions or motion, the law court

has a revisory power over the proceedings at the jury term, in all proper cases. If this court has the power, it is the right of either party who deems himself aggrieved, to call upon us to examine the alleged grievance, and if law and justice require, to relieve it. That a verdict of this description would be regarded by a judge at *nisi prius*, as an obstacle to a decree in favor of the proponent for the approval of the codicil, is very certain. It is true that under our present statutes (laws of 1872, c. 83,) the judge, at *nisi prius*, may set aside a verdict in a case tried before him, and grant a new trial when in his opinion the evidence in the case demands it. But this power must be exercised at the trial term if at all, and when there have been two verdicts against the applicant, the verdict is not to be set aside by a single justice. In proceedings according to the course of the common law, the losing party has his election to address his motion to the presiding justice or to the full court. *Averill* v. *Rooney*, 59 Maine, 580. Whether where an issue has been framed to the jury in a probate case, the judge presiding at the trial has discretionary power to refuse to report the evidence to the law court, or to disregard the verdict and make a decree according to his own view of the evidence and the facts proved, is not now the question. If a single justice has such a power in a class of cases so important as the present, he did not in this instance see fit to exercise it, but reported the whole case to this court for determination as he lawfully might do under R. S., c. 77, § 13. Whether the court see occasion to submit the issues raised to the jury again or not, we think it makes a more orderly, intelligible and symmetrical record, to set the verdict aside, if the evidence requires it, than simply to render a judgment in opposition to it; and such has been the practice in probate appeals, and in the analogous case of issues of fact presented to the jury in suits in equity. *Withee* v. *Rowe*, 45 Maine, 571; *Larrabee* v. *Grant*, 70 Maine, 79.

But upon a careful examination of the two hundred and seventy printed pages of evidence here reported, we find no sufficient cause to sustain the motion or disturb the findings of the jury.

The testimony may well be regarded as showing a gradual but serious decay of the powers, bodily and mental, of this extremely

aged testator. The case presents some very peculiar features. If we regard it as questionable whether a want of testamentary capacity is clearly established on the whole evidence, it must still be said that great weakness and unusual exposure to undue influence, are painfully evident. There is uncontradicted testimony which, if believed, shows that the testator in years past, was by no means master of his own household, but was subject to a control which he desired in vain to throw off.

Whatever the character of the influence thus acquired over him may have been, it is a significant fact that none of those who from their position in his family would be likely to know best in regard to it, are brought forward by the proponent as witnesses, nor does she present herself to explain or rebut the accounts which she is said by contestant's witnesses to have given of his condition. There is pregnant evidence, moreover, that in the latter part of his days, more particularly after the execution of the codicil, there was something to be concealed by the persistent exclusion of all his relatives from his house. The devise in the codicil to the proponent is declared in set terms to be "in token of my appreciation of her thirty years service in my behalf;" but the evidence shows unmistakably that she was his housekeeper scarcely more than a third of that time, and that at times for a considerable period of years, she and her associates were anything but welcome occupants of a part of his house, because he did not possess sufficient energy to rid his premises of them.

Looking at the whole case, we do not find ourselves inclined to question the correctness of the findings of which the proponent complains.

Motion overruled. Decree approving and allowing the will dated January 5, 1878, and rejecting and disallowing the codicil thereto dated August 6, 1879, to be signed; and case remanded to probate court for further proceedings in conformity with this decree.

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

EUNICE W. CARVILLE *vs.* WILLIAM HUTCHINS.

Somerset. Opinion March 2, 1882.

Deed. Title by disseizin.

Prior to the enactment of R. S., 1841, c. 91, §1, the deed of one who was disseized could not, during the continuance of the disseizin, convey a title to his grantee.

Where a grant of land is made with fixed and definite metes and bounds capable of being ascertained on the face of the earth, it cannot be enlarged so as to include adjoining land by the mere addition of the words "together with the buildings thereon standing," although such adjoining land is covered by corners of the buildings referred to.

The seizin acquired by a first disseizor will not enure to the benefit of other disseizors who come after him unless there is a privity of estate between them and him either by purchase or descent.

ON EXCEPTIONS.

Writ of entry in which plaintiff demands certain premises in New Portland.

At the trial after the evidence was out, the presiding justice ruled as a matter of law that the plaintiff was entitled to recover and to this ruling the defendant excepted.

The material facts are stated in the opinion.

Walton and Walton, for the plaintiff, cited: *Crosby* v. *Parker*, 4 Mass. 110; *Page* v. *McGlinch*, 63 Maine, 472; *Blethen* v. *Dwinel*, 34 Maine, 133; *Bolster* v. *Cushman*, 34 Maine, 428; *Ward* v. *Fuller*, 15 Pick, 185; *Farwell* v. *Rogers*, 99 Mass. 33;

J. I. Hopkins, for the defendant, cited: 3 Wash. R. P. * 628, * 623, * 631; *Esty* v. *Baker*, 50 Maine, 331; *White* v. *Williams*, 48 N. Y. 334; *Clark* v. *Gilbert*, 39 Conn. 94; *Williams* v. *Buker*, 49 Maine, 428; *Sohier* v. *Coffin*, 101 Mass. 179; *Poignard* v. *Smith*, 6 Pick. 172; *Holton* v. *Whitney*, 30 Vt. 405; *Hamilton* v. *Wight*, 30 Iowa, 480; *Cornell* v. *Jackson*, 3 Cush. 508.

BARROWS, J. The plaintiff has an uncontroverted title by deed to a lot of land and buildings thereon, situated in West New Portland village and lying easterly of the one rod strip

here in controversy; the defendant has a like title to a triangular lot lying westerly of said one rod strip.

The question is which party has the better title to this strip? The plaintiff produces a quit-claim deed to herself from Addison Spooner, dated Febuary 5, 1877, in which the parcel conveyed is described as "the same land conveyed to me (A. S.) by Ward Spooner by a quit-claim deed dated April 23, A. D. 1853, and being also the same premises conveyed to the said Ward Spooner by Samuel P. Strickland by a deed dated May 16, 1834, and recorded," &c. "to which deed so recorded reference is had." The deed thus referred to unmistakably describes the identical one rod strip in controversy.

But the defendant contends that the plaintiff acquired no title by these deeds because he says that Samuel P. Strickland at the date of his deed to Ward Spooner in 1834, had been and then was disseized of this one rod strip.

It is true that prior to the enactment of § 1, c. 91, R. S., of 1841, (now embodied in R. S. of 1871, c. 73, §1,) the deed of one who was disseized could not, during the continuance of the disseizin, convey a title to his grantee. *Williams* v. *Buker*, 49 Maine, 429. If the testimony in the case would have justified the jury in finding that Strickland was in fact disseized when he conveyed to Ward Spooner, the defendant's point would be well taken; but the testimony falls far short of such proof. It appears that Strickland had a conveyance from Oliver Peabody, Jr. April 30, 1828, of a lot fronting on the street five rods and including the one rod strip, by which lot Ward Spooner in his deed of March 20, 1831, to Thomas Spooner under whose heirs the defendant claims, bounded the lot he was then conveying to his son Thomas.

By accepting a conveyance thus limited, Thomas Spooner recognized the title of Strickland in the one rod strip, and there is nothing to show that any use he made of it before or afterwards was under a claim of right, or otherwise than in submission to the title of the true owner. Had he been in possession, claiming title in himself, it is not probable that his father, who had given

him the house lot originally, would have taken the deed of the one rod strip from Strickland in April, 1834.

It is not sufficient to defeat the deed under which the plaintiff's title is ultimately derived to show acts of possession by Thomas Spooner without showing that such possession was adverse to Strickland's title.

The plaintiff thus exhibiting a title by deed to the demanded premises through mesne conveyances from an undisputed former owner, the next inquiry is, can the defendant show a better title?

Confessedly the parcel of land described in the deeds introduced by the defendant, is bounded easterly by the westerly line of the one rod strip and does not include any portion of it unless the deeds can be construed so as to cover the trifling pieces over which the corners of the buildings erected upon the lot to which the defendant has a valid title by deed, project.

But where a grant of land is made with fixed and definite metes and bounds capable of being ascertained on the face of the earth, it seems clear that it cannot be enlarged so as to include adjoining land by the mere addition of the words "together with the buildings thereon standing," although such adjoining land is covered by corners of the buildings referred to. It is plainly not within the terms used and it has no analogy to the cases where the grant of the building has been held to carry the land on which it stands.

This phrase is said by the court in *Crosby* v. *Parker*, 4 Mass. 114, to have no legal operation. We think it certain that in the connection in which it is here used it can have none such as the defendant claims for it. Nor is it possible to sustain the defendant's claim of title by adverse possession. His own possession, if upon the loose testimony offered it could be regarded as exclusive and adverse, has not been long enough to avail him. Nor can he tack thereto the consecutive possessions by his predecessors to make a continuity of disseizin, for they did not embrace in their deed to him any supposed rights of theirs in the one rod strip if they had any, but, on the contrary, bounded him by the west line of the same. As was said by the court in *Ward* v. *Bartholomew*, 6 Pick. 415, "nothing being sold to the tenant except

what was included in the boundaries stated in his deed he has no right by an entry under the deed to the excess which was in the possession of his grantor." It is familiar law that the seizin acquired by a first disseizor will not enure to the benefit of other disseizors who come after him unless there is a privity of estate between them and him either by purchase or descent.

The want of such privity would of itself be fatal to the defendant's claim; but we may remark further that the evidence fails to show a title by adverse possession in Thomas Spooner or his heirs. That Thomas Spooner's occupation, so far as it was not a mere trespass, was by permission of his father who bought this strip from Strickland in 1834, under the circumstances here disclosed could hardly be doubted, and had it been exclusive and adverse, inasmuch as Thomas died "more than thirty years before the trial," the proof that it continued for twenty years is wanting. He was succeeded by his son Addison Spooner, the plaintiff's grantor, who took a deed of the locus from his grandfather, Ward Spooner, in 1853, and having both title and possession is presumed to claim by his title and not by wrong. *Moulton* v. *Edgcomb*, 52 Maine, 32; *Page* v. *McGlinch*, 63 Maine, 475, 476, and cases there cited.

Moreover the possession of this strip seems to have been a mixed possession by the occupants of the lots now respectively owned by the plaintiff and defendant, each using it more or less for convenient access to their respective dwellings.

Under such circumstances it is hardly necessary to say that no title by possession would accrue to either; and the seizin would be in the party having the legal title by conveyance from the former owner.

Exceptions overruled.

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

INHABITANTS OF BELMONT *vs.* INHABITANTS OF MORRILL.

Waldo. Opinion March 7, 1882.

Paupers, settlement of. Burden of proof. Practice.

In an action for pauper supplies, where it is claimed that the pauper's settlement in the defendant town was obtained in his own right or by the person through whom it was derived by the five years residence therein without receiving pauper supplies, if the residence for five years is proved and there are no circumstances which indicate that relief was needed or given, it is sufficient, till the adverse party, alleging that supplies were furnished, offers some evidence of the fact.

Where exceptions are taken to the admission of a written memorandum as evidence and they do not state the whole evidence, and the relation of the memorandum to the whole does not appear in such a way as to show that the rulings were wrong and the excepting party aggrieved, the exceptions cannot be sustained.

ON EXCEPTIONS.

Action for pauper supplies furnished to the wife of Robert Childs.

The verdict was for the plaintiffs.

The material facts appear in the opinion.

William H. Fogler, for the plaintiffs, cited: *New Portland* v. *Kingfield*, 55 Maine, 172; *Corinna* v. *Hartland*, 70 Maine, 356; *Weld* v. *Farmington*, 68 Maine, 301; *Norridgewock* v. *Madison*, 70 Maine, 174; *Hovey* v. *Hobson*, 55 Maine, 276; *Dennen* v. *Haskell*, 45 Maine, 430; *Millett* v. *Marston*, 62 Maine, 477; *Tarr* v. *Smith*, 68 Maine, 97; *Barrett* v. *Bangor*, 70 Maine, 335; *Wing* v. *Chesterfield*, 116 Mass. 356.

William H. McLellan, for the defendants.

SYMONDS, J. In 1855, the town of Morrill was incorporated, from territory previously included in the town of Belmont. The father of Robert Childs, husband of the alleged pauper, lived in Belmont from 1823 till the division of the town; and the plaintiffs claimed that for five years preceding Robert's becoming of age, in December 1836, his father's residence had been continuous there, without aid received from the town; and that the

derivative settlement gained in this way by Robert Childs in the plaintiff town became fixed by operation of law in the town of Morrill, upon its incorporation. Spec. laws, 1855, c. 466, § 4.

This the defendants denied, and asserted that during that period of five years, pauper supplies had been furnished. The ruling of the court that upon this last issue, whether, supposing the father's residence in Belmont, in 1836, had been long enough to give him a legal settlement there, it had been interrupted by receiving pauper supplies, or not, the burden of proof was on the defendants, seems to be in accordance with the opinion of the court in *Corinna* v. *Hartland*, 70 Maine, 355. We understand it to mean no more than this: that when the plaintiffs undertook to prove a pauper settlement acquired by the father in the sixth statutory mode, proof of residence in the ordinary way, without unusual circumstances showing want or destitution, without apparent sign of the need or of the furnishing of supplies, raised a certain presumption of fact that none were furnished, which was as far as the plaintiffs need go towards proving a negative, till the defendants overcame this presumption by evidence.

To require the plaintiffs to prove an absolute negative might be impracticable. If the residence for the five years is proved, and there are no circumstances which indicate that relief was needed or given, it is sufficient, till the adverse party, alleging that supplies were furnished, offers some evidence of the fact. We think the reasons given for the ruling at the trial, and the manner in which it was stated, sufficiently limited or qualified it.

The cases cited by the counsel for the plaintiffs, sustain the admissibility of the memorandum signed by the selectmen of the two towns, and relating to the adjustment of accounts between them for the support of the father and mother of Robert Childs; provided it was relevant to the issue before the jury. It was dated March 29, 1858, and the objection urged is, that a memorandum affecting a person's settlement in 1858 is not admissible on the question of his settlement in 1836. We cannot say that it may not be. That depends upon whether there is evidence connecting the two dates, tracing back the settlement of 1858 to

1836, and showing that it continued the same. For all that the exceptions show, there may have been such evidence at this trial. If the fact of the father's residence in Belmont, for the five years preceding 1836, had been formally admitted at the beginning of the trial, or before the memorandum was offered, and the court had been then advised that the only question made was whether he received aid during that time, or not, there is no reason to suppose that the memorandum would have been received in evidence at all. Payment by the defendant town for the father's support in 1858 was only evidence by way of admission on their part that he had then acquired a settlement there by residence as alleged. It did not tend to show that he had also received aid prior to 1836; and if with the jury it improperly had such effect, it would be in the defendants' favor.

The request to the court to rule the memorandum out, made during the progress of the defendants' argument, does not appear to have been accompanied by a formal admission of the fact of residence for the five years prior to 1836. The statement of the case is, that the defendants denied that the father "lived in Belmont five years without receiving pauper supplies" prior to 1836. On one branch of this question this paper was admissible, if connected in point of date, as we assume it was. The exceptions do not state the evidence in the case, and the relation of this memorandum to the whole does not appear in such a way as to enable us to say that the rulings were wrong, or that the defendants were aggrieved.

Exceptions overruled.

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

JOHN R. PULSIFER *vs.* ISAAC D. WATERMAN.

Androscoggin. Opinion March 7, 1882.

Fraudulent conveyance. R. S., c. 113, § 51. Exceptions. Statute of frauds. Equity powers of Supreme Judicial Court.

Where the maker of a promissory note, before its maturity, conveyed his farm to his son in fraud of his creditors and died, and his estate was decreed

' insolvent before judgment was recovered on the note, in an action by the payee against the fraudulent grantee, founded on R. S., c. 113, § 51; *Held*, that the fact that the farm could not be attached or seized on execution by the payee, is no defense, the farm having been attachable or seizable when the relation of debtor and creditor was created.

The receipt by the payee of his dividend of the estate, was no abandonment of his remedy under § 51.

Nor is it any legal objection to the maintenance of such an action, that the plaintiff will recover more than a *pro rata* share of his debt.

Where to such an action the defense was *inter alia* that the conveyance was not fraudulent as to creditors, but in pursuance of an oral contract entered into between the defendant and his father some years before, and the presiding justice instructed the jury that it was immaterial whether the alleged oral contract was valid or not; *Held*, that the defendant had no cause for exceptions when it appeared that the jury found that no such contract was in fact made.

A part performance by the purchaser, of an oral contract for the sale and purchase of land, may take the contract out of the operation of the statute of frauds, and authorize a court of general equity powers, in the exercise of a sound discretion, to decree specific performance on the part of the vendor.

Since February 28, 1874, the Supreme Judicial Court of this State, has possessed general equity powers and authority to decree specific performance of oral contracts.

On exceptions, and motion to set aside the verdict.

An action on the case under the provisions of R. S., c. 113, § 51, against the defendant for aiding in the fraudulent transfer and concealment of certain real estate of Jabez Waterman, the father of the defendant, and a debtor of the plaintiff.

The relation of debtor and creditor between Jabez Waterman and the plaintiff, was shown by a note dated February 8, 1877, in which one C. A. Foster was the maker, Jabez Waterman was the payee and first indorser, and the plaintiff was the second indorser. It went to protest April 12, 1877, was paid by the plaintiff, and passed into a judgment against Waterman's estate, at the September term, 1878.

The alleged fraudulent conveyance was a deed of real estate from Jabez Waterman to the defendant, dated February 16, 1877, and recorded April 6, 1877.

Jabez Waterman died April 2, 1877, and his estate was rendered insolvent.

The defendant *inter alia*, claimed and testified that the deed from his father to him of February 16, 1877, was in pursuance

of a contract and agreement made between them in 1846, that if the defendant would stay with his father and "see him and mother through," and assist in paying certain debts, the defendant was to have one-half the property, and the father would give him a deed any time he wished it.

Other material facts stated in the opinion.

W. W. Bolster, for the plaintiff, cited: R. S., c. 113, § 51; c. 66, § 23; *Spaulding* v. *Fisher*, 57 Maine, 411; *Hovey* v. *Chase*, 52 Maine, 304; *Darby* v. *Hayford*, 56 Maine, 246; *Laughton* v. *Harden*, 68 Maine, 210; *Pratt* v. *Curtis*, 6 N. B. R. 139; *Oxnard* v. *Swanton*, 39 Maine, 125; *Cunningham* v. *Horton*, 57 Maine, 420; *Soule* v. *Winslow*, 66 Maine, 477.

N. and J. A. Morrill, for the defendant.

Supposing the alleged fraud on the part of Jabez Waterman, and the alleged knowledge of the same on the part of the defendant to be proved, yet the case shows such a state of facts, by reason of the death of Mr. Waterman, senior, and the insolvency of his estate, as will not entitle the plaintiff to aid in this action; the legislature did not contemplate the application of this statute to such a case, and such an application would be unjust and inequitable to other creditors. The statute prescribes certain conditions within which the creditor must bring or find himself before he can maintain an action thereunder. *Quimby* v. *Carter*, 20 Maine, 221; *Herrick* v. *Osborne*, 39 Maine, 232. The property must be such as would be liable, but for the conveyance or transfer, to be taken by the creditor in the particular manner named, to satisfy his demand; for the conveyance of exempted property, no matter if the debtor was ignorant of the law and had ever so fraudulent intent, would furnish no ground for an action under the statute.

There has not been a moment since the plaintiff's claim against Jabez Waterman became certain, that he has had, or could in any way have had, any distinct portion of Jabez Waterman's property applied toward the satisfaction of his debt; his rights as a creditor, are only in common with all other creditors, to have the property applied *pro rata* to the satisfaction of their

debts. The case differs from *Spaulding* v. *Fisher*, 57 Maine, 411; there the money had been liable to attachment and seizure; although the house was not; here, no property has ever been so liable on plaintiff's claim. That an executor or administrator acting as the representative of the creditors could avoid any fraudulent transfer of property personal or real, and apply it or its value to the satisfaction of creditors' claims cannot be doubted, but the remedy is exceedingly simple, aided by the provisions of R. S., c. 64, § 65, as amended by laws of 1874, c. 168, and not by the statute here relied upon.

Such an application of the statute is contrary to the provisions and policy of the law for the distribution of the estate of persons deceased, insolvent, and in its application would be wholly inconsistent therewith. *Caswell* v. *Caswell*, 28 Maine, 234; R. S., c. 71, § 22; *Thatcher* v. *Jones*, 31 Maine, 532; *Philbrook* v. *Handly*, 27 Maine, 55; *Platt* v. *Jones*, 59 Maine, 244.

No creditor has a right to apply property to the payment of his individual debt as against other creditors of an insolvent estate, but it would be just as inconsistent to allow him to obtain payment under this statute. If the executor through ignorance or collusion with a single creditor, neglects to sell the real estate, as land fraudulently conveyed, or by the aid of a court of equity, obtain a cancellation of the fraudulent conveyance (as he may do, *Caswell* v. *Caswell*, *supra; McLean* v. *Weeks*, 65 Maine, 418; *Holland* v. *Cruft*, 20 Pick. 321; *Welsh* v. *Welsh*, 105 Mass. 229,) such creditor, although unable by suit directly against the debtor's estate to satisfy his debt by levy on such property, may by suit against the party holding the conveyance, obtain an execution to be satisfied out of the same property, and thus obtain payment of his claim in preference to other creditors. Suppose that, in case the property in question be personal, the executor being unable to reach it, has brought suit for its value and recovered judgment, (*Martin* v. *Root*, 17 Mass. 222; *Gibbens, Adm'r*, v. *Peeler*, 8 Pick. 254; R. S., c. 64, § 37,) or, in case it be real, has by process in equity set aside the conveyance, whereby the property is lost to the grantee, still under the plaintiff's theory he may yet be liable to this action at the suit of a

creditor, and in the first case would be obliged to pay three times its value, (twice to the creditor and once to the executor,) or, if the property could be reached, twice its value and lose the property.

The defendant is entitled to have the property, but he must pay twice its value and no more. *Fogg* v. *Lawry*, 71 Maine, 215.

The plaintiff by taking his dividend from the estate of Jabez Waterman, thereby abandoned other remedies and cannot now maintain this action. See *Trimbell* v. *Woodhead*, U. S. S. C. Reporter, April 27, 1881; (102 U. S. 647); *Martin* v. *Root*, 17 Mass. 228; Bigelow on Estoppel, 535, *et seq.*; *Chaffee* v. *Bank*, 71 Maine, 514; *Rapalee* v. *Stewart*, 27 N. Y. 314; *McLean* v. *Weeks*, 61 Maine, 280; also 65 Maine, 417; *Caswell* v. *Caswell*, 28 Maine, 232.

We think the evidence in regard to the contract, should have been submitted to the jury for the purpose of determining Jabez Waterman's intentions, as well as the defendant's honesty or dishonesty.

The residence of Isaac D. Waterman on the home place, the improvements that he made upon it, bring this case within the rule that courts of equity will enforce a specific performance of a contract within the statute of frauds, where the parol agreement has been partly carried into execution. 1 Story's Eq. Jur. 12 ed. § 759, and note 1; *Potter* v. *Jacobs*, 111 Mass. 32; *Lobdell* v. *Lobdell*, 36 N. Y. 327; *Kurtz* v. *Hibner*, 8 Am. Rep. 665, (Ill.); *Hardesty* v. *Richardson*, 22 Am. Rep. 57 (Md.); *Burkholder* v. *Ludlam*, 32 Am. Rep. 669; *Neales* v. *Neales*, 9 Wall. 1; *McDowel* v. *Lucas*, Reporter, May, 25, 1881. This rule seems to be well established in courts having full equity jurisdiction. In *Wilton* v. *Harwood*, 23 Maine, 133, the court say, that if it were "intrusted with a general jurisdiction in equity, there might be no difficulty in decreeing a specific performance of the agreement, on the ground of part performance by the delivery and acceptance of possession, accompanied by the other acts above stated." Such jurisdiction was given by laws of 1874, c. 175.

VIRGIN, J. Case, to recover the amount of the defendant's liability under R. S., c. 113, § 51, for knowingly aiding his father, Jabez Waterman, in an alleged fraudulent transfer of the latter's farm, to secure it from creditors and to prevent its attachment and seizure on execution.

The relation of debtor and creditor which subsisted, at the time of the conveyance, between the grantor and the plaintiff, depended upon the contingent liability of a prior, to a subsequent indorser of a negotiable promissory note. Such a liability established that relation (*Thatcher* v. *Jones*, 31 Maine, 528, 532); and it became fixed when the note was executed by the parties and put in the bank. *Sargent* v. *Salmond*, 27 Maine, 539, 542–3; *Thompson* v. *Thompson*, 19 Maine, 244; *Howe* v. *Ward*, 4 Maine, 195. And although the liability was still conditional when the grantor deceased, it survived against his personal representative and ripened into an absolute indebtment against his estate, and the relation was not affected by his decease.

At the trial before the jury, the defendant contended, and being there overruled, now ably urges that, assuming the conveyance to have been fraudulent, still, inasmuch as the debtor died before his debt was payable and his estate was decreed insolvent before judgment was recovered, the farm could not be "seized on execution," and therefore the facts on which the plaintiff bases his action are not such as are contemplated by the statute.

It would seem to be a self-evident proposition that, such property of a debtor as, by positive statute provision, is exempted from attachment or seizure for the owner's debts, is not susceptible of fraudulent alienation; for no creditor can, in legal contemplation, be defrauded by his debtor's conveyance of property which is intangible by any civil process in behalf of such creditor. *Legro* v. *Lord*, 10 Maine, 161, 165. And doubtless if the farm in question had been worth but five hundred dollars instead of twenty-five hundred dollars, and the debtor had seasonably filed the homestead certificate in accordance with the provisions of R. S., c. 81, § § 60 *et seq.* the plaintiff would have no legal cause to complain of the conveyance.

And prior to 1839, for a similar reason any of those classes of property which could not be taken on execution at law, such as

the interest of a mortgagee of land or of chattels, the incorporeal and intangible right of an inventor or an author in a patent or copyright, notes, accounts, bonds, etc. might be transferred with impunity, and creditors not be able to impeach the transaction at law as being in violation of the stat. of 13 Eliz.; and there is high authority for declaring that equity would not intervene. 1 Story Eq. § 367, and notes. But in that year, the legislature provided a method by which a judgment creditor, whose judgment debt was at least ten dollars, might reach with his execution, unless the debtor preferred perpetual imprisonment, "any property, not exempted expressly by statute from attachment." Stat. 1839, c. 412, § 2, incorporated into R. S., c. 113, § 14. And since the enactment of that statute this court has assisted through its equity powers, judgment creditors in discovering and reaching their debtors' property which could not be seized on execution at law, and especially such as had been fraudulently transferred and secreted. *Gordon* v. *Lowell*, 21 Maine, 251; *Sargent* v. *Salmond*, 27 Maine, 539, 546–7. And now, notwithstanding the *dictum* in *Skowhegan Bank* v. *Cutler*, 49 Maine, 315, all those kinds of property not specially exempted from attachment, and which before the statute of 1839 could not be taken on execution, are deemed property for the fraudulent transfer of which the fraudulent transferee is liable under the provisions of the statute on which the action at bar is founded. *Spaulding* v. *Fisher*, 57 Maine, 411.

The farm conveyed to the defendant was not exempt from attachment or seizure by any statute. To be sure it could not be seized on execution as the debtor's property, not because it was exempt as that phrase is generally used and understood, but because before the judgment was recovered the estate of the debtor had been decreed insolvent, and that decree dissolved all attachments of it (R. S., c. 81, 65), and prevented the issuing of any execution on the judgment. R. S., c. 66, § § 16, 17.

If the defendant had, before the maturity of the note, conveyed the farm to a *bona fide* purchaser, it is familiar law that the farm then could not be attached or seized on execution by the plaintiff on his debt; but the defendant's learned counsel would

hardly contend that that fact would constitute a defence to this action. In either case, the farm was attachable and seizable within the meaning of § 51. For whether attachable or seizable depended not upon its situation when the plaintiff's action was commenced upon the note or the judgment recovered, but when the relation of debtor and creditor commenced, viz: when the note was executed and delivered. From that moment the creditor, although his debt was not payable, had a right to complain against any fraudulent transfer of any property of his debtor which was then attachable; for he "had an interest in it as a fund out of which the debt ought to be paid." *Howe* v. *Ward*, 4 Maine, 200. If the law were otherwise, any debtor might convey his property before maturity of his debts and leave his creditors without remedy. "Such a consequence is not to be disregarded, nor a principle leading to such a consequence to be respected in a court of justice." *Howe* v. *Ward*, *supra*. So that we may reiterate the language of the court in *Quimby* v. *Carter*, 20 Maine, 221, invoked by the defendant, that the plaintiff must prove: "that he has a just debt or demand, that his debtor has fraudulently concealed or transferred property liable to be taken by attachment or seized on execution to satisfy it, and that the person sued has knowingly aided the debtor to defeat his right as a creditor."

But the defendant says that when the plaintiff proved his claim and took his dividend, he thereby abandoned his remedy under § 51.

In the first place he did not prove his claim before the commissioners, and they had nothing to do with it. His action was pending in the Supreme Judicial Court when the estate was declared insolvent; and instead of discontinuing his action and resorting to the commissioners, he recovered a judgment in this court; and the statute (c. 66, § § 16, 17,) "entered the sum on the list of debts."

This is altogether different from the facts in *Fogg* v. *Lawry*, 71 Maine, 215. The plaintiff in that case, after commencing his action under § 51, filed a petition in bankruptcy against the defendant on which the latter was declared a bankrupt, caused the

assignee to bring a bill against the defendant (fraudulent grantee) to recover the property conveyed; and the court decided that the plaintiff thereby waived his remedy under § 51. When the plaintiff voluntarily became a party to the proceedings in bankruptcy, he thereby elected to take whatever percentage the bankrupt estate would pay and thereby cease to be a creditor; and ceasing to be a creditor, he could have no claim under § 51. *Thatcher* v. *Jones*, 31 Maine, 528, 533. But the receipt of a dividend from an insolvent estate of a deceased person does not discharge the debt. R. S., c. 66, § 23. Nor is there any analogy between a creditor's merely accepting a dividend under the insolvent statute, and becoming a party to an assignment for the benefit of creditors; and *Chaffee* v. *National Bank*, 71 Maine, 514, is not applicable.

The aim of bankrupt and insolvent statutes is to make a just and equitable *pro rata* distribution of debtors' property among their creditors and assignees charged with this duty receive the authority to pursue property conveyed by a debtor in fraud of creditors. *Freeland* v. *Freeland*, 102 Mass. 475; *Glenny* v. *Langdon*, 98 U. S. 20; *Trimble* v. *Woodhead*, 102 U. S. 647. And for the same purpose executors and administrators, when the estates of their testators and intestates have been decreed insolvent, have alone the same authority, as the representative of all having an interest in the distribution. *McLean* v. *Weeks*, 61 Maine, 277; S. C. 65 Maine, 411; *Caswell* v. *Caswell*, 28 Maine, 232. But there seems no power to compel action on the part of a personal representative as there is under the bankrupt law (*Trimble* v. *Woodhead*, *supra*); the only remedy (in the opinion of TENNEY, C. J.) being to remove the administrator in case of his refusal and the appointment of some one who will act. *Caswell* v. *Caswell*, 28 Maine, 235. But these cases have no application to an action brought under the express unconditional provisions of a statute in no wise pertaining to the insolvent estates of deceased persons.

But it is urged that inasmuch as the executor can maintain a bill and recover the whole farm for the benefit of all the creditors,

the defendent, if this action is sustained, may be obliged to pay twice its value and lose it also; thus subjecting him to a greater penalty than the statute inflicts and contrary to the decision in *Fogg* v. *Lawry*, *supra*. This result cannot follow in this case, neither will it in any other. Section 51 is remedial, "enacted to enable creditors to recover their debts." *Quimby* v. *Carter*, 20 Maine, 218; *Platt* v. *Jones*, 59 Maine, 244. Whatever is recovered in this action operates *pro tanto* as payment of the debts of the debtor although not paid by the debtor. *Quimby* v. *Carter*, *supra; Philbrook* v. *Handley*, 27 Maine, 55. If the plaintiff recovers his debt by this action and a bill is subsequently brought for the benefit of the other creditors, equity does not lend its aid to enforce penalties, but tempers the wind to the shorn lamb and would adjust its decrees to suit the equitable liability of the defendant.

If it be said that in this way the plaintiff would recover all of his debt while the other creditors would not fare so well; the answer is such a result not infrequently happens even in equity. "It is a well established principle," says WHITMAN, C. J., "when a creditor has, through the instrumentality of a court of equity, sought out and discovered the property of his debtor, which he had before been unable to discover and seize upon execution at law, that he becomes entitled to a preference over other creditors, to have his judgment first satisfied, even under the insolvent laws." *Gordon* v. *Lowell*, 21 Maine, 251, 257. To the same purport are *McDermutt* v. *Strong*, 4 Johns. Ch. Cas. 687, and the numerous cases cited by Ch. KENT in that case, and in *Thompson* v. *Brown*, 4 Johns. Ch. Cas. 619.

In *Fletcher* v. *Holmes*, 40 Maine, 364, 368, where a bill in equity brought by an administrator in behalf of the creditors to obtain property belonging to his intestate, was defeated by reason of not having exhausted legal remedies, the court suggested that the creditors there had the remedy now pursued by this plaintiff.

We now come to the two exceptions taken to instructions in the charge.

After stating to the jury the principal issue, whether the grantor, when he made the conveyance, intended thereby to defraud,

delay or hinder his creditors; if he did not, this action could not be maintained; but if he did, then whether the defendant, knowing of such intention on the part of the grantor, accepted the deed for the purpose of aiding or assisting him in carrying it out, the presiding justice proceeded to call the attention of the jury to the alleged contract, telling them that the defendant put in evidence of it "to show that he was entirely honest in the transaction," that the plaintiff claimed no such contract was ever made while the defendant claimed there was, and instructed the jury to ascertain "whether it was true or false; if false, it does not necessarily give the case to the plaintiff;" but if false, "to ascertain how far it bears upon the question of fraud in taking the conveyance." Thereupon, in the same connection, he proceeded to give the instruction first excepted to, viz: "Whether that contract was a legal one, if made, is not of consequence here. It is only of consequence so far as this: if a man accused of a fraud, as this defendant is, puts in a false explanation of his transactions, of his acts which are claimed to be fraudulent, the jury have a right to consider that as bearing upon the question of his honesty, for the simple reason that when a man is honest in his transactions, when he is honest in the acts which are in question, the truth will answer his purpose better than falsehood. Therefore, for that purpose, and for no other, you will examine this evidence with regard to that contract, to see how far it is true or false." Then after telling the jury to consider all the testimony upon both sides and to reconcile the conflicting testimony so far as they found it necessary and proper, the presiding justice gave the following instruction (excerpts from which constitute the defendant's second exception to the charge) viz: "The question in regard to that contract is not whether it was valid, not whether it was binding upon the parties, because that is not material; because if it was not binding upon the parties, the grantor could have refused to fulfill, if it was binding, then he could fulfill it. That is not the issue before us; it is only whether he has set up the truth in justification, or whether he has set up a falsehood; and then say how far that bears upon the question of fraud. . . . . If it was an honest transaction, no matter whether there

was any consideration for it or not; the property itself might be open to attachment, but the party to the deed could not be mulcted in double damages until he is proved to have acted fraudulently."

All these instructions obviously relate to the question, whether or not any such oral contract as the defendant set up, was ever in fact made between himself and his father; and the jury must, under the instructions, have found for the plaintiff on that issue. And on that issue, it was immaterial whether it was valid or binding upon the parties. And, of course, if no such contract was made, there was no occasion for the court to instruct the jury as to its validity upon the main issue. We fail, therefore, to perceive wherein the defendant could have been aggrieved by the instruction, so far as the objection raised by the defendant is concerned.

But there is another view equally fatal to the exceptions. Assuming what the case nowhere shows, that the defendant contended below that the deed was made to carry out the oral contract which being taken out of the statute of frauds by part performance on the part of the defendant, it was proper for the jury to consider it, if valid, on the question of the grantor's intention in making the conveyance; and assuming, against the finding of the jury, that the contract, as testified to by the defendant, was actually made, we still think the defendant was not aggrieved by the instruction that the validity or invalidity of the contract was immaterial.

The general rule has long been settled that a part performance by the purchaser, of an oral contract for the sale and purchase of land, may take the contract out of the operation of the statute of frauds, and authorize a court of general equity powers, in the exercise of a sound discretion, to decree specific performance of the contract on the part of the vendor. 2 Story's Eq. Jur. § 259 *et seq.* 1 Sugd. Vend. (8th Am. ed.) c. 18, § 7. 4 Kent's Com. 451. Browne, Frauds, § 452. This is said to be upon the ground that one party shall not interpose the statute of frauds to defraud the other party, it appearing that it would be a fraud upon the latter who has acted in good faith relying that the former would do the same, if the contract is not completed. And although this court has heretofore, on account of limited equity

powers, declined to decree specific performance of oral contracts, (*Stearns* v. *Hubbard*, 8 Maine, 320; *Wilton* v. *Harwood*, 23 Maine, 131; *Bubier* v. *Bubier*, 24 Maine, 42,) still since February 28, 1874, when there was conferred upon the court "full equity jurisdiction, according to the usage and practice of courts of equity in all cases where there is not a plain, adequate and complete remedy at law," specific performance of oral contracts is within the equity powers of this court. St. 1874, c. 175; *Wilton* v. *Harwood*, *supra*; *Potter* v. *Jacobs*, 111 Mass. 32.

But whether the alleged contract was such as the court in its discretion might enforce is immaterial to our present inquiry; for the proposition cannot be successfully maintained that the conveyance did in fact fulfill on the part of the grantor the oral contract. All the witnesses of the defendant upon that subject matter testify with noticeable uniformity as well as unanimity that the defendant was to "have one-half of everything right through;" but the deed conveyed in fact more than three-quarters of the real estate and there were only seventeen dollars' worth of personal.

The defendant does not press his motion, and we think there is ample testimony on the part of the plaintiff to support a verdict in his behalf, if the testimony is true, as the jury, who saw the witnesses, have declared by their verdict. And it is considerable less in amount than the evidence would warrant; but of this fact the defendant has no reason to complain.

Motion and exceptions overruled.

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

ELIZA LUNT, by guardian, *vs.* JOSEPH STIMPSON.

Cumberland. Opinion March 9, 1882.

Review. Costs. Practice. R. S., c. 89, § 15.

The judge who orders judgment for the prevailing party in an action of review must determine whether in his opinion justice requires that such party should recover the costs to which he would have been entitled in the origi-

nal action had he then prevailed, and the decision of such judge upon this question is conclusive and cannot be reversed by this court on exceptions.

If he makes no order to the contrary, then, by the provisions of § 15, c. 89, R. S., the prevailing party shall have judgment for such costs with the other sums to which he is entitled.

ON EXCEPTIONS.

Review of an action of trover which was once reported in 70 Maine, 250.

The opinion states the case.

C. P. Mattocks, for the plaintiff, cited: *Dunlap* v. *Burnham*, 38 Maine, 112; *Crehore* v. *Pike*, 47 Maine, 435; *Curtis* v. *Curtis*, 47 Maine, 525; *Dyer* v. *Wilbur*, 48 Maine, 287.

Henry Orr, for the defendant, cited: same case, 70 Maine, 250; *Dyer* v. *Wilbur*, 48 Maine, 287; *Jay* v. *Carthage*, 48 Maine, 353; *Tibbetts* v. *Shaw*, 19 Maine, 204; R. S., c. 89, § 12; c. 82, § 104.

BARROWS, J. It is not now an open question whether substantial justice would not have been as well done if the judgment originally rendered had been left unreviewed; nor whether if the plaintiff's cause had been more discreetly managed in the first instance much of the cost which has now accumulated might not have been saved.

It is true that there is danger of a miscarriage of justice when a case comes to trial upon a review, after the death of a witness upon whom the party originally prevailing had relied; it is also true that care ought always to be taken in the granting of reviews to impose such conditions as will prevent pertinacious litigants from taking advantage of their own laches to oppress their adversaries with costs; but these are questions and considerations to be addressed to the judge who hears the petition for review, and when he has settled them as matters of discretion, his conclusions can not be revised by this court on exceptions.

The only question before us on these exceptions is, whether judgment was entered for the plaintiff in review for the sums which she was legally entitled to recover, she having obtained upon the trial in review a verdict in her favor, and no legal objection being interposed to the entry of a proper judgment upon

the verdict. In the original suit the defendant had judgment against her for his costs. Upon the review the presiding justice ordered judgment to be entered in her favor for a sum equal to the amount of the verdict she had obtained, and the amount of this judgment against her for costs, with interest from the date of its rendition, and the further sum of one hundred and thirty-four dollars and five cents, being the sum which she would have been entitled to recover as costs in the original action had she then prevailed, the amount of the judgment recovered by the defendant for costs in the original suit, and interest, (the same never having been paid by the plaintiff,) to be offset *pro tanto* against this, and execution to issue in her favor for the balance.

This seems to be in strict accordance with the provisions of R. S., c. 89, § § 11, 12 and 15, unless we are to understand that the statement in the exceptions that the judge "ruled as matter of law" that the plaintiff was entitled to these sums, signifies that he held her so entitled without regard to his own opinion on the question whether justice required that she should have what she would have been entitled to recover as costs in the original action.

We do not find that defendant's counsel in his argument claims that the exceptions should be so construed, though he dwells much upon the injustice of allowing the plaintiff costs which she heaped up by her own irregular and improper management. But the question whether justice required that she should recover those costs, was for the presiding justice and his opinion on that question must be regarded as conclusive. The mandate of § 15 is that they shall be recovered "unless the court shall otherwise order."

Here it does not appear that the court did otherwise order, but the contrary, and the refusal to make the order necessary for his relief appears to be the basis of the defendant's complaints.

In *Brown* v. *Cousens*, 51 Maine, 307, this court, after passing upon the exceptions taken to the instructions given at the trial on the review, remarked that as no reason was given why the defence of the statute of limitations upon which the defendant finally prevailed had not been set up in the original action, the

defendant ought not to recover costs in that proceeding; but there the question had not been passed upon at *nisi prius*; and it does not thence follow that, when it has been so passed upon, the correctness of the judge's decision can be re-examined on exceptions.

The provisions touching this matter in § § 12 and 15, c. 89, taken together, mean that the judge in ordering judgment for the successful party in review shall inquire and determine whether such party ought in justice to have costs in the original action, but unless he otherwise orders it shall be taken for granted that in his opinion justice does require it.

Exceptions overruled.

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

ANDREW L. T. JONES *vs.* GEORGE W. PARKER.

Cumberland. Opinion March 9, 1882.

Chattel mortgage — recording of. Evidence. R. S., c. 91, § 2.

It is competent in an action of trover, brought by the mortgagee of personal property against an attaching officer, to show that the plaintiff's mortgage was withdrawn by him from the clerk's office, where it should be recorded, after delivery and before it was recorded.

The entry of the date of receiving the mortgage for record made upon the back of the mortgage and in a book kept for that purpose by the town or city clerk, does not show the date of the record, except by inference, and that inference may be overcome by evidence showing the contrary.

The proper construction of the words "it shall be considered as recorded when received," in R. S., c. 91, § 2, is that it shall be so considered while the mortgage remains on file. If it is withdrawn by the mortgagee, or by his order, before it is recorded, it is withdrawn from the record, and the entry is of no avail.

ON agreed statement of facts from superior court.

Trover to recover the value of certain personal property, brought by the mortgagee of the same, against an attaching officer.

Plea, general issue, with a brief statement.

The opinion states the material facts.

The following are the entries made by the city clerk at the time of receiving the mortgage for record; upon the back of the mortgage in the following words and figures:

"———ss. Received March 7th, 1881, at 11 h. A. M. and recorded in book 25, page

Attest: H. I. Robinson, City Clerk."

And in a book kept in his office, entitled "Records of entry, City of Portland," in the following words:

"1881, March 7, 11 h. A. M. William H. Taylor to Andrew L. T. Jones."

P. J. Larrabee, for the plaintiff.

The record made by the city clerk in his entry book, and his certificate upon the back of the mortgage are conclusive and cannot be contradicted by parol evidence. *Crommett* v. *Pearson*, 18 Maine, 344; *Tracy* v. *Jenks*, 15 Pick. 465; *Ames* v. *Phelps*, 18 Pick. 314; *Adams* v. *Pratt*, 109 Mass. 59; *Fuller* v. *Cunningham*, 105 Mass. 442; *Stevens* v. *Whittier*, 43 Maine, 376; *Heard* v. *Goodwin*, 37 Maine, 181.

And they met the requirements of the statutes as to noting the time of receiving the mortgage, and the mortgage must be considered as recorded from that date. R. S., c. 91, § 2.

Bradbury and McQuillan, for the defendant, cited: *Sawyer* v. *Pennell*, 19 Maine, 167; *Handley* v. *Howe*, 22 Maine, 560; *Holmes* v. *Sprowl*, 31 Maine, 75; Jones, Chattel Mortgages, § § 264, 276; *Stedman* v. *Perkins*, 42 Maine, 130; *Morrill* v. *Sanford*, 49 Maine, 566; *Bither* v. *Buswell*, 51 Maine, 601; *Platt* v. *Steward*, 13 Blatch, 481; S. C. 101 U. S. 731; 10 Mich. 500; 23 Wis. 532.

DANFORTH, J. This action is submitted upon an agreed statement of facts, and involves the title to certain personal property; the plaintiff claiming under a mortgage, and the defendant under an attachment. The mortgage is prior in date, and no objection is made to its validity, except the want of a seasonable record. That it was seasonably delivered to the clerk, and that he correctly entered upon it the time of its reception, and also made a similar entry with the names of the parties in a book entitled, "Records

of entry, City of Portland," is agreed. It was not then recorded, and no entry was made at that time in the book where it was subsequently recorded.

The entry in the "Records of entry," does not seem to be required by the statute, R. S., c. 91, § 2, and without the mortgage gives no information which is expected to be derived from the records, and in fact adds nothing to what is derived from the entry upon the mortgage itself. It is convenient to enable an interested party the more readily to ascertain whether there is a mortgage such as he is looking for on file; but can serve no other purpose. The entry of the time received in the book where it is recorded, is required by law but need not, perhaps cannot, be made until it is actually recorded. The language of the law is, "the clerk . . . shall record all such mortgages delivered to him, in a book kept for that purpose, noting therein, and on the mortgage, the time when it was received; and it shall be considered as recorded when received." The noting on the mortgage should, to prevent mistakes, undoubtedly be made at the time of the delivery. It was so made in this case, and the counsel claims that such an entry, together with the one subsequently made in the record book, is conclusive proof that it was so received and recorded. If that is so, it gives a title prior to the defendant's attachment, and the plaintiff must recover. But though we should concede that the entry may be conclusive proof of the time when the mortgage was received, though of this we give no opinion, it does not follow that it is conclusive, or any proof of the time it is actually recorded. The law does not require any entry of the date of the record. In this respect the clerk's duty is performed when he notes upon the mortgage, and in the book of records, "the time when it was received." Whatsoever is done more than this in respect to this entry, is not done under an official sanction. Hence in this case we find no proof of the time of its actual record. There is an entry upon the mortgage of the time when it was received, and the additional fact that it was recorded and the place where recorded. As to the time of record there is no date. If that were material, and especially if a part of the official duty of the clerk, as there is but one date, we

should infer, as contended by counsel, that such date applies to both transactions. But that would be but an inference which could be rebutted by oral or other evidence without contradicting the record. It would only be supplying an omission which is not required to make a complete record. Besides, the statute evidently contemplates that the record will not at once follow the delivery, else there would be no occasion for the provision, "it shall be considered as recorded, when received." We may then properly, and without contradicting any record or statement even of the clerk, admit the facts showing when the record was made, and by so doing, we find there was a space of time between the delivery and the actual record.

Still we are met with the provision of the statute, that "it shall be considered as recorded, when received." This undoubtedly means, that after the delivery and entry, the effect shall be the same as if actually spread upon the records. This, however, must have a reasonable construction. It must be understood as consistent with the purpose of the law, which is to give notice to all persons interested, not only of the existence of a mortgage, but of its contents. Hence we must understand that this provision applies only when the mortgage is left with the clerk until recorded. Otherwise that part of the statute which requires a record, might, with entire safety be disregarded, and the purpose of the law be entirely defeated. The agreed statement shows that this mortgage was not so left, but was taken away by the plaintiff himself, and while away, the creditor's attorney as well as the defendant, made the proper examination of the records and inquiries of the clerk, and finding no mortgage on file, or on record, made the attachment.

But again it is said this is not admissible evidence because it contradicts the records. But there is no record or entry that shows the mortgage to have been on file at the time when it was looked for. As before, in the absence of proof, we might so infer. In this respect there is an omission. The date of the first delivery is undoubtedly correct. But when returned, no date is given, and that is the delivery under which it was recorded. What the effect might have been if taken by any other person than the

mortgagee or by his authority, we do not now decide. In this case it was taken by the mortgagee. It was his right to do so. If the clerk had been present, it was no part of his duty to prevent it. He had no occasion even to inquire into his motive, but might, without any fault on his part presume that it was a withdrawal from the record, as it really was. That the mortgagee supposed it to have been recorded, is not material. The defendant or the creditor had nothing to do with bringing about that mistake, and therefore should not suffer for it. Thus we are led to the conclusion that at the time of the attachment, the mortgage was not recorded; nor under the law could "be considered as recorded." *Boynton* v. *Grant*, 52 Maine, 228.

Plaintiff nonsuit.

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

SULLIVAN C. TOWLE and another, by IRA F. TOWLE, father and next friend, *vs.* W. F. DRESSER and another.

Somerset. Opinion March 9, 1882.

Minors, contracts of, rescission of.

If minors having in their possession the consideration received by them upon the sale and delivery of their goods and chattels desire to return the same to the party contracting with them and rescind the contract, they may do so during their minority as well as within a reasonable time after they come of age; and upon the refusal of the other party to accept the consideration returned and to restore the property, they may maintain trover, prosecuting their suit by *prochein ami* for the property withheld from them.

The rescission of a minor's contract in this manner through the intervention of an agent employed by him for that purpose is not manifestly nor necessarily prejudicial to the minor and is therefore not to be classed nor regarded as void; and his appointment of an agent for such purpose is at the worst only voidable; and the opposite party when thus notified of the rescission, if he refuses to accept the consideration returned and to restore the property can no longer shield himself under the contract.

Even if the failure of the infant to present himself personally to make the rescission were to be regarded as a valid objection—still if the other party, without questioning the authority of the agent to act in the premises at the time of the tender and demand, simply refuses to restore the property and accept

the tender he may be regarded as waiving the objection. The disability of infancy is a personal privilege which the infant and his legal representatives only are entitled to assert.

ON REPORT.

Trover for a horse sold and delivered to the defendants by the plaintiffs, who were minors and claimed they had rescinded the contract of sale and tendered the consideration received.

At the trial after the evidence was out, the court ruled that the action could not be maintained and ordered a nonsuit; and by agreement of parties the case was reported to the full court. If the action can be maintained upon the proof offered, the nonsuit is to be taken off and the action is to stand for trial.

The facts are stated in the opinion.

J. B. Peaks and C. A. Farwell, for plaintiffs, cited: *Robinson* v. *Weeks*, 56 Maine, 102; *Edgerton* v. *Wolf*, 6 Gray, 453; *Chandler* v. *Simmons*, 97 Mass. 508; *Boody* v. *McKenney*, 23 Maine, 517; *Gibson* v. *Soper*, 6 Gray, 280; *Stafford* v. *Roof*, 9 Cow. 626; *Miles* v. *Boyden*, 3 Pick. 213; *Bradford* v. *French*, 110 Mass. 365; Schouler, Dom. Rel. 532; *Hastings* v. *Dollarhide*, 24 Cal. 195; *McCarty* v. *Murray*, 3 Gray, 578; *Hardy* v. *Waters*, 38 Maine, 450; *Whitney* v. *Dutch*, 14 Mass. 457.

D. D. Stewart, for the defendants.

Three questions of law arise in this case.

Can a *prochein ami* authorize an agent to rescind a contract on behalf of a minor?

Can a minor himself employ such an agent?

Can a minor rescind a contract until his arrival at age?

I. A father as guardian by nature of his son has no control over his property, real or personal, and has no right to demand possession of personal property. *Coombs* v. *Jackson*, 2 Wend. 153; *Bradford* v. *French*, 110 Mass. 368; *Miles* v. *Boyden*, 3 Pick. 213; *May* v. *Calder*, 2 Mass. 55; *Fonda* v. *VanHorn*, 15 Wend. 633. The power of a *prochein ami* commences with the suit, and he can therefore maintain a suit for such causes only as may be prosecuted without previous special demand. *Miles* v. *Boyden*, 3 Pick. 219; *Guild* v. *Cranston*, 8 Cush. 506.

II. The great weight of authority is that an infant cannot appoint an agent for any purpose. There are a very few early cases to the contrary, as *Whitney* v. *Dutch*, 14 Mass. 457, and *Hardy* v. *Waters*, 38 Maine, 450, and this last case has been substantially overruled by several subsequent cases or its authority strictly limited to negotiable paper.

"An act which an infant is under a legal incapacity to perform is the appointment of an attorney or in fact an agent of any kind." 1 Am. Leading Cases, 248, (3d ed.) See also, *Fonda* v. *VanHorne*, 15 Wend. 633; *Stafford* v. *Roof*, 9 Cow. 628; *Thomas* v. *Roberts*, 16 Mees. and W. 780; 1 Pars. Contr. (2d ed.) 243; *Guild* v. *Cranston*, 8 Cush. 510; *Valier* v. *Hart*, 11 Mass. 300; McPherson on Infancy, 458, (vol. 25, Law Library N. S.); *King* v. *Robinson*, 33 Maine, 126; *Crockett* v. *Drew*, 5 Gray, 399; *Cutler* v. *Currier*, 54 Maine, 82; *Robinson* v. *Weeks*, 56 Maine, 106; *Marshall* v. *Wing*, 50 Maine, 62.

There was no waiver here by the defendants, by not objecting specially when demand was made on them by an agent, for it nowhere appears that they knew that the plaintiffs were minors.

"A waiver is an intentional relinquishment of a known right." *Shaw* v. *Spencer*, 100 Mass. 395; Bigelow on Estoppel, 506.

The proper course for plaintiffs would have been to have guardians appointed. *Barker* v. *Hibbard*, 54 N. H. 539; *Isaacs* v. *Boyd*, 5 Porter, 389; *Smith* v. *Redus*, 9 Ala. 99.

It may be proper to close this branch of the argument with the remark, that while the courts of common law in England for more than three hundred years, and those in this country for more than one hundred years have considered all branches of the law of infancy, it is believed that no decision can be found holding that an infant can legally appoint an agent to rescind for him a contract. See *Maxham* v. *Day*, 16 Gray, 217; *Anthony* v. *Slaid*, 11 Met. 291; *Costigan* v. *R. R. Co.* 2 Denio, 610; *Russell* v. *Men of Devon*, 2 D. and E. (T. R.) 673.

III. The precise question was before the supreme court of New York in *Roof* v. *Stafford*, 7 Cowen, 179, and it was there held that a minor could not rescind a contract during minority.

And in *Boody* v. *McKenney*, 23 Maine 517, opinion by SHEPLEY, J., it was held that an infant could not rescind an

executed sale of his personal property until he becomes of age. That decision has never been overruled nor questioned. Whatever may be the conflicts of opinion elsewhere the law of Maine must be held to be settled that an infant cannot avoid an executed sale of his personal property until he arrives of age.

An infant who has repudiated his contract during minority, may, on arriving at age, disaffirm his own repudiation. *Railway Co.* v. *McMichael*, 5 Exch. 127; *Railway Co.* v. *Coombe*, 3 Exch. 565; *Roof* v. *Stafford*, 7 Cow. 183.

BARROWS, J. Trover for a horse. The following facts may be regarded as established by the testimony here reported.

In October, 1876, being then minors aged respectively eighteen and sixteen years, the plaintiffs sold and delivered at their own house their colt to the defendants residing in a distant county, receiving therefor two promissory notes of one of their townsmen amounting to two hundred dollars, payable to the defendants or bearer, and indorsed by one of the defendants. The following summer one of the notes having become due and remaining unpaid, an attorney at law, employed by the plaintiffs with the assent of their father, went with the notes which he tendered to each of the defendants and demanded the colt. The defendants refused to receive the notes or return the colt, and thereupon this suit was instituted, October 9, 1877, their father appearing as *prochein ami*, never having been appointed their legal guardian. The defendants severally pleaded the general issue, with brief statements asserting that the sale was made as above to one of them; that it was never legally rescinded nor any tender of the notes made to, or legal demand for the restoration of the colt upon either of them, and denying the refusal to return or the conversion. The notes were placed upon the clerk's files for the use of the defendants and their attorney notified of the fact. A nonsuit having been ordered the question is, whether upon the above facts the action is maintainable, and this involves the inquiry: 1, Whether minors can rescind an executed sale of their personal property during their minority? 2, Whether they can notify the vendee of their election to rescind, offer to return the consideration and demand a restoration of their property by an agent? 3,

Whether, if the response to such notification, offer and demand is a simple refusal by the vendee to accept the return of the consideration and to restore the property, without objection on the ground of want of authority in the agent to make the demand, it would be competent for the jury to find a waiver on the part of the vendee of any possible defect in the demand on that score, and a conversion by him accordingly?

When men of full age get possession of property by making a contract with infants, they will do well to bear in mind the familiar doctrines of the text books, that, "when the law says that they (infants) are not capable (of making contracts) until the age of twenty-one years, it is for *their* sake and by way of protection to *them*, that only those of their contracts which the court can see and declare to be to their prejudice will be pronounced void, and those that are not clearly so but may be useful will be held at the worst only voidable at the election of the infant himself, and that it is a general rule that the disability of infancy is the personal privilege of the infant himself, and no one but himself or his legal representatives can take advantage of it." "Were it otherwise this disability might be of no advantage to him but the reverse." See Parsons on Contracts, 1st ed. vol. 1, pp. 243, 275, 276.

Here the defendants claim the right to set up the disability of the minors to appoint an agent in order to relieve themselves from a liability which it is plain they could not otherwise avoid. If they can do it successfully it is manifestly a case where the disability is no advantage to the infant, but the reverse.

I. As to the power of minors to rescind an executed sale of their personal property during minority upon returning the consideration received. We find no good reason either upon principle or authority to deny that power. It is the legitimate use of the shield with which the law covers their supposed want of judgment and experience, and places both parties *in statu quo ante*, a condition of things of which it would seem neither ought to complain. By reason of the transitory nature of personal property, to withhold this right from the infant, perhaps for a term of years, until he became of age, would, in many cases, be to make it utterly valueless.

In support of their denial of its existence, defendants rely upon *Roof* v. *Stafford*, 7 Cowen, 179, and the dictum of a former learned justice of this court, in *Boody* v. *McKenney*, 23 Maine, 525.

The case in 7 Cow. 179, was reversed on appeal, *Stafford* v. *Roof*, 9 Cowen, 626, where it was held that although he could not avoid a conveyance of land until he became of age he might a sale of chattels. The power is expressly recognized in *Shipman* v. *Horton*, 17 Conn. 483; *Carr* v. *Clough*, 26 N. H. 280, 293.

And this is the principle upon which alone the numerous class of cases proceed in which the minor after he has worked for a man has been allowed to repudiate his contract to labor for a fixed period of time at a certain rate of wages, and to recover by suit through the intervention of a next friend what his work was fully worth without regard to his stipulations. For illustration, see *Judkins* v. *Walker*, 17 Maine, 38; *Derocher* v. *Continental Mills*, 58 Maine, 217; *Boynton* v. *Clay*, *Id.* 236; *Vehue* v. *Pinkham*, 60 Maine, 142.

The learned judge who uttered the dictum in *Boody* v. *McKenney*, 23 Maine, 525, would never have recognized it as an authority or decision of the point. It was purely a dictum, put forth, apparently on the strength of the case in 7 Cowen, 179, in a discussion of the decided cases for the purpose of seeing how far the remarks in them were capable of being harmonized. See *ibid.* p. 523. Defendants' counsel cannot expect us to give it more credit than he would have us give to *Hardy* v. *Waters*, 38 Maine, 450, against which he so stoutly contends.

II. But this last named case was we think rightly decided, and it stamps as inaccurate and unsound all dicta or decisions (if such there be) which hold all acts done and contracts executed by an infant through the intervention of an agent void, and on the contrary relegates the appointment of agents (for certain purposes at least) by them to the class of voidable contracts to be disposed of by the rules applicable to that class. And it recognizes the cardinal principle that in relation to all voidable acts and contracts, infancy is a personal privilege which no one but the infant or his legal representative is entitled to assert.

In the almost inevitable confusion of dicta which arises from speaking of voidable acts when avoided as void, the only recourse seems to be to revert to what is declared in *Tucker* v. *Moreland*, 10 Pet. 59, on the authority of Kent's Commentaries, to be "the result of the American decisions," "that they are in favor of construing the acts and contracts generally to be voidable and not void," at all events in cases where they are not manifestly and necessarily prejudicial.

What we mean to hold is, that the rescission of a minor's contract through the intervention of an agent employed by him for that purpose is not manifestly nor necessarily prejudicial to the minor, and is therefore not to be classed as void; and that where as here it is accompanied by the restoration of the consideration it will be so far effectual that the other party can no longer shield himself under the contract from a liability to restore or make compensation for such of the infant's property as he acquired by the contract.

It is not for him to set up the infant's disability for his own protection when the contract has thus been rescinded. It is difficult to find any valid reason for the subtle distinction once set up between cases where the money has been paid or goods delivered on sale by the hand of the infant, and other cases of a minor's contract which are deemed voidable for the protection of the infant from the consequences of his want of discretion and experience. The act is none the less indiscreet and injurious because it is complete; on the contrary it may be more so.

While, under the circumstances of this case we regard the offer to return the notes as necessary to a valid rescission, we are not to be understood as deciding by implication that there are no conceivable cases in which the infant can be allowed to rescind without returning the consideration. Whether where we hold the minor capable of rescinding his contracts of this sort we ought not also to hold that such rescission is irrevocably binding on him is a question which will deserve serious consideration when it necessarily arises. It would seem that the personal privilege has performed all its legitimate functions of a "shield" to the infant when it has resulted in restoring the

original condition of things and in placing him and his property on the same footing as though no contract had ever been made.

III. The conclusion reached on the second question disposes of the case for the present, without requiring the consideration of the third. But it may not be amiss to remark that the cases of *Miles* v. *Boyden*, 3 Pick. 213, and *Seguin* v. *Peterson*, 45 Vermont, 255, well illustrate the unwillingness of courts to defeat suits for the enforcement of the rights of minors for want of a sufficient demand in their behalf wherever a waiver of the defect by the other party may be inferred from his neglect to raise the objection promptly. No want of authority on the part of the plaintiff's attorney to notify them of the rescission and to demand a return of the property was suggested by these defendants when he tendered them their notes and reclaimed the horse.

It can hardly be doubted that they knew the ground upon which the claim was made. And it would seem that upon the ground of waiver also the action might have been maintained. It was the duty of the defendants on being informed of the plaintiff's election to rescind the contract to receive the proffered notes and return the plaintiffs' horse.

As they refused to do this and can no longer defend the possession of the animal on the ground of a subsisting contract they are liable upon the testimony before us for the value of the beast and interest from the date of the conversion.

The exceptions must be sustained.

Nonsuit set aside. New trial granted.

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

GEORGE H. JORDAN

vs.

SYLVANUS HARMON, and CHARLES E. JUDKINS, alleged trustee.

Androscoggin. Opinion March 11, 1882.

Trustee process. R. S., c. 86, § 32.

When it appears by the disclosure of an alleged trustee that the fund in his hands is claimed by a third person, if the plaintiff would make his process

of foreign attachment available, he must pursue the course prescribed in R. S., c. 86, § 32, and have the claimant cited in if he does not appear voluntarily. If the plaintiff neglects this, and calls, instead, for an adjudication on the disclosure, the court cannot ignore the claim of such third person or decide it adversely in a suit to which the steps requsite to make him a party have not been taken; and the trustee must be discharged.

ON EXCEPTIONS from municipal court of Lewiston, certified to the law court, in accordance with the provisions of § 10 of the act establishing the municipal court of Lewiston.

Assumpsit on an account annexed for necessaries.

The exceptions were to the ruling of the municipal judge discharging the trustee upon the following disclosure:

"On the twelfth day of April, 1881, I was station agent of Maine Central Railroad at Lisbon, Maine. On that day I received from T. P. Shaw, paymaster of said corporation, the sum of $29.70 in lawful money, the same being the sum due from said corporation to said defendant for his labor in its employ as section hand for the month of March, 1881, with directions to pay said sum to defendant and procure his signature to the pay roll. On April twelfth, 1881, at about four o'clock, P. M. I saw defendant at the village in front of C. B. Jordan's shop, told him I had his money for him, that I was ready to pay it and asked him twice to step into Jordan's shop, sign the pay roll and let me pay him the money. He declined, said John Smith was to have the money and said to me, 'You can go in and pay it to John Smith, or keep the money for me till evening; you come over this evening and we will fix it up.'"

"Before I saw defendant again at about 6h. 45m. in the evening of the same day the trustee process was served upon me. On the thirteenth day of April, 1881, the next day after the service of the writ on me, I paid the money over to E. N. Chamberlain by request of defendant. Chamberlain wrote defendant's name on pay roll, then paid the money to John Smith and handed me a bond of indemnity signed by said John Smith. The writ was served upon me at the station house by W. B. Jordan, constable, and plaintiff was with him. Harmon was not in the employ of the corporation when the money was received by me."

Asa P. Moore, for the plaintiff, cited: *Ball* v. *Gilbert*, 12 Met. 397; Drake on Attachment, § § 487, 514, 526, 674; *Union M. F. Ins. Co.* v. *Holbrook*, 4 Gray, 235.

Hutchinson and Savage, for the trustee.

BARROWS, J. If a creditor would make the goods, effects or credits of his debtor, in the hands and possession of an alleged trustee available for the payment of his debt, he must pursue the course prescribed by the statutes regulating trustee process. He cannot have an adjudication against the trustee which will expose the trustee to litigation with any third party whose claim to the fund by virtue of an assignment from the principal debtor, or in any other way, has been made known by the trustee in his disclosure.

In R. S., c. 86, § 32, the course which the plaintiff must take in such case is marked out. Unless the party named in the disclosure as asserting a claim to the fund voluntarily appears, it is incumbent upon the plaintiff to cite him in. If, after such citation, he does not appear in person or by attorney (or if, appearing, he fails to maintain his claim by due proof,) the assignment shall have no effect to defeat the plaintiff's attachment.

But his rights cannot be judicially determined until he is made a party to the suit either by his own voluntary act, or by a citation from the court at the instance of the plaintiff. If the plaintiff fails to put the case into such a position that there may be a conclusive determination as to the validity of the assignee's claim before the trustee's disclosure is presented to the court for final adjudication, the court must discharge the trustee. He must not put the possible burden of a future controversy with the claimant on the trustee. It was for the plaintiff to have that question settled, and the validity of his attachment so far as that might affect it, ascertained before he called upon the court to pass upon the disclosure.

Unless he takes the proper steps as directed by the statute to remove the obstacle, the claim of the third party thus disclosed will "have the effect to defeat his attachment." *Burnell* v. *Weld, & trustee*, 59 Maine, 423, and cases there cited. It may be true as plaintiff's counsel contends that after Judkins had informed Harmon

of his reception of the money from the paymaster to pay the sum due to Harmon as wages from the railroad company, and proposed to pay it over to him, and Harmon had directed him to pay it to John Smith or keep it till evening when it could be fixed up, the money, so far as the principal defendant had any interest in it, was so deposited in Judkin's hands, that, in a suit for necessaries, he might be held as trustee of Harmon.

But the disclosure shows at the same time that the fund was claimed by John Smith; and the plaintiff instead of pursuing the course pointed out by the statute to secure a determination of the question between himself and Smith, asks us to ignore Smith's claim or hold that it is not valid without giving him an opportunity to be heard.

The court below rightly refused to do this and discharged the trustee.

Exceptions overruled.

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

BENJAMIN F. HARRIS and another, in equity,

vs.

HENRY C. PEABODY and others.

Cumberland. Opinion June 7, 1881.*

Stat. 1878, c. 74, § 11. 1879, c. 154, § 3. Insolvency. Equity jurisdiction. Partnership creditors, when they share in the separate estates.

Under the provisions of stat. 1878, c. 74, § 11, as amended by stat. 1879, c. 154, § 3, the Supreme Judicial Court has full power to revise by proper process, the proceedings, orders and decrees of the court of insolvency had and made under § 54 of the former statute.

The provision of stat. 1878, c. 74, § 54, which in case of insolvency of a partnership and its several members appropriates the net assets of each estate to its own debts, and the surplus of each to the creditors remaining of the other, is applicable only when there is available joint estate and all the partners are insolvent.

*Received by the Reporter May 16, 1882.

When there are no available net proceeds of partnership assets and no solvent partner, the partnership creditors share the separate estate concurrently with the separate creditors.

ON REPORT.

Bill in equity, heard on facts stated in the bill, the respondents reserving the question of jurisdiction.

(Bill.)

"State of Maine, Cumberland, ss. In Insolvency. In the matter of Williams and Norton, insolvents.

"To the Honorable Justices of the Supreme Judicial Court: Respectfully come Benjamin F. Harris, of Portland, in our county of Cumberland, and State of Maine, and the First National Bank located and doing business at said Portland, and in behalf of themselves and all other partnership creditors of Williams and Norton, file this petition against Henry C. Peabody and George E. Bird, each of said Portland, assignees of Williams and Norton, and John C. Proctor of said Portland, and David Boyd of Cape Elizabeth, in said county. And thereupon allege and say: On the 15th day of April, A. D. 1879, at a session of the insolvency court, having jurisdiction of proceedings in insolvency, held at Portland within and for the county of Cumberland, Royal Williams and James A. Norton, each of said Portland, copartners under the firm name of Williams and Norton, upon their own petitions were adjudged insolvent debtors individually and as copartners, that on the 5th day of May, A. D. 1879, at a session of said court held for that purpose, Henry C. Peabody and George E. Bird were appointed assignees of the estate of said Williams and Norton, individual and copartnership, and thereafterwards on the same day, accepted said trust, and were qualified as such assignees, that said Harris is a creditor of said partnership whose claim has been proved and allowed in said insolvency for $1174.18, and said bank is a creditor of said partnership, whose claim has been proved and allowed in said insolvency for $747.07. At a session of said insolvency court held at said Portland on the third Monday, to wit, on the 25th day of March, A. D. 1880, said assignees filed in said court the petition a copy of which is hereto

annexed, and your petitioners say that the matters alleged in said petition are true.

"On the 5th day of April, A. D. 1880, the judge of said insolvency court after due notice to, and upon full hearing of the parties interested in said petition, and the facts set out in said petition being admitted, ordered and decreed that the partnership creditors of said Williams and Norton are not entitled to a dividend from the assets of Royal Williams, and the said Judge further ordered and decreed that from the sum of $1177.06 mentioned in said petition, said assignees pay the sum of $1133.67 to and among the creditors of said Royal Williams, according to their respective claims as set forth in said petition, a copy of which order and decree are hereto annexed as part of this petition.

"Which order and decree was erroneous in law, because upon the facts shown by the case aforesaid, your petitioners are entitled to receive *pro rata* dividends from the assets of the estate of Royal Williams, in the same manner and to the same extent as the individual creditors. That said Proctor and Boyd are the largest of said individual creditors, holding more than two-thirds of all the individual debts, and would fairly represent the individual creditors aforesaid. Wherefore your petitioners pray this honorable court to review said order and decree and correct the same, and to grant to your petitioners such relief in the premises as justice and equity require."

William L. Putman, Solicitor.

Benjamin F. Harris.
First Natl. Bank of Portland,
per Wm. E. Gould, Cashier.

William L. Putman, for the plaintiffs, cited: *Harlow* v. *Tufts*, 4 Cush. 451; Bump's Bankruptcy, (10th ed.) 786, 787; *Amsinck* v. *Bean*, 22 Wal. 403; *Egery* v. *Howard*, 64 Maine, 68; *Hacker* v. *Johnson*, 66 Maine, 24; Story, Part. § 360; Lindley, Part. (3d ed.) 700; Robson, Bankruptcy, 583; *Ex parte Kensington*, 14 Ves. 447; *Tucker* v. *Oxley*, 5 Cranch, 183; *Knight's Case*, 8 N. B. R. 436; *McEwen and Sons*, 12 N. B. R. 11; *Melick's Case*, 4 N. B. R. 95; *Kennedy's Case*, 2 D. M. and G. 228; *Ex parte Peaks*, Rose's Cas. in Bank. 54; *Ex parte Birley*, 2 M. D. and D. 354; *Ex parte Geller*, 2 Mad. 262.

George C. Hopkins, *Charles P. Mattocks*, *and Strout and Holmes and E. P. Payson*, for different defendants, furnished able briefs, citing: *Howe* v. *Lawrence*, 9 Cush. 553; *Somerset Works* v. *Minot*, 10 Cush. 592; *Ensign* v. *Briggs*, 6 Gray, 329; *In re Marwick*, 2 Ware, 235; *In re Owen Byrne*, 1 N. B. R. 122; *Ex parte Kennedy*, 19 E. L. and E. 150; Story's Eq. Jur. § 2; *Williams* v. *Brimhall*, 13 Gray, 465; *McCulloh* v. *Dashiell*, 1 Harris and Gill, 96; *Murrill* v. *Neill*, 8 How. 427; *Forsyth* v. *Woods*, 11 Wall. 484.

VIRGIN, J. Royal Williams and James A. Norton, copartners under the firm name of Williams and Norton, upon their own petition, were individually and as copartners duly adjudged insolvent debtors. The assets of the partnership, amounting to one dollar and nineteen cents only, were absorbed by the expense of selling the same. Norton's individual estate had no assets, while Williams', after deducting legal costs and charges, amounted to eleven hundred and seventy-seven dollars and thirty-six cents.

Against the partnership estate, claims amounting to more than twenty-two hundred dollars were proved; against Williams' individual estate eleven hundred and thirty-three dollars and sixty-seven cents; and against Norton's, no claims.

Before the court of insolvency the partnership creditors claimed a *pro rata* dividend from the separate assets of Williams *pari passu* with his individual creditors; but the judge denied the claim and decreed that the assignees should distribute those assets among the individual creditors. Thereupon the complainants brought this bill (claimed by them to be authorized by the insolvent statute of 1878, c. 74, § 11, as amended by stat. 1879, c. 154, § 3,) somewhat in the nature of an appeal from the decree of the judge of insolvency; and the parties have brought the case before us on an agreed statement, reserving the question of jurisdiction of this court, which is expressly raised.

1. Jurisdiction. By the provisions of the original act (stat. 1878, c. 74, § 10,) an appeal lay "in all cases arising under this act." This section was amended by stat. 1879, c. 154, § 2, by providing that "no appeal shall lie in any case under this act

unless specially provided for therein." If this court has no jurisdiction under § 11 to revise the decree of the judge of insolvency, then the complainants are without relief, since the section (§ 54,) under which the decree was made, contains no special provision for an appeal.

By § 11, "full equity jurisdiction in all matters arising under this act" is given to this court. This language is very sweeping and comprehensive; and although it does not contain some of the specific terms adopted in the Massachusetts statute (from which very many of the provisions of our statute were derived,) we think the legislature intended to confer upon the court full power to revise in the manner therein specified the proceedings, orders and decrees of the court of insolvency in all cases in which no other remedy is given by the statute; and that such power was given in part for the purpose of avoiding a suspension of all further proceedings below till the appeal is settled, and also to secure a consistent and uniform application of the law. *Barnard* v. *Eaton*, 2 Cush. 301-2. A like construction has been given to a somewhat similar provision in the Massachusetts insolvent act, § 16, Mass. Insolv. Laws, (Cutler's ed.) 29, and cases there cited. See also cases cited under U. S. R. Stat. § 4986.

2. The next question is, was the decree of the court of insolvency correct in ordering a distribution of Williams' individual assets among his separate creditors, to the exclusion of the complainants, the creditors of the firm. The respondents rely upon the provisions of § 54, stat. 1878, c. 74, and certain cases cited of their brief.

It is familiar history that as early as 1715, Lord Ch. HARCOURT laid down as the rule of administering the joint and separate estates in bankruptcy, that the joint estate shall be applied in payment of the partnership debts, and the separate estate, of the separate debts, any surplus of either estate being carried over to the other. *Ex parte Crowder*, 2 Vern. 706. This doctrine was followed by Lord Ch. KING, in *Ex parte Cook*, 2 P. Wms. 500. But it seems that this rule was departed from by Lord THURLOW who let in creditors of the firm concurrently with the separate creditors, upon the separate estate, upon the ground that they

were equally creditors of the firm and of the partners. *Ex parte Cobham*, 1 Bro. C. C. 576; *Ex parte Hodgson*, 2 Bro. C. C. 5; *Ex parte Page*, 2 Bro. C. C. 119. The former rule was restored, however, by Lord LOUGHBOROUGH (*Ex parte Elton*, 3 Ves. 239; *Ex parte Abell*, 4 Ves. 837,) confirmed by Lord ELDON; (*Ex parte Clay*, 6 Ves. 813; *Ex parte Taitt*, 16 Ves. 193,) and it has been the prevailing general rule ever since in England. Lindl. Part. (3d Eng. ed.) 1201; Robs. Bank. 584; Colly. Part. (Perkins' ed.) 775-6; *Lodge* v. *Prichard*, 1 De G. G. and S. 609;, and in this country as well. Among the numerous cases, see *Wilder* v. *Keeler*, 3 Paige, 167; *Payne* v. *Mathews*, 6 Paige, 19; *Murray* v. *Murray*, 5 Johns. Ch. 60; 3 Kent, 64, 65; Story Partn. § § 376-378; *In re Marwick*, 2 Ware, 233; Pars. Partn. 480, *et seq.* and notes. This rule was also adopted in the U. S. Bankrupt Law, 1841; (5 U. S. Stat. 440, 448, § 14,) U. S. Bankrupt Law, 1867, (§ 36, R. S., U. S. § 5121); in the Insolvent Laws of Massachusetts, (1838, § 21,) and in the Insolvent Laws of this State, stat. 1878, c. 74, § 54. *Jarvis* v. *Brooks*, 23 N. H. 136.

This rule applies to the estates as they exist when the parties are declared bankrupt or insolvent, and not before; for the creditors of the firm have no lien upon its property which can prevent the partners from *bona fide* changing its character and converting it into the separate estate of one of them prior thereto. *Ex parte Ruffin*, 6 Ves. 119; *Case* v. *Beauregard*, 9 Otto, 119; *Robb* v. *Mudge*, 14 Gray, 534.

The reasons assigned for giving the partnership creditors the preference over the joint estate in bankruptcy have been various. But the view generally taken founds it not upon any lien or superior claim which they primarily have, but upon a privilege or preference sometimes denominated a lien "derived from the equitable right which each partner, who being liable for all the partnership debts and whose interest in its property being simply his share of the residue after payment of its debts and settlements of its accounts, consequently has that the partnership property shall go to pay its debts in preference to those of any individual partner. *Case* v. *Beaureguard*, *supra*; *Johnson* v. *Hersey*, 70

Maine, 74; *Washburn* v. *Bellows Falls Bank*, 19 Vt. 286, 288. It has also been said that this priority in joint assets and equality in the separate are founded on the fact that the partnership creditor trusted each and all the partners while the separate creditor trusted but one; and that natural justice warrants the marshalling of the assets so as to give the former the preference. *Brock* v. *Bateman*, 25 Ohio St. 609. That it is familiar law that a creditor of a partnership, having recovered a judgment against it, may satisfy his execution against partnership property or against the individual property of any of the partners; (*Juchero* v. *Axley*, 5 Cranch, 34, 40; *Egery* v. *Howard*, 64 Maine, 68, 73; *Washburn* v. *Bellows Falls Bank*, *supra*,) and in the case of intervening insolvency, having two funds, from which to satisfy his claim, the principle familiar in marshalling assets or securities, comes in and compels him to exhaust the fund to which he has the exclusive right before he be allowed to compete with a creditor who has a claim only on one of the funds. *Ex parte Elton*, 3 Ves. 240; 1 Story Eq. § 558. Lord Justice TURNER, said: "This rule may perhaps proceed upon this: that the joint estate is clearly liable both at law and in equity for the joint debts, at law, by reason of the survivorship, and in equity by virtue of the rights of the partners, *inter se*, to have it so applied; and that the separate estate is as clearly liable, both at law and in equity, for the separate debts; and that the carrying over the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estate being liable for the separate debts only so far as the interest of the partners from whom the debts may be due may extend, and from the separate estates, if taken for the joint debts, having recourse over against the joint estates, and which arise also from the equities between the parties." *Lodge* v. *Prichard*, *supra*. Prof. Parsons suggests the ground that a partnership is a distinct entity, contracting its own debts, having its own creditors, and possessing its own property applicable to its debts. That when it has ceased to exist, it is resolved into its elements and the relations between its members and creditors arise. If the

joint debts have been paid, the former partners share the remaining property. If the joint funds are not sufficient to pay its debts, they who were its members become the debtors of the joint creditors. Pars. Part. 346-7.

The rule that each estate is to be applied to its own debts, and the surplus of each to the creditors remaining of the other, is applicable only to the facts upon which it is predicated, *i. e.* when there is joint estate, and all the partners are insolvent. But if there is no available joint estate and no solvent partner, then the creditors of the partnership have no exclusive fund to exhaust, but may share concurrently with the separate creditors the separate estate. *Ex parte Hayden*, 1 Bro. C. C. 454, and notes in Perkins' ed. 398; Colly. Part, § 926; Lindl. Part. 1234; Story Part. § 380; Pars. Partn. 482. In some of the cases this is called an exception to the rule. Professor Parsons says that "instead of being an exception it is a case that falls without the rule." Others say it is a part of the rule. Judge DRUMMOND, after stating what he denominates "the well established rule upon the subject," says: "It is partly on the ground that, although it is a debt of the firm, it is still a debt against each individual member of it, for the satisfaction of which the property of each is responsible; and that being the only source to resort to for the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members." *In re Knight*, 8 N. B. R. 436, 438. The same doctrine prevails in all the federal dist. courts. *In re Marwick*, 2 Ware, 233; Bump, Bankruptcy, (9th ed.) 771 and cases there cited. Such, evidently, is the opinion of Mr. Justice CLIFFORD. *Amsink* v. *Bean*, 11 N. B. Reg. 495; S. C. 22 Wall. 395 and the cases of *ex parte Leland*, which he there cites.

We are aware that this question has been decided otherwise in Massachusetts (*Howe* v. *Lawrence*, 9 Cush. 553 and *Som. P. Works* v. *Minot*, 10 Cush. 592); but the answer of Judge DRUMMOND is more satisfactory to our minds. *In re Knight*, *supra*. Neither does the *dictum* of Mr. Justice DANIEL outweigh the great weight of current authority. See also, *Rogers* v. *Meranda*, 7 Ohio St. 179; *Brock* v. *Bateman*, 25 Ohio St. 609.

It seems there were some joint assets, though not enough to pay the cost of selling; and hence (in the language of the statute) no "net proceeds." In such case, there should be considered no joint assets. Though when there are any available joint assets, however small in value, the rule is applicable. Lindl. Partn. 1235; Colly. Part. § 926; Story Partn. § 380, says they must be enough to be "available." The question is thoroughly examined in *In re McEwen*, 12 N. B. R. 11. As recently as December, 1880, the question came before Judge CHOATE (S. D. N. Y.), who said: "It is, however, unnecessary to go into this question, because in a recent decision, which is conclusive on this court, the right of firm creditors to share *pari passu* with individual creditors in the individual estate has been recognized and enforced, where the firm, as well as the individual partners, had been adjudicated, and the firm assets were not more than sufficient to pay the costs and expenses properly chargeable to the firm estate. *In re Slocum*, D. C. Vt. Oct. 4, 1879; S. C. affirmed on review, by BLATCHFORD, C. J., December 13, 1880." *In re Litchfield*, 5 Fed. Rep. 47, 50.

Decree reversed. Decreed that the partnership creditors of Williams and Norton are entitled to dividends from the assets of the estate of Royal Williams, pari passu with his separate creditors.

WALTON, BARROWS, LIBBEY and SYMONDS, JJ., concurred. APPLETON, C. J., did not concur.

JULIA A. FOLSOM *vs.* JOSEPH H. CRESSEY and others.

Kennebec. Opinion March 15, 1882.

Poor debtor's disclosure. Record of inferior courts. Evidence.

Inferior courts, such as magistrates hearing poor debtors' disclosures, are not required to make up full and formal records; their doings may be shown by their minutes and the original papers or certified copies; and the original papers are admissible whenever certified copies are.

Eleven days' notice to the creditor of a poor debtor's disclosure, although the statute prescribes fifteen, is sufficient if the creditor appears at the disclosure, and does not then object to the notice; the insufficiency of the notice is thereby waived.

The force of the regular minutes and papers in a poor debtor's disclosure cannot be overcome by a statement subsequently certified by the magistrates, a paper which is not legally a part of the regular proceedings.

A debtor need not swear to his disclosure taken in writing unless requested by the creditor so to do.

ON EXCEPTIONS from superior court.

Debt on a poor debtor's bond.

The questions presented by the exceptions and the facts bearing upon them are stated in the opinion.

Bean and Beane, for the plaintiff. There is nothing showing the appearance of the creditor, and the documents put in evidence by the defendants show no legal notice of the disclosure. R. S., c. 113, § 52; *Williams* v. *Burrill*, 23 Maine, 144; *Call* v. *Mitchell*, 39 Maine, 465; *Mace* v. *Woodward*, 38 Maine, 426.

There is no legal evidence of the organization of the justices' court nor or of their doings. The record was the best evidence and none was produced. *Paul* v. *Hussey*, 35 Maine, 97; *State* v. *Hall*, 49 Maine, 412; *Lewis* v. *Benner*, 51 Maine, 108; *Chamberlain* v. *Sands*, 27 Maine, 458; *Bank* v. *Treat*, 18 Maine, 340; *Williard* v. *Whitney*, 49 Maine, 235; *Ayer* v. *Fowler*, 30 Maine, 347; *Spaulding* v. *Record*, 65 Maine, 220.

S. and L. Titcomb, for the defendants, cited: *Baker* v. *Holmes*, 27 Maine, 153; *Lowe* v. *Dore*, 32 Maine, 27; *Neal* v. *Paine*, 35 Maine, 158; *Waterhouse* v. *Cousins*, 40 Maine, 333; *Pike* v. *Harriman*, 39 Maine, 52; *Granite Bank* v. *Treat*, 18 Maine, 342; 1 Greenl. Ev. § 513; *Page* v. *Plummer*, 10 Maine, 334; *Moore* v. *Bond*, 18 Maine, 144; *Lord* v. *Skinner*, 9 Allen, 376; *McInerny* v. *Samuels*, 125 Mass. 427; *Palmer* v. *Dougherty*, 33 Maine, 502; *Bailey* v. *McIntire*, 35 Maine, 107; *Sanborn* v. *Keazer*, 30 Maine, 457; *Smith* v. *Brown*, 61 Maine, 73.

PETERS, J. In this action, debt upon a poor debtor's bond, the defendants introduced in evidence, to prove a disclosure by the debtor, the citation to the creditor and officer's return thereon,

the record of disclosure and the certificate of discharge issued by the justices.

This documentary evidence was objected to by the plaintiff because it consisted of original papers, the plaintiff contending that the only proper evidence to establish a defense, would be an extended and certificated record. But original papers are admissible where certified copies are. Either is just as good evidence as the other. Both are original evidence. The record of disclosure, as usually kept by justices, is not a full description of all the proceedings, and may be aided and extended by other papers, if there are not contradictions between them. Such inferior courts are not required to make up full and formal records, and their doings may be shown by their minutes and the original papers or certified copies. *Knox* v. *Silloway*, 10 Maine, 201; *Chamberlain* v. *Sands*, 27 Maine, 458; *State* v. *Bartlett*, 47 Maine, 396; *Sawyer* v. *Garcelon*, 63 Maine, 25.

The plaintiff contends that the service of the citation was not good, eleven days' notice being given instead of fifteen. The answer to this objection is, that the creditor appeared and participated in the disclosure, and made no objection to the notice. The deficiency of notice was waived. Had an objection been made, there would have been time enough for a new notice before the forfeiture of the bond. *Moore* v. *Bond*, 18 Maine, 144; *Randall* v. *Bowden*, 48 Maine, 37; *Smith* v. *Brown*, 61 Maine, 70.

The plaintiff introduced at the trial a written disclosure signed by the debtor, upon which the magistrates, under date of April 25, 1879, certify that the disclosure was taken on December 24, 1878, the papers submitted in evidence by the defendants showing that the proceeding took place on December 7, 1878. The plaintiff contends that this certificate nullifies the evidence of disclosure relied upon by the defendants. There is an unexplained discrepancy between the papers. But there is much more certainty that the defendants' papers represent the real proceeding than that the paper introduced by the plaintiff does. The citation was returnable on the seventh of the month. The record of disclosure shows that upon that day the oath was

administered. The certificate declares the same thing. These papers are *prima facie* evidence of a discharge of the debtor on that day. *Dunham* v. *Felt*, 65 Maine, 218. While the certificate upon the disclosure is in no proper sense a record or minute of record required by law. *Randall* v. *Bradbury*, 30 Maine, 256; *English* v. *Sprague*, 33 Maine, 440.

The plaintiff further contends that the discharge of the debtor was improperly granted because the written disclosure was not sworn to. He was not requested to swear to it. There was no error in the proceedings on that account. R. S., c. 113, § 29.

Exceptions overruled.

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

CHARLES WILSON *vs.* HENRY C. BORSTEL.

Knox. Opinion March 15, 1882.

Shipping. Seaman's wages, three months' extra for discharge in foreign port. Seaman's part may be recovered at common law. Practice.

A seaman discharged with his own consent in a foreign port, who was prevented by the conduct of the master from making application to the American consul at the place of discharge, may maintain an action at common law against the master for two months' wages as his part of the three months' extra pay which the U. S. R. S., § § 4582, 4584, required the master to pay to the consul on account of the discharge of such seaman.

It is too late to raise a question at the law court, which was not reserved in reporting the case.

ON EXCEPTIONS.

Assumpsit on an account annexed for wages as seaman, together with two months' extra pay for discharge in Liverpool.

The opinion states the material facts.

Rice and Hall, for the plaintiff, cited: *Emerson* v. *Howland*, 1 Mason, 45; *The Saratoga*, 2 Gallison, 181; *Ogden* v. *Orr*,

12 Johns. 143; Abbott, Shipping, 620; *Orne* v. *Townsend*, 4 Mason, 549; *The Juniata*, Gilpin, 193; *The Dawn*, 1 Ware, 499.

C. E. Littlefield, for the defendant.

The only item contested in the account annexed to the plaintiff's writ is that for "two thirds of three months' wages extra by reason of discharge in Liverpool, eighty dollars."

This cannot be recovered in this action. To recover, the plaintiff must prove a contract express or implied to pay the eighty dollars. He does not pretend that there was any such contract. His right to recover, if any, depends entirely on the U. S. R. S., § 4582, and the cause should have been specially declared, alleging all the facts relied upon to make this defendant liable at common law. 1 Chitty Pl. (16th ed.) 111, 112, 311, 350, 360; *Bennett* v. *Davis*, 62 Maine, 544; *Penley* v. *Whitney*, 48 Maine, 351; *Cape Elizabeth* v. *Lombard*, 70 Maine, 398; *Palmer* v. *York Bank*, 18 Maine, 173; *Sanford* v. *Haskell*, 50 Maine, 86; *Wentworth* v. *Hinckley*, 67 Maine, 370; *Bath* v. *Freeport*, 5 Mass. 326; 2 Greenl. Ev. (13th ed.) 103, 117; *Richardson* v. *Kimball*, 28 Maine, 463.

These extra wages are recoverable in admiralty only. *Ogden* v. *Orr*, 12 Johns. 143; *Sullivan* v. *Morgan*, 11 Johns. 66; *Pool* v. *Welch*, 1 Gilpin, 143; *The Dawn*, 1 Ware, 499; Abbott, Shipping, 620; *Van Beuren* v. *Wilson*, 9 Cow. 158; 2 Parson, Ship. and Ad. 56; *Wells* v. *Meldrum*, Blatchford and Howland, 345; *Betsy and Rhoda*, 2 Ware, 123.

PETERS, J. The United States statutes provide, that, whenever a ship or vessel, belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall with his own consent be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul the list of the ship's company, and to pay to such consul, for every seaman so discharged, three months' pay over and above the wages that may then be due to such mariner or seaman, two-thirds thereof to be paid by such consul to each seaman or

mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other third to be retained for the purpose of creating a fund for the assistance, in several ways named in the statutes, of destitute American seamen. U. S. R. S., § § 4582, 4584.

It appears in this case, that the plaintiff, an American seaman, was, with his own consent, discharged by the defendant in a foreign port; was prevented by the conduct of the master from making an application to the American consul at the place of discharge; and that the three months' extra wages never were paid or offered by the master to anybody. After both parties returned home, the seaman sues the master, to recover two months' wages, in an action at common law. We think the action may be maintained.

Suits to recover the seaman's portion of the wages have been frequently sustained in courts of admiralty. In *Emerson* v. *Howland*, 1 Mason, 45, Judge STORY said it was the practice of that court to allow the seaman to recover the two months' wages; and the only question with him was whether the amount due the government should not be recovered in the same libel. Judge HOPKINSON doubted the seaman's right to recover in his own name, but deferred to the opinion of Judge STORY. *The Juniata*, Gilpin, 193. Judge STORY'S ruling has been adopted in some reported, and many unreported, cases in the admiralty courts. *The Dawn*, Ware's R. 499; *The Saratoga*, 2 Gallis, 181; *Orne* v. *Townsend*, 4 Mason, 549; *Hoffman* v. *Yarrington*, 1 Lowell, 168; *Rogers* v. *Lewis*, *Id.* 297; *The Hermon*, *Id.* 515.

In Flanders on Shipping, 133, the doctrine of the cases is summarized by the author as follows: "It would certainly seem, that not only the terms of the law, but the objects to be attained by it, to wit, the return of American seamen to their country, and their maintenance when found destitute in a foreign port, all require that this money should be paid to the consul in the foreign port where the seaman is discharged, and that no other payment or obligation to pay is recognized by the act. But upon the ground that the wages would be entirely lost, and the law violated with impunity, were such a construction of the act

to be adopted, the courts have enforced the payment of the wages here, where the master has refused or omitted to pay them abroad." Parsons, in his work on Maritime Law, vol. 2, p. 576, admits the current of authority to be in accordance with the doctrine thus stated.

If the admiralty court can sustain a libel for such wages, we see no reason why they may not be recovered in an action at common law. That is the rule as to seaman's wages generally. We find no cases deciding the contrary, excepting those relied upon by the defendant, two cases in New York. (*Ogden* v. *Orr*, 12 Johns. 143; *VanBeuren* v. *Wilson*, 9 Cow. 158.) The former is affirmed in the latter case with merely a passing word. In the former case, the grounds of objection to the action, relied upon by the court, were three. First: That the suit lies against the master and not against the owners. Second: Because the money is payable to the consul and not to the seaman. Third: Because the money is payable "as a kind of penalty" upon masters for discharging American seamen in foreign countries.

The first objection does not arise in this case, the action being against the master alone. The second objection does not seem to us a conclusive one, and is well answered by the extract quoted (*supra*) from Flanders on Shipping. The money is payable to the consul, but belongs to the seaman. The policy of paying it to the consul instead of to the seaman, is lost when the master and mariner have both arrived home. It would be an useless circuity and an idle ceremony, and very likely a profitless errand, to send the seaman out of court, to endeavor to collect his wages in the name of the American consul. Judge STORY says, in the case of *The Saratoga*, *supra*, that the courts will enforce the collection for the sailor directly against those who are circuitously compelled to pay the wages. All the cases proceed upon the idea, that the consul is in reality an agent of the seaman, to enable him to obtain a passage to the United States, and that when the seaman has returned home, the object and policy of the agency have been attained.

Nor do we think that the wages are recoverable as a "penalty" or in the "nature of a penalty." Without the statute, the master

would be liable in damages for not returning the seaman to this country, as his contract obliges him to do, and the seaman would have his right of action therefor. The statute merely determines what the damages shall be. *Croucher* v. *Oakman*, 3 Allen, 185; 2 Pars. Mar. Law, 576. Judge STORY said; "The act having given the sum as wages, it is recoverable as such." In *Rogers* v. *Lewis*, *supra*, Judge LOWELL says: "The two months' wages are intended to secure to mariners, whose contract is unexpectedly terminated, a fixed compensation, in whatever part of the world they may be, as an indemnity for their disappointment. It is a conventional sum which may be much more or much less than an actual indemnity." Judge SPRAGUE says, in *Knowlton* v. *Boss*, Sprague's Dec. 166, that the two months' additional pay can be recovered specifically as wages, and that the right to recover the wages "is a kind of statute extension of the original contract." In the same case reported in 12 Law Rep. 13, it was called a "kind of statute 'substitution' for the original contract." The shipping articles do not contain the whole agreement between the master and mariner, but refer to the law for its completion. The agreement is partly created by the parties and partly by the law. The statutory provision for two months' wages is a tacit part of the contract of the parties. In no just sense, can it be, in our judgment, regarded as a penalty. *Sheffield* v. *Page*, 1 Sprague's Dec. 285, 287.

The point is made, at the argument, that the wages are not recoverable upon an account annexed, but should have been declared for by a special count in assumpsit. The point comes too late. It was not reserved in reporting the case. *Knight* v. *Fort Fairfield*, 70 Maine, 500.

Verdict to stand.

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

STATE *vs.* INTOXICATING LIQUORS, E. C. MOFFITT, claimant.

Kennebec. Opinion March 16, 1882.

C. O. D. Spirituous liquors. R. S., c. 27, § 37.

Courts and juries from their general information may take the initials C. O. D, when affixed to packages sent by common carriers from seller to buyer, to mean, that a delivery is to be made upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods.

A package of spirituous liquor so sent and seized by an officer from an express company before delivery to the buyer, may be reclaimed by the buyer from the state, if not liable to confiscation, no other party or person making any claim.

ON REPORT of facts agreed, upon an appeal from trial justice to superior court.

The opinion states the material facts.

H. M. Heath, county attorney, for the state.

At the time of the seizure the claimant had no right to the liquor. R. S., c. 27, § 37.

The contract of sale must be regarded as made in Massachusetts, as it was by letter from Winthrop to Boston. *Milliken* v. *Pratt*, 125 Mass. 374; *McIntyre* v. *Parks*, 3 Met. 207; *Orcutt* v. *Nelson*, 1 Gray, 536; *Kline* v. *Baker*, 99 Mass. 253; *Jordan* v. *Dobbins*, 122 Mass. 168.

By the law of Massachusetts the sale being for cash on delivery the title was in the vendors until payment. *Stone* v. *Perry*, 60 Maine, 48; *Seed* v. *Lord*, 66 Maine, 580; *Whitney* v. *Eaton*, 15 Gray, 225; *Hirschorn* v. *Canney*, 98 Mass. 149; *Adams* v. *O'Connor*, 100 Mass. 515; *Deshon* v. *Bigelow*, 8 Gray, 159.

J. H. Potter, for the claimant, cited: Benj. Sales, § § 44, 181, 693; *Hunter* v. *Wright*, 12 Allen, 548; *Abbott* v. *Shepherd*, 48 N. H. 14.

PETERS, J. The claimant sent an order to a firm in Boston for whiskey, to be forwarded to him by express, C. O. D. The whiskey was sent, as ordered, to the town of Winthrop in this state. Immediately upon its arrival, before the claimant could

get it, the package was seized as liable to confiscation under the liquor act. Immediately after the seizure, the claimant tendered the charges to the express company, and demanded the package, both of the express company and of the officer. It is not now claimed that the liquor was for any reason liable to confiscation, and it is withheld by the government for the purpose of ascertaining whether the claimant, who made himself a party to the legal proceedings, is a proper person to whom the liquor may be returned.

Undoubtedly, the initials C. O. D. meant, collect on delivery, or more fully stated, deliver upon payment of the charges due the seller for the price, and the carrier for the carriage, of the goods. These initials have acquired a fixed and determinate meaning which courts and juries may recognize from their general information. What can be established by indisputable proof may be acknowledged without proof. What is notorious needs no proof. 1 Whar. Ev. § 330; Best, Ev. 351.

Here, then, was a sale of the property to the claimant, the price payable on delivery. The rule that requires a delivery does not apply, inasmuch as creditors or second purchasers are not interested. The statute of frauds does not apply, for the price of the goods must fall far short of thirty dollars. The contract stands upon the simple rule of the common law. The seller was entitled to his price, and the buyer to his property, as concurrent acts. The title passed to the vendee when the bargain was struck. Any loss of the property by accident would have been his loss. The vendor had a lien on the goods for his price. The vendor could sue for the price, and the vendee, upon a tender of the price, could sue for the property. 2 Kent's Com. 492; *Merrill* v. *Parker*, 24 Maine, 89; *Wing* v. *Clark*, *Id.* 366; *Chase* v. *Willard*, 57 Maine, 157.

By § 37, c. 27, R. S., the claimant must have "a right to the possession" of the liquors "at the time when seized." If the magistrate is satisfied that "the claimant is entitled to any part of the liquors seized," the same are to be surrendered to him.

In this case both the seller and purchaser had a qualified right of possession; the seller, upon the purchaser's neglect or refusal

to pay for the goods; and the buyer, by paying for the same. The buyer had a right of possession upon a condition which he was willing and ready to perform, which has since been performed, and which would have been performed in the manner intended by the parties to the sale, but for the act of the officer. The counsel for the state cites *Stone* v. *Perry*, 60 Maine, 48. The controversy there was between seller and purchaser. In the present case, the seller does not appear and makes no claim. We think the claimant's right to possession must be regarded as better than that of the state.

A return ordered.

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

STATE *vs.* BENJAMIN L. JONES.

Knox. Opinion March 16, 1882.

Assault and battery, Jurisdiction. Police court, Rockland. R. S., c. 118, § 28.

The Supreme Judicial Court has original jurisdiction by indictment of the offense of assault and battery. This jurisdiction is concurrent with the jurisdiction of municipal and police courts and trial justices when the offense is not of a high and aggravated character.

The act establishing the police court of Rockland, confers upon it "exclusive jurisdiction over all such criminal offenses committed within the limits of said city as are cognizable by justices of the peace or trial justices;" *Held*, that this means exclusive, not as against all courts, but only as against courts of the same grade, as against justices of the peace and trial justices.

ON motion to dismiss the indictment.

Indictment for assault and battery.

The terms of the report provided that if this court has original jurisdiction, and the indictment can legally be found by the grand jury, the case was to stand for trial; otherwise a discontinuance was to be entered.

H. B. Cleaves, attorney general, for the State, cited: Priv. stat. 1850, c. 166; 1852, c. 283; 1854, c. 360, § 11; 1861, c.

78; R. S., c. 132, § 4; stat. 1879, c. 114; *John Hersom, Petitioner*, 39 Maine, 476.

D. N. Mortland, for the defendant, contended that the police court of Rockland, had exclusive jurisdiction of the offense charged in the indictment, by the act establishing the court, stat. 1861, c. 78, and cited, *State* v. *Billington*, 33 Maine, 146.

PETERS, J. This is an indictment in common form for assault and battery. The motion is to dismiss the indictment because it is for a minor offense, a subject for complaint and not indictment, exclusively within the jurisdiction of the police court of Rockland.

By § 4, c. 132, R. S., judges of municipal and police courts, and trial justices, have jurisdiction of assaults and batteries when the offense is not of a high and aggravated character. But it is not therein or elsewhere prescribed that they shall have exclusive jurisdiction in such cases.

Section 1, c. 131, R. S., provides, that "the Supreme Judicial Court shall have original jurisdiction, exclusive or concurrent, of all criminal offenses, except those of which the jurisdiction is conferred by law on municipal and police courts and trial justices, and appellate jurisdiction of these." This section is a combination of several previously existing statutory provisions, and the meaning at first view may not be clear. But the words "the jurisdiction," in their connection in this section, mean more than the word jurisdiction simply would imply. Here the words mean all (original) jurisdiction, or the exclusive (original) jurisdiction. Otherwise the words in the section, "or concurrent," would have no meaning. The case of *State* v. *Mullen*, 72 Maine, 466, is decisive of this case.

Further: By § 28, c. 118, R. S., the offense of assault and battery is punishable by imprisonment less than one year, or by fine not exceeding two hundred dollars, and by c. 82, laws of 1872, the punishment is enlarged so as not to exceed five years in the state prison, or a fine of one thousand dollars. And now an assault and battery may be a felony. *State* v. *Goddard*, 69 Maine, 181. Of course an aggravated assault and battery

would ordinarily be beyond the jurisdiction of police courts or trial justices. Still, we cannot know of what grade the offense is by the allegations. There is no necessity of alleging particular enormities. It is "assault and battery" that is thus punishable. Whether an assault and battery shall be punished as of a high and aggravated character, depends upon the proof and not the intensity of the allegations. If a committing magistrate finds, by the proof, that the offense charged is a minor matter, he can retain the case to be disposed of within his own jurisdiction. If otherwise, he should send the case to the court above, as an offense fit for indictment and beyond his jurisdiction.

The act establishing the police court of Rockland, confers upon it "*exclusive* jurisdiction over all such criminal offenses committed within the limits of said city as are cognizable by justices of the peace or trial justices." This means exclusive, not as against all courts, but only as against courts of the same grade, as against justices of the peace and trial justices. The act allows that court to absorb the jurisdiction which before belonged to justices of the peace and trial justices.

Case to stand for trial.

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

JOHN M. SKINNER and others *vs.* BILEY LYFORD and others.

Somerset. Opinion March 16, 1882.

Poor debtor's bond to obtain release from arrest for taxes.

A poor debtor's bond given to obtain a release from an arrest for taxes should run to those persons who were assessors of the town at the time the arrest was made, to be a valid statute bond; but if it run to those persons who were assessors at the time the tax was assessed, it will be a valid bond at common law.

ON REPORT.

Debt on a poor debtor's bond given by Biley Lyford, the principal defendant, to procure his release from arrest for the taxes of

1876, in the town of St. Albans. The bond run to the assessors who signed the tax warrant, and not to the assessors who were in office when the arrest was made.

The question submitted to the court was, whether the bond was void or valid.

D. D. Stewart, for the plaintiffs, cited: *Bates* v. *Butler*, 46 Maine, 393; *Hoxie* v. *Weston*, 19 Maine, 322; *Athens* v. *Ware*, 39 Maine, 345; *Kavanagh* v. *Saunders*, 8 Maine, 422; *Burroughs* v. *Lowder*, 8 Mass. 381; *Randall* v. *Bowden*, 48 Maine, 37; *Smith* v. *Brown*, 61 Maine, 70; *Clapp* v. *Cofran*, 7 Mass. 101.

Josiah Crosby, for the defendants, contended in an able argument, that the bond was void. The points of the argument are stated in the opinion. Counsel cited: Stat. 1878, c. 79; *Purple* v. *Purple*, 5 Pick. 226, and contended that the cases of *Hoxie* v. *Weston*, 19 Maine, 322; *Athens* v. *Ware*, 39 Maine, 345; and *Pindar* v. *Upton*, 44 N. H. 358, cannot be regarded as authority to sustain the validity of the bond in suit.

PETERS, J. One of the defendants, to procure his release from arrest for taxes, gave the poor debtor's bond sued in this action, running to those persons who were assessors of the town when the tax was assessed, when it should have been to those who were assessors when the arrest was made. Laws of 1879, c. 79. It is not, therefore, a statute bond. The question is whether a suit may be maintained upon it as a valid bond at common law.

It is, in this State, a well settled rule, that a bond from a debtor, in the custody of the sheriff, voluntarily offered to obtain his release, accepted by the creditor, imposing the same conditions as those required by law or conditions similar thereto, not forbidden by the statute or public policy, though varying from the bond prescribed for such purpose by the statute, is a good bond at common law.

That principle clearly covers this case. Here is a bond in accordance with the requirements of the statute, excepting in a single particular. The variation is, that one set of assessors are made the trustees of the town, instead of another set. The

statute designates one set of assessors to represent the town as creditors, and the parties agree upon a different set. The statute prescribes one form, and the parties substitute another. There is nothing illegal about it; no oppression is practiced; a consideration is not wanting. Practically, the one form is as serviceable as the other.

The counsel for the defendants suggests considerations against the lawfulness of the bond, which go to the question of convenience more than anything else. It is said, the plaintiffs are only private citizens. But they are a portion of the real creditors, and are in the place of all the creditors by representation. They are the obligees or covenantees by description. *Carr* v. *Bartlett*, 72 Maine, 120. It is said, that they could not receive the money from the debtors for the town; and it is asked how the town could get the money out of their hands, if paid to them. We can appreciate no difficulty about that. Either set of assessors would be a nominal party, and either could be dealt with as well as the other. Had the bond been to those who were the assessors of the town at the time of the arrest, their offices must have expired before the bond would have been forfeited. It is further said, that one condition of the bond was impossible of performance; that the debtor could not surrender himself to the jailer, because the jailer could not receive him upon a common law bond. But the debtor could have tendered a surrender of himself at the jail, and that act might have been a performance or have excused a further performance. But, be that as it may, the rule is, that if there are several alternative conditions, one or more of which are, at the execution of the bond, impossible to be performed, the condition of the bond will be broken, if none of the others be performed.

We think, however, the question is foreclosed against the defendants by our own adjudications in cases presenting the same question. *Hoxie* v. *Weston*, 19 Maine, 322; *Athens* v. *Ware*, 39 Maine, 345. And we think that the doctrine of those cases is supported, rather than opposed, by the New Hampshire case cited by the defendants. (*Pindar* v. *Upton*, 44 N. H. 358.) We do not concur with the counsel for the defendants, in regard-

ing the authorities cited by the court in *Hoxie* v. *Weston*, *supra*, as a groundless support for the decision in that case, or as mal-apropos to the question there discussed. We think them to be good illustrations of the adaptations which the law furnishes, to preserve the spirit of the maxim, that papers shall, if possible, be so interpreted *ut res magis valeat quam pereat.*

The counsel for the defendants insists strongly upon the case of *Purple* v. *Purple*, 5 Pick. 226, as an adverse authority upon this question. We cannot so regard it. In that case, an officer undertook to replevy goods, taking a bond of the plaintiffs to himself instead of to the defendant. That made him a trespasser. He could not proceed a step without a legal bond. Hence, one of the requirements in the definition of a good common law bond was wanting. It was an unlawful proceeding. A trespasser took a bond to himself from the party for whom he committed the trespass. The defendant in the original action was no party to the bond directly or indirectly, voluntarily or involuntarily. The case does not disclose that the action upon the bond was prosecuted for his benefit. It may have been for the benefit of the officer. In *Purple* v. *Purple*, the court say, that "bonds varying in some respects from the requisitions of the statute have been held to be good at common law, but in all those cases, the parties to the instrument are right, and the bond is in substance such as by law they have a right to make." This language of the court is much relied upon by the defendants in the present case. Here, the bond is such as the parties have a right to make, and therefore the parties must be right. In the case cited it was otherwise.

Action to stand for trial.

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

CECIL J. BURRILL *vs.* SAMUEL A. PARSONS.

Somerset. Opinion March 16, 1882.

Promissory notes. Tender. Estoppel.

Where the defense to an action on a promissory note was, that it was given for agricultural implements which the payees of the note promised to send the maker within a certain time, but which were not sent nor ever intended to be sent, and that the note was obtained without consideration and by fraud; and it was shown that a small portion of the articles were sent to the defendant and taken by him before the commencement of the suit; *Held*, that the verdict, which was for the defendant, should have been against him for some amount.

In such a case the defendant cannot be permitted to say that he took the articles sent as a trespasser.

When a tender is made for the purpose of fulfilling a contract in part, the party to whom the tender is made cannot without consent take and hold the article tendered for any other purpose, and he would be estopped from denying the true character of the transaction.

ON MOTION to set aside the verdict.

Assumpsit on the following note:

"Dead River, Maine, Oct. 1, 1874.

One year after date, I promise to pay to the order of C. B. Mahan, agent, four hundred thirty-three 75-100 dollars, at First National Bank, Skowhegan, Maine.

Samuel A. Parsons."

(Indorsed) "C. B. Mahan, Agent Granite Agricultural Works, Lebanon, N. H."

Verdict was for the defendant.

Baker and Baker, for the plaintiff.

D. D. Stewart, for the defendant.

PETERS, J. The note in suit was given for agricultural implements which the payees of the note promised to send to the defendant within a certain time. The defense was that the articles were not delivered, that the payees intended never to deliver them, and that the note was obtained by them without consideration and by fraud.

It is undeniable, however, that a small portion of the articles were forwarded by the payees, and actually taken by the defendant prior to the commencement of this suit. The verdict, therefore, which was for the defendant, should have been against him for some amount.

It is contended, that the verdict may stand, upon the ground that the defendant did not accept the articles under the contract, but took them as a trespasser. He cannot stand upon this position. He would be coming into court with a confessed fraud upon his hands of a greater magnitude than the fraud alleged against those who obtained his note. It is very clear that the articles were not in fact so taken, nor could they have been. When they were tendered, as they virtually were, for the purpose of fulfilling the contract in part, the defendant could not, without consent, take and hold them for any other purpose. The law does not allow him to accept the goods and repudiate the effect of an acceptance. If a tender be made for any particular purpose or with any condition, and the tender be taken, the purpose or condition is acknowledged and agreed to by the person taking the tender. The purpose for which, or the condition under which, a tender is made is an inseparable part of the tender itself. If I tender to you my money or goods in payment of my note to you, you cannot take the money, and then say you will account for the money only as a trespasser. You would be estopped from denying the true character of the transaction. The case of *McGlynn* v. *Billings*, 16 Vt. 329, well illustrates the rights of parties in a transaction like this. See 18 Vt. 339.

It is also contended, that the verdict should not be disturbed, because the value of the articles received may not exceed the damages which the defendant sustained by not receiving, at the contract price, all the implements which were to be delivered. But there is no evidence whatever upon which to found this position. *Non constat*, that the defendant was not really benefitted thereby.

Motion sustained.

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

JAMES A. DOW *vs.* GEORGE R. DAVIS.

Cumberland. Opinion March 28, 1882.

Bankruptcy. Discharge. Covenant of seizin.

The discharge in bankruptcy of the covenantor is a bar to an action upon a covenant of seizin, when the eviction took place after the defendant was adjudged a bankrupt but before the order for the final dividend.

ON agreed statement of facts from superior court.

Action of covenant broken.

The opinion states the material facts.

B. J. Larrabee, for the plaintiff.

There is no breach of covenant of warranty until eviction. *Reed* v. *Pierce*, 36 Maine, 455; *Twambly* v. *Henley*, 4 Mass. 442; *Bearce* v. *Jackson*, *Id.* 408; *Chapel* v. *Bull*, 17 Mass. 213; *Gilman* v. *Haven*, 11 Cush. 330.

Plaintiff then had no cause of action against the defendant at the time of commencement of bankruptcy proceedings, and whether he ever would have depended upon the fact whether or not he ever should be evicted, and it was not therefore a contingent debt or liability within the meaning of the bankrupt act. U. S. R. S., § 5068.

The contingency here was whether there would ever be any liability.

There is a difference between a contingent debt or liability, which is provable, and a contingency whether or not there will ever be any debt or liability, which is not provable. *Fernald* v. *Johnson*, 71 Maine, 437; *Reed* v. *Pierce*, 36 Maine, 455; *Ellis* v. *Ham*, 28 Maine, 385; *French* v. *Morse*, 2 Gray, 111, and cases cited. The principle relied upon by the plaintiff, as established by the foregoing authorities, is as applicable to the act of 1867 as to the act of 1841.

Locke and Locke, for the defendant, cited: *Merrill* v. *Schwartz*, 68 Maine, 514; U. S. R. S., § § 5068, 5115; *Williams* v. *Har-*

kins, 15 N. B. R. 34; *Jones* v. *Knox*, 8 N. B. R. 559; *U. S.* v. *Throckmorton*, 8 B. R. 309; Blumenstiel's Bankruptcy, (ed. 1878) 275.

APPLETON, C. J. This is an action on the covenants of a deed, to which the defendant pleads in bar a discharge in bankruptcy.

The land conveyed was under mortgage. When the defendant was adjudged a bankrupt, the plaintiff had not discharged the incumbrance, nor had he been evicted. There was a breach of the covenant against incumbrances, and it is not denied that the plaintiff's claim under that covenant is barred by the discharge in bankruptcy.

The covenants of seizin and good right to convey are practically synonymous and were not broken until the plaintiff's eviction. It was determined, under the bankrupt law of 1841, that these covenants were not barred by the bankrupt's discharge. *Reed* v. *Pierce*, 36 Maine, 456, and cases cited.

In the case at bar, the eviction took place after the defendant was adjudged a bankrupt and before the order for a final dividend and the question arises whether in such case the discharge is a bar under the bankrupt law of 1867.

This precise question does not appear to have heretofore arisen in any adjudicated case and must be determined by the language of the statute.

By the bankrupt law of 1841, "all persons having uncertain and contingent demands against such bankrupt may come in and prove such claims under the act, and shall have a right, when those debts or claims become absolute, to have the same allowed them."

The language of the act of 1867, is: "In all cases of *contingent debts* and *contingent liabilities* contracted by the bankrupt, and not herein otherwise provided for, the creditor may claim therefor, and have his claim allowed, with a right to share in the dividends, if the *contingency shall happen 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, which shall then be done in such a manner as the court shall order, and he shall be allowed to prove for the amount so ascertained."

The act provides for contingent liabilities as well as contingent debts, by adding contingent liabilities to the words of the statute of 1841. The object was to embrace an additional class for which previous legislation had made no provision.

Now, was here a liability and was it contingent, uncertain, dependent on what may or what may not occur? The defendant by signing a deed was bound to the performance of its covenants. There was no present liability under some of the covenants, those in controversy, if the plaintiff became seized. But was there not a liability, which in a contingency might ripen into an existent right of action? If there was not, then in no event could the defendant be liable on his covenants in case of a breach subsequently occurring. If there was, then was there not a contingency of a better outstanding title and an eviction under it? Was there not a contingent liability, a liability contingent upon the happening of the future event by which the contingent liability was changed into an existent one.

If this is not a contingent liability, it is not easy to define what would be such liability. But whether it is a contingent debt or liability, if one or the other, it is immaterial in the present case, for the statute applies to both in case "the contingency shall happen before the order for the final dividend," as it did by the plaintiff's eviction.

The apparent object was, in all cases where the contingency had occurred, if occurring before the order of final distribution, to permit proof to be made of the contingent debt or liability.

The claim of the plaintiff was provable and being provable by the section under consideration, it is barred.

In *Fernald* v. *Johnson*, 71 Maine, 437, the contingency had not happened and it was uncertain whether it would happen before the order for the final dividend. The other cases relied upon by the plaintiff were mainly decisions under the bankrupt law of 1841.

Judgment for defendant.

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

RALPH C. JOHNSON and others, executors,

vs.

PHILO HERSEY and another, and GEORGE G. PIERCE and others, trustees.

Waldo. Opinion March 30, 1882.

Trustee Process. Partnership assets. Individual debts.

The funds of an insolvent firm, paid by one partner upon his private debt, without the consent of the copartner, may be attached in the hands of the private creditor, by trustee process in behalf of a firm creditor, the private creditor knowing when he received the funds that they belonged to the firm.

The principle applies, although the note upon which the payment is made, be the single partner's note with the copartner's name thereon as a surety; and although the money be collected by a draft given in the name of the firm to the order of an agent of the private creditor.

ON REPORT.

Assumpsit upon a promissory note of two thousand dollars.

The question presented by the report was the liability of George G. Pierce and A. B. Mathews as trustees.

In May, 1874, and long before, the defendants were partners under the firm name of Hersey and Woodward. In 1873, one of the defendants, Woodward, gave Pierce a note for five hundred dollars, signed by Woodward as principal and the other defendant, Hersey, as surety. Pierce left the note at the Belfast Savings Bank on his departure for Chicago. May 1, 1874, without the authority, knowledge or consent of Hersey, Woodward drew two drafts in the name of the firm, one for three hundred dollars on D. M. Hodgden and Company, of Boston, and the other for two hundred and thirty-five dollars on Leland, Rice and Company, of Boston, and paid and delivered the same to the treasurer of the Savings Bank to pay the Pierce note. The drafts were upon funds of the firm and were accepted and paid and the treasurer of the Savings Bank sent to Pierce the five hundred and thirty-five dollars by draft on Howard National Bank, Boston.

In the case of Mathews, the report shows that he sold Woodward some furniture and that Woodward paid him on account

one hundred dollars by the draft of Hersey and Woodward on D. M. Hodgden and Company, without the authority, knowledge or consent of Hersey. Mathews testified that at the time he received the draft, he did not know anything about the financial condition of Hersey and Woodward, that he had no reason to believe the firm insolvent, and that he did not know whether or not Woodward paid the firm for the draft.

William H. Fogler, for the plaintiffs, cited: *Blodgett* v. *Sleeper*, 67 Maine, 499; *Johnson* v. *Hersey*, 70 Maine, 74; *Ex parte Weston*, 12 Met. 1; *Ex parte First National Bank*, 70 Maine, 373.

N. H. Hubbard, for the trustees.

The drafts in this case were discounted by the bank and became the property of the bank, the proceeds were the property of Hersey and Woodward and by direction of Woodward were applied to the payment of the Pierce note, and the mis-appropriation was by the bank and not by Pierce who could have no knowledge from whose funds or how his note was paid.

PETERS, J. In this case, as to the other trustees, it was held, that, "where one partner, without the knowledge or consent of his copartner, pays his own note to a private creditor out of the funds of the insolvent firm, such creditor knowing that the money belonged to the firm, the funds so received will be regarded as held by the private creditor in trust for the benefit of the firm, and may be attached in his hands upon a trustee process instituted against the firm by one of its creditors." *Johnson* v. *Hersey*, 70 Maine, 74; *Blodgett* v. *Sleeper*, 67 Maine, 499, is in accord with *Johnson* v. *Hersey*.

We perceive no difference between the facts presented then and those presented now which will enable the present parties to avoid the application of the principle established by the former decision. There, the single partner's note did not have the copartner's name upon it. Here, it has the copartner's name upon it as a surety. This does not, however, make the note a partnership note, the funds given for it having been a loan to the single partner and not to the firm. *Ex parte First National*

Bank, 70 Maine, 369, and cases there cited by the counsel and court.

Here, the money was not collected by the private creditor himself, but his note was collected by an agent, who received therefor drafts drawn in the partnership name, and forwarded the proceeds thereof to his principal. This fact cannot change the principal's reponsibility. The private creditor got his payment of the debt out of a fund which belonged to partnership creditors and not to him.

Trustees charged.

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

WILLIAM CALL *vs.* FRANKLIN HOUDLETTE.

Lincoln. Opinion April 1, 1882.

Shipping. Right of part owner to the earnings. Subrogation.

The administrator of a part owner of a vessel recovered judgment in an action, commenced by his intestate, for the earnings of the vessel, and appropriated a part of the proceeds in compliance with an assignment of the claim by his intestate, as collateral security for debt, and settled the balance of the debt as agent for the surety, and appropriated the balance of the judgment, fifteen hundred dollars, upon another debt of his intestate, which he settled as agent for the same surety, either debt largely exceeding the amount of the judgment. The estate of his intestate was rendered insolvent, and no part of this judgment was charged in the account of administration. The administrator had heard that there was another part owner to the vessel, but received no notice from him until the proceeds of the judgment had been appropriated as aforesaid.

Held, that the other part owner could recover of the administrator his portion of the earnings of the vessel, being less than fifteen hundred dollars, with interest, in an action for money had and received.

ON REPORT.

Assumpsit for money had and received.

The defendant was administrator on the estate of Henry S. Hagar, who, in his lifetime, had commenced an action for freight money of certain vessels, one being the brig Yazoo of which the plaintiff was part owner. Hagar assigned the claims under this action as collateral security for a debt of fifteen thousand dollars, upon which his mother, Sarah Hagar, was holden as surety.

Hagar was also indebted to his counsel in that suit for a larger amount, which was secured by collaterals belonging to his mother. Hagar died before judgment, which was taken in the name of this defendant as administrator. The counsel collected the judgment, and the net proceeds, five thousand dollars, he appropriated by sending thirty-five hundred dollars to the person for whose benefit the Hagar assignment was made, and crediting fifteen hundred dollars on his claim against the Hagar estate. This defendant, as agent for Sarah Hagar, settled and paid the balance of the fifteen thousand dollar debt upon which the thirty-five hundred dollars had been paid, and a few days after as agent for Sarah Hagar settled with and paid the balance due on the claim of the counsel, which was secured by her collaterals, and on which the fifteen hundred dollars were credited. Hagar's estate was rendered insolvent and no part of this judgment was charged to the administrator in his account of administration.

This defendant had heard before Hagar's death that the plaintiff was a part owner of the brig Yazoo, and he knew that a portion of the judgment was for the earnings of the Yazoo, but he received no notice from the plaintiff that he claimed any portion of that judgment, until after its appropriation as above stated, and the settlements were made.

This action was to recover the amount of plaintiff's portion of the earnings of the Yazoo which entered into that judgment, and it was agreed, such portion amounted to $1133.32 at the time of the trial.

A. P. Gould, for the plaintiff.

J. W. Spaulding and *F. J. Buker*, for the defendant.

DANFORTH, J. This case has once been before the law court, 71 Maine, 308, and it was then held that "the plaintiff's ownership is *prima facie* evidence of his right to a share in the sum recovered for the earnings of the vessel, notwithstanding a recovery in Hagar's name alone." That the plaintiff was such an owner, and that the judgment in the action began by Hagar in his lifetime, recovered and collected by this defendant as his administrator included such earnings, are conceded facts. It follows that when that judgment was collected, the defendant

had in his hands a sum of money, the amount of which has been agreed upon by the parties, which belonged to the plaintiff, and which has not been in any way disposed of with his consent.

In the same decision it was held that, "if the defendant in good faith paid over the money or allowed it to be appropriated for the benefit of the estate he represented, without notice not to pay it over, he is not liable therefor." This presented a question of fact for the jury, which was taken from them by the ruling of the presiding justice, and the exceptions filed to that ruling were sustained. By the present report of the case this question is presented to the court upon the evidence.

Starting from the point, which, as we have seen is conceded, that the defendant at one time had money in his hands belonging to the plaintiff, it is quite evident that the burden is upon him to show why he should not be liable in this action; for, as held in *McLarren* v. *Brewer*, 51 Maine, 402, so long as the plaintiff can trace his property he may recover, and to this rule, as there stated, money is no exception. Assuming this burden, the defendant says he appropriated the money in good faith for the benefit of the estate, relying upon the assignment made by his intestate. Upon this point there seems now to be no dispute in regard to the material facts, and without imputing any moral delinquency or fraud to the defendant, we think they fail to sustain the defence.

In his testimony the defendant admits that he had knowledge of the plaintiff's ownership in the vessel. He denies personal and positive knowledge, and lays considerable stress upon that fact. But he admits that he had been so informed both in Hagar's lifetime, and subsequently and from his answers, no other inference can be drawn, than that he believed the information. He also knew that the judgment included a sum for the earnings of that vessel. Here certainly is sufficient knowledge to put him upon his guard, sufficient to induce the belief that the plaintiff had some interest there which should not and could not with propriety be disregarded.

Nor does the assignment under which the defendant claims to have paid the money avail him. Independent of the suspicion which his knowledge should have thrown upon its validity, only

a portion of the money included in the judgment was paid in accordance with its provisions. The assignment was not absolute, but as collateral security for a specific demand. This demand was secured by other property, and the notes were signed by Mrs. Hagar as surety, and after its discharge fifteen hundred dollars were left, more than sufficient to meet the plaintiff's claim.

True, this fifteen hundred dollars was subsequently allowed upon another demand, upon which Mrs. Hagar was also surety. But the defendant could not avail himself of any subrogation to which Mrs. Hagar might have been entitled. This was a personal privilege which she alone could claim, or which she might waive. The case shows that the other collateral was assigned to her, while it does not appear that she made any claim whatever to this. There was then no subrogation in fact.

Another objection to the defence, is the fact that the money was not in a legal sense paid for the benefit of the estate. It was paid upon a demand due from the estate. But the defendant in his evidence, says the estate had been decreed insolvent, and this demand had never been proved before the commissioners. It was not competent therefore, for him to pay any part of the estate's money upon it. This should have been reserved to be distributed in the legal way among all the creditors. Nor does it appear that he did so appropriate, or allow it to be appropriated as belonging to the estate. From his own statement he neither charged himself as administrator with this money, nor gave himself credit for the amount paid by it. Nor did he act as administrator in the settlement of that demand, but in an entirely distinct capacity, that of agent for one who was surety therefor. It may therefore be properly said that as to this plaintiff, he not only had knowledge of such facts as should have, at least, led to further inquiries as to the ownership of this money, but that legally he still has the money in his hands. In accordance with the provisions of the report, the default must stand, and

Judgment for $1133.32, and interest, as provided in the report.

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

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

RUTH B. WIGHT, Administratrix, *vs.* JAMES GRAY, and others.

Hancock. Opinion April 4, 1882.

Fixtures. Mortgagor and mortgagee.

Fixtures actually or constructively annexed to the realty, after the execution of a mortgage of the real estate become a part of the mortgage security, and, while the mortgage is in force cannot be removed or otherwise disposed of by the mortgagor or by one claiming under him, without the consent of the mortgagee.

ON REPORT of facts agreed.

Trespass *qu. cl.* and removing from the premises, which were then in plaintiff's possession as mortgagee, a frame building erected thereon by the husband of the mortgagor with her consent after the execution of the mortgage.

The material facts are stated in the opinion.

H. D. Hadlock, for the plaintiff, cited: *Blaney* v. *Bearce*, 2 Maine, 132; *Allen* v. *Bicknell*, 36 Maine, 436; *Bird* v. *Decker*, 64 Maine, 550; *Hinkley and E. Iron Co.* v. *Black*, 70 Maine, 480; *Chase* v. *Wingate*, 68 Maine, 204; *Lynde* v. *Rowe*, 12 Allen, 100; *Bonney* v. *Foss*, 62 Maine, 248.

O. P. Cunningham, for the defendants, claimed that as the building removed was erected upon the land by the consent of the owner in possession, it never became a fixture to the freehold and could be removed by the tenant or his representative as personal property. 51 Maine, 48; 6 Maine, 456; 4 Mass. 514; 16 Mass. 448; 30 Maine, 570; 1 Maine, 119.

SYMONDS, J. The general rule is that fixtures, actually or constructively annexed to the realty, pass by a conveyance or mortgage of it, where the contents of the deed do not show an intention to the contrary. *Davis* v. *Buffum*, 51 Maine, 160.

Fixtures annexed after the execution of the mortgage become a part of the security for the mortgage debt and, while the mortgage is in force, cannot be removed or otherwise disposed of by the mortgagor or by one claiming under him without the

consent of the mortgagee. "The mortgagor generally looks to the redemption of the property, and what he adds to it of a permanent character is for his own benefit. . . . . He may always save himself from loss, however expensive his erections may be, by paying his debt." So far as the relations between the mortgagor and the mortgagee in this respect are concerned, the distinction between trade-fixtures and other fixtures is of no importance. *Smith* v. *Goodwin*, 2 Maine, 173; *Corliss* v. *McLagin*, 29 Maine, 115; 43 N. H. 390.

"If, after the execution of a mortgage of real estate, fixtures are added by a tenant at will of the mortgagor, his right to remove them, after an entry by the mortgagee for the purpose of foreclosure, must be determined by the rule which prevails between mortgagor and mortgagee, and not by that which prevails between landlord and tenant." *Lynde* v. *Rowe*, 12 Allen, 100.

There is some tendency to hold, as in *Tefft* v. *Horton*, 53 N. Y. 380, that, where the fixture was erected by a tenant of the mortgagor, under an agreement with him that it should remain the tenant's chattel, the mortgagee cannot interpose before taking possession of the premises, to prevent the carrying out of such an agreement. But this distinction is of no importance here, as the mortgagee was in full possession at the date of the trespass alleged. See *Richardson* v. *Copeland*, 6 Gray, 536; *Clary* v. *Owen*, 15 Gray, 522; *Hunt* v. *Bay State Iron Co.* 97 Mass. 279; *Pierce* v. *George*, 108 Mass. 78.

If the mortgagee consents that the fixture shall remain personalty, the right of removal is not lost. *Bartholomew* v. *Hamilton*, 105 Mass. 239.

These general principles include a full statement of the law of this case. The building in controversy was erected upon premises then subject to mortgage by the husband of the mortgagor with her consent, but without the consent of the mortgagee. The plaintiff was in possession by virtue of a foreclosure of the mortgage, when the defendants entered and removed the building against her will and remonstrance. Under the rules already stated, the building was as to the mortgagee a part of the realty, if it was actually or constructively annexed thereto. The only

description of it is that it "was not underpinned but rested upon posts set in the ground, and was finished and had a chimney." The cases of *Butler* v. *Page*, 7 Met. 40, and *Cole* v. *Stewart*, 11 Cush. 182, are direct authorities that buildings of this description are fixtures which the mortgagee may hold. *Linscott* v. *Weeks*, 72 Maine, 506.

Judgment for the plaintiff.
Damages to be assessed at Nisi Prius.

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

ELLEN BOLTON *vs.* ADDIE M. BOLTON.

Kennebec. Opinion April 7, 1882.

Masonic relief associations. Life insurance. Contract. "Widow." Evidence.

The Kennebec Masonic Relief Association is a mutual life insurance company, notwithstanding the organization is benevolent and not speculative in its purposes.

When an accepted applicant for membership pays his membership fee and promises in his written application to pay the further sum of one dollar and ten cents whenever any other member dies, or forfeit his own claim to a benefit; and the by-laws provide that the association, within thirty days after satisfactory proof of his death, will pay to his "widow" as many dollars, not exceeding one thousand, as there are surviving members at the time of the death,—a contract of life insurance is completed.

Also held, that the contract being in writing, and unambiguous, and being in terms payable to the widow, the legal widow was entitled to the benefit; and that no evidence *dehors* the written contract, was admissible to vary its construction and show that another woman with whom the deceased member went through the form of marriage, and cohabited for many of the last years of his life, was intended.

ON EXCEPTIONS.

Assumpsit for money had and received.

The opinion states the case and the material facts.

Orville D. Baker (*Joseph Baker* with him), for the plaintiff, cited, on defendant's exceptions: R. S., c. 55, § 5; *Schunck* v. *Gegenseitiger*, &c. 44 Wis. 369; *Erdmann* v. *Mutual Ins. Co.*

44 Wis. 376; *Kentucky Masonic Ins. Co.* v. *Miller*, 13 Bush. 489; *Masons' Benev. Soc.* v. *Winthrop*, 85 Ill. 537; *Same* v. *Baldwin*, 86 Ill. 479; *State* v. *Mut. Benev. Soc.* 22 Alb. L. J. 427; *State* v. *Mut. Benefit Soc.* 105 Mass. 149; Bliss, Life Ins. § 463; *Coles* v. *Iowa St. Mut. Ins. Co.* 18 Iowa, 425; *Simeral* v. *Ins. Co.* 18 Iowa, 319; *Treadway* v. *Ins. Co.* 29 Conn. 68; *Com.* v. *Wetherbee*, 105 Mass. 149.

On plaintiff's exceptions: Stephen's Dig. Ev. art. 91, par. 8; 1 Greenl. Ev. § § 290, 287; *Cotton* v. *Smithwick*, 66 Maine, 365; *Tucker* v. *Seaman's Aid Soc.* 7 Met. 188; Whart. Ev. § 992; Wigram on Wills, 66; *Dorin* v. *Dorin*, English and Irish Appeal Cases, 568; *Re Davenport's Trust*, 1 Sm. & Giff. 126.

J. H. Potter, for the defendant, claimed that as the specifications in plaintiff's writ contained the allegation that the sums of money were obtained by defendant by falsely and fraudulently representing herself to be the wife of James H. Bolton, and no proof of such false and fraudulent representation was offered or existed, the action could not be maintained, the plaintiff not supporting by evidence, the material allegation in her writ. And further claimed, that as these associations were benevolent and charitable organizations, and both voluntary, and as no action could be maintained against them by either the defendant or plaintiff, and as the payment to defendant was voluntary, no action could be maintained by plaintiff against defendant to recover the money back.

Both associations were Masonic Relief Associations, one incorporated under c. 55, of R. S., the other not incorporated. They were not organized for business purposes, having in view pecuniary gain and profit to its members. Their sole object was to relieve the widow or orphans of a member after his decease. Such associations are clearly benevolent or charitable. 46 N. Y. 477. And both voluntary. Neither the defendant nor the plaintiff could have maintained an action against either of these associations, c. 55, § 5, R. S. The money paid to defendant was in law a gift, a gratuity, and it was paid voluntarily without

fraud or imposition on her part. It was a gift made perfect by delivery and acceptance, and the associations could not in an action recover it back.

These associations have not the character of a life insurance company, and the wife of a member acquires no right against the association on her husband's death. *Durian* v. *Central Verein of Hermann's Soehnne*, 7 Daly, N. Y. 168; 1 Parsons on Contracts, 235.

Neither the plaintiff nor defendant had a legal claim against the associations for the benefits. But the money was paid to the defendant, and the maxim, "*Melior est conditio possidentis, ubi neuter jus habet*," applies with full legal force. Also, see *The People ex ul.* v. *The Board of Trade of Chicago*, 80 Ill. 134; *Robinson* v. *Yates City Lodge of F. A. A. Masons.* We cite further, *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518.

The instruction excepted to was sound law. For when it is doubtful as to which of two or more extrinsic objects or persons, a provision in itself unambiguous, is applicable, then evidence of the declaration of intention of the party or parties making the provisions, is admissible. Wharton's Evidence, vol. 2, p. 236, § 992, and § 997.

In the construction of contracts evidence of concurrent intention, is admissible. Wharton's Evidence, vol. 2, p. 234.

And in the case in 7 Daly, above cited, the court held that if the member himself should designate, it would be sufficient, and that "it makes no difference in such a case that the person designated to receive it, is falsely called the wife of the member, his intentions being clear."

VIRGIN, J. In 1846, one Bolton married the plaintiff in Boston, and on the same day went with his wife to the homestead of his father, in Manchester, where they resided and cohabited about eight months, when they moved to Lowell, where they resided and kept house some four or five months, during the latter part of which period, a child was born to them. Soon afterward, they removed with their child to Manchester, where they continued to reside some less than a year, when Bolton left his family say-

ing he was going to California; since which time the plaintiff never heard from him or of him, until after his decease in 1879.

In 1862, Bolton, so far as the forms of law are concerned, married the defendant in Boston, where they resided and cohabited except while at sea, until November, 1867, when they moved to Augusta in this State, where they continued to reside until his death, the defendant never having heard of his marriage with the plaintiff, during his lifetime.

In October, 1877, Bolton was duly made a member of the "Kennebec Masonic Relief Association," and in August, 1878, of the "Mechanic Falls Masonic Relief Association," in each of which he continued in good standing, until his decease.

On June 3, 1879, Bolton died; and on the eleventh day of the same month, the defendant received from the former association, as the benefit due to his widow by virtue of his membership, the sum of four hundred and forty-eight dollars, and on the twenty-fourth, from the latter association the sum of one thousand dollars.

On October 21, 1879, the plaintiff brought this action to recover the sums thus received by the defendant, and alleged in her specifications filed under the count for money had and received, that the defendant obtained the money from each of the associations by "falsely and fraudulently representing herself to be the widow of Bolton." And at the trial, the presiding justice instructed the jury, against the contention of the defendant, that it was not necessary for the plaintiff to prove the allegation of fraudulent representation on the part of the defendant.

The defendant also contended that the associations were benevolent and charitable in their purpose and character, and not speculative; that one of them was incorporated under the provisions of R. S., c. 55, against which no action could be maintained by the plaintiff or defendant by reason of § 5; that the payment to the defendant by the associations was voluntary, in the nature of a gift; and that the plaintiff could not maintain this against the defendant in any event which the presiding justice overruled; whereupon the defendant alleged exceptions.

1. So far as the first point is concerned, we do not understand the defendant to urge it, except so far as it may be involved in the other.

2. Is the Kennebec Masonic Relief Association such a corporation as is contemplated by R. S., c. 55, § 5? We have no doubt that it is not. But if it were, that fact could have no bearing upon this action, since the terms of the statute apply only to members of the association and the corporation itself, and neither of these parties is a member. Even if it had adopted the name of benevolent or charitable, instead of relief association, it could make no difference. Its name would not necessarily fix or establish its real legal character. When occasion requires, the law looks through or behind the names of things and passes its judgment upon their substance. *Governors, etc.* v. *Am. Art Union*, 7 N. Y. 228; *State* v. *Citizens' Benefit Asso.* 6 Mo. App. 163. If the prevalent purpose and nature of an association, of whatever name, be that of insurance, the benevolent or charitable results to its beneficiaries would not change its legal character. And that this association, *et id omne genus* are mutual life insurance companies, we entertain no doubt whatever.

The text books, as well as the opinions of various courts, contain definitions of the contract of insurance as it is applied to its various subjects; and although differently expressed, they all concur as to its substantive elements, that all that is essential to such a contract is the payment of a consideration by one party, and the promise of the other to pay an agreed amount upon the happening of the contingency specified in the contract, it being understood that the former party had an insurable interest in the subject-matter insured. *Commonwealth* v. *Wetherbee*, 105 Mass. 160.

By the provisions of the by-laws of the Kennebec Masonic Relief Association, any member of a lodge of masons within this State, not over sixty years of age, may become a member thereof, by presenting his application stating therein certain specified facts, and the certificates prescribed, and paying a membership fee of two dollars. And on the receipt thereof, his name is placed on the list of members and he becomes "entitled to all the

benefits from that date," (art. 4, § 1), the maximum amount of benefit being limited to one thousand dollars, § 3. Upon the death of a member entitled to a benefit, an assessment of one dollar and ten cents is laid on each survivor, and if not paid within a month, the delinquent forfeits his membership. Art. 9, § 1. Upon satisfactory proof of the death of a member, the president and secretary draw a draft on the treasurer for as many dollars, not exceeding one thousand, as there were members who had paid their assessments at the time of the death, "payable to the widow of the deceased member . . . provided, any member, during his life-time, may direct in writing signed by himself and two witnesses, to whom the benefit shall be paid." Art. 8, § 1.

Bolton's application, after reciting the facts necessary to show his eligibility, promised to abide by the by-laws, etc., pay promptly any assessment authorized thereby, and in default thereof to forfeit his membership, and authorized the secretary to sign his name to the by-laws.

The substance of all which is: Each member, when accepted, pays his membership fee of two dollars, and promises to pay the further sum of one dollar and ten cents whenever any other member dies, or forfeit his own claim to a benefit: And in consideration thereof, the association agrees that within thirty days after the proof of the death of a member, it will pay to his "widow," as many dollars, not exceeding one thousand, as there are surviving members at the time of the death. The interest of the member in his own life, supports the contract. *Campbell* v. *N. E. Mut. L. Ins. Co.* 98 Mass. 381.

To be sure the association takes no note of the modern science of biological contingencies, but each applicant, regardless of age up to sixty years, if otherwise eligible, becomes a member by contributing the same sum to the general fund, and his beneficiary draws substantially the same amount, thus adopting the old original simple principles of life insurance, and making the association a mutual co-operative life insurance body. "This is not the less a contract of mutual insurance upon the life of the assured, because the amount to be paid by the corporation is not a gross sum, but

a sum graduated by the members holding similar contracts; nor because a portion of the premiums is to be paid upon the uncertain periods of the deaths of such members; nor because in case of non-payment of assessment of any member, the contract provides no means of enforcing payment thereof, but merely declares the contract at an end, and all moneys previously paid by the assured, to be forfeited to the company. The fact that the organization was benevolent and not speculative, has no bearing upon the nature and effect of the business conducted and contracts made by the corporation." *Commonwealth* v. *Wetherbee*, *supra*. And we may add to this list of facts the limitation of membership to persons belonging to the masonic fraternity, together with the various other differences between modern life insurance companies and those under discussion, suggested (ironically) by the defendant's counsel.

There are large numbers of similar associations in the various states, known by different names but governed by like rules, all recognized as mutual life insurance companies when before the courts. *Citizens' Benefit Asso.* 6 Mo. App. 163; *State* v. *Bankers' etc. Benefit Asso.* 23 Kans. 499; *Folmer's Appeal*, 87 Pa. St. 133; *Fairchild* v. *N. E. M. L. Asso.* 51 Vt. 613; *Schunck* v. *Gegenseitiger, &c. Fond*, 44 Wis. 369; *Erdmann* v. *Mut. Ins. Co. etc.* 44 Wis.; *Maryland Mut. Ben. Soc.* v. *Clendenien*, 44 Md. 429; *Arthur* v. *Odd Fel. Ben. Asso.* 29 Ohio St. 557, 376; *Ken. Mas. Ins. Co.* v. *Miller*, 13 Bush. (Ken.) 489; *Masons' Benev. Soc.* v. *Winthrop*, 85 Ill. 537; *Same* v. *Baldwin*, 86 Ill. 479; *State* v. *Merchants' Mut. Ben. Soc.* 25 Al. L. J. 427.

The association in hand being an insurance company, is not within the provisions of R. S., c. 55, § 5; and the contract not being under seal, the party for whose benefit the promise was made might maintain an action upon it. *Hinkley* v. *Fowler*, 15 Maine, 285. The payment by the association to the defendant was not, therefore, voluntary and in the nature of a gift, but as the intended fulfilment of a contract of insurance, entered into between Bolton and the association for the benefit of his "widow;"

and if made to the defendant under the mistaken belief that she was his widow when she was not, the association might recover the money back. (*Townsend* v. *Crowdy*, 8 C. B. (N. S.) 98 E. C. L.) 477; *Kelly* v. *Solari*, 9 Mees. and W. 54; *Dails* v. *Lloyd*, 12 Q. B. (64 E. C. L.) 531; *Appleton Bank* v. *McGilvray*, 4 Gray, 518); and the defendant, not being the "widow" of Bolton, and having received money paid to her in the belief that she was the plaintiff, she cannot withhold it from her rightfully, and the law implies a promise on her part to pay it over to the rightful owner.

Plaintiff's exceptions. The plaintiff contended that the contracts of insurance between the associations and Bolton were in writing, and unambiguous; and that being in terms payable to Bolton's "widow," the plaintiff, who was his only legal widow, was entitled to the benefits.

But the presiding justice, entertaining the opinion that the extrinsic facts of Bolton's marriage and long cohabitation with the defendant, etc. developed such an ambiguity in the meaning of the word "widow" as used in the contract to designate the person entitled, as to authorize the jury to determine from all the testimony in the case, which of the two persons, plaintiff or defendant, was, in the contemplation of Bolton and the associations, intended by the designation of "widow." And he accordingly instructed them: "If you find from the evidence in the case that it was in the contemplation of James H. Bolton and either of the associations, that the benefit was to be for the defendant with whom he was then living as his wife, that she was to be treated and recognized as his widow, in case he died leaving her, and if it was in the contemplation of the parties that she was to be treated as the person designated as his widow after his death, it is competent for you to find for the defendant; and this, notwithstanding there was no written designation of the person to whom the money should be paid. That provision of the by-laws applies to a case where a member of the association designates some person other than the one named or designated by the association as the person to receive the benefit."

While the law will not admit parol testimony to contradict or otherwise vary written contracts, capable of a clear and intelli-

gible exposition from their terms, and thus make contracts for parties other than those which they have made for themselves, (*Haven* v. *Brown*, 7 Maine, 420; *Elder* v. *Elder*, 10 Maine, 80,) it does admit, by necessity, sufficient extrinsic testimony to apply them to the subjects and objects to which by their terms they refer. *Eveleth* v. *Wilson*, 15 Maine, 109. And as a general rule the law allows the expounder "the same light and information that the parties had; to acquaint himself with the persons and circumstances that are the subjects of the allusions and statements in a written instrument; and is entitled to place himself in the same situation as the parties who made the contract to view the circumstances as they did, and so judge of the meaning of the words and of the correct application of the language professed to be described." *Shore* v. *Wilson*, 9 Cl. and Fin. 555, 569; *Hisckscocks* v. *Hisckscocks*, 5 Mees. & W. 363, 368; *Emery* v. *Webster*, 42 Maine, 204. The object being to ascertain not what the actual intention of the parties may have been as contra-distinguished from what their words express, but what is the meaning of the words they have used to express their intention, *i. e.* to ascertain what they have said they mean. 1 Greenl. Ev. § 277, and cases in notes.

When a written instrument, free from doubt on its face, is thus brought into contact with surrounding circumstances, a doubt sometimes arises as to which of a plurality of persons or of things, each answering the words of the writing, the parties intended to designate. Such a contract is said to contain a latent ambiguity. An ambiguity, because the word about which the doubt arises has two meanings, and latent because it does not appear upon reading the instrument, but is developed when it comes to be applied to the persons or things to which it refers. And being developed by evidence *dehors* other evidence of the same character is admissible to solve the doubt. Add. Cont. 147. As where a bequest was made to the "Am. Tract Society" and extrinsic evidence disclosing two societies of the same name, other parol evidence was admitted to show which was in the testator's mind. *Bodman* v. *Am. Tract Soc.* 9 Allen, 447. So where a sealed contract speaks of "David's deed," and it appeared by

extrinsic evidence that the phrase applied equally well to a deed from, as well as to a deed to David, parol evidence was admitted to solve the ambiguity. *Patrick* v. *Grant*, 14 Maine, 233. The books contain very many illustrations of this well known principle, and the text books as well as the opinions of courts have adopted Lord Bacon's definition of it: "That which seems certain and without ambiguity for anything that appears upon the deed or instrument, but there is some collateral matter outside of the deed that breedeth ambiguity (Bac. Max. Reg. 23); and illustrations are styled by him equivocations.

Before extrinsic evidence can be admitted, the word or phrase concerning which the doubt is raised must apply to each of the two or more persons with legal certainty (1 Greenl. Ev. § 290, and cases there cited. *Cotton* v. *Smithwick*, 66 Maine, 367; *Pickering* v. *Pickering*, 50 N. H. 350; 1 Jarm. Wills, (R. and T. ed.) 743, *429 and notes); or "equally well" (Stephens' Dig. Ev. § 8); or with "equal propriety or with legal certainty." 1 Redf. Wills, 560, § 7. The language must be interpreted according to its proper acceptation, unless the context of the instrument has otherwise defined it, and shows that it is susceptible of some more popular interpretation reconcilable with extraneous facts. 1 Jarm. Wills, (R. and T. ed.) 726, 730; Stephens' Dig. Ev. Art. 91, § 5.

Sir J. WIGRAM expresses the principle thus: "A testator is always presumed to use the words in which he expresses himself according to the strict and primary acceptation, unless from the context of the will it appears that he has used them in a different sense." Prop. 1. There is no word or phrase in this contract of insurance which shows that the parties to it intended the word "widow" to be used in any other than the legal sense, a woman whose husband is dead. It could not legally apply to the defendant, in this state; for here there can be but one widow of a deceased husband. To be sure, so far as the mere forms of law are concerned, she was married to Bolton and lived in adultery with him ever after until he died; but the formal marriage was absolutely void and would not save her children (if she had any) from illegitimacy, or confer upon her any derivative pauper set-

tlement. *Pittston* v. *Wiscasset*, 4 Maine, 293; *Howland* v. *Burlington*, 53 Maine, 54.

And "where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and when his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict primary sense, and in no other, although they may be capable of some popular or secondary interpretation and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered. Wig. Prop. II.

The foregoing rules find numerous illustrations in the construction of wills wherein legacies and devises are given to a "child" or "children" of some person named and such person has legitimate and illegitimate child or children, in which case the legitimate and not the illegitimate issue take. The word "children" it is said means *prima facie* legitimate children, as much so as if the word "legitimate" were written before it. Lord HATHERLEY, in *Dorin* v. *Dorin*, Eng. & Ir. Ap. Cas. 568; *Hill* v. *Crook*, L. R. 6 H. L. Cas. 268; *Gardner* v. *Heyer*, 2 Paige Ch. 10, 13; *Cromer* v. *Pickney*, 3 Paige Ch. 461, 475; *Collins* v. *Hoxie*, 9 Paige Ch. 81, 88. Where a testator has had two illegitimate children by a woman, married her, and the next day made his will leaving to her his property with "liberty to dispose of it amongst our children" by will, and should she make no will, expressed the desire "that the property at her death be equally divided between my children by her," and no children were born after the marriage, but he always treated the illegitimate children as his own; it was held that the illegitimate children took nothing. The Lord Ch. (CAINES,) said: "The will upon its face constrains no departure from what is the ordinary and *prima facie* legal meaning of the word 'children.' There is no case whatever which would enable us, in the interpretation of this will, to strain the word 'children' beyond its legal meaning." Lord HATHERLY said: "The only mode in which the word 'children' can be made to bear a different sense from that which is its first legal

and natural sense, is this, that if you look to the outward circumstances as well as to the expressions contained in the will, and find that the outward circumstances of the case, combined with the expressions in the will, fail to give any adequate or intelligible sense to the will, then you have at once to arrive at the conclusion that the word 'children' has been used in some other or different sense; just as if the will had spoken of the 'children of my late brother' or the 'children of my late sister,' and if neither of those persons had been married and they were then dead, and there was no possibility that they should ever marry, you would be driven necessarily to the conclusion that the only children that could be meant must be those whom the law would not otherwise allow to fall into that class, viz: illigitimate children. I am at a loss to find in the outward circumstances anything beyond the fact that this gentleman had by this lady illegitimate children to whom he was very partial and whom he treated as his children; but the fact that he had such children by no means shows us that he intended to provide for them in his will. Your lordships may make your own conjecture upon the subject, but you are not at liberty, from anything that appears in his will, to infer that he meant anything other than that which the law says he has there done, namely, to make provision for the children of the marriage by the lady whom he had just married — that is for their children in the strict legal sense of the term. It is not because you find in the outward circumstances that there are some children whom you think he ought to have provided for, that the will must be taken to mean that they are to be provided for, when the words in the will can have full and complete effect given them if you interpret them in another and a legal sense without altering a single word. The testator, unfortunately if he intended to provide for their illegitimate children, has not used apt words in his will to give effect to that intention."

So in the older case of *Hare* v. *Lloyd*, 1 T. and R. 693, Lord ELDON said: "I have not the least doubt that this testator meant illegitimate children, but I am clearly of the opinion that there is not enough on the face of this will to authorize me to

carry that intention into effect." And in the still older case of *Carturight* v. *Vandry*, 5 Ves. 534, Lord LOUGHBORROUGH said: "This is a very unfortunate case. I have no doubt of the intention; but how can I possibly put upon the will the construction the plaintiff desires when there are lawful children?" To the same purport is *Godfrey* v. *Davis*, 6 Ves. 48, commenting on which, Sir John STUART, V. C., said: "Take the words of Sir W. GRANT: 'No illegitimate child can claim under such a description,' that is, under the description of children, 'unless particularly pointed out by the testator, and manifestly and incontrovertibly intended, though in point of law not standing in that character,' why cannot an illegitimate so claim? Simply because, in the proper sense of the word 'child,' an illegitimate child is not a child. . . The law has long been established to this effect, and it is founded upon the principle which lies at the root of the construction of all instruments, viz: that the language must be interpreted in its ordinary sense, unless there be something in the context to show with certainty that another sense was intended." *Holt* v. *Sindrey*, L. R. 7 Eq. Cas. 175. See also the numerous cases cited and discussed in 2 Jarm. Wills (R. and T. ed.) c. 31, at the close of which the learned author draws the following conclusions:

1. That illegitimate children may take by any name or description which they have acquired by reputation at the time of making the will, but,

2. They are not objects of a gift to children or issue of any other degree, unless a distinct intention to that effect be manifest upon the face of the will; and if, by possibility, legitimate children alone would have satisfied the terms of such gift, illegitimate children cannot take," etc. 821–2. See also, Stephens' Dig. Ev. 148 (h.). So "next of kin" *prima facie* means legitimate kindred. *In re Standley's Est.* 1 L. R. 5 Eq. 303.

The same principles apply to wife or widow. See *In re Davenport's Trust*, 1 Sm. and Gif. 126, which is quite fully stated in Wig. Wills, 76, in note.

"These rules may be safely applied, *mutato nomine*, to all other private instruments." 1 Greenl. Ev. § 287, and note 1.

And the general rule as laid down by Mr. Greenleaf, is: "The terms of every written instrument are to be understood in their plain, ordinary and popular sense, unless they have generally, in respect to the subject matter, as, by the known usage of trade, or the like, acquired a peculiar sense, distinct from the popular sense of the same words; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense." 1 Greenl. Ev. § 278. And "the same intention must be collected from the same words of a contract in writing, whether with or without a seal." LORD ELLENBOROUGH, in *Seddon* v. *Senate*, 13 East, 73. But even if this rule of construction governing wills be different from that of other instruments in respect to the question under examination, it is a sufficient answer that a contract of life insurance like those in question, while it is not a testament, it is in the nature of a testament; and in construing it, the courts should treat it, so far as possible, as a will. *Masonic Ins. Co.* v. *Miller*, *supra*.

Our opinion, therefore, is, that assuming the plaintiff to be, what the jury found, the "widow" of Bolton, she is by the terms of the contracts entitled to the benefits sued for, since he could leave but one widow in this monogamic state; and that the presiding justice should have given that instruction instead of the one hereinbefore recited.

We need not consider the other questions raised by the exceptions of the plaintiff.

Plaintiff's exceptions sustained.

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

INHABITANTS OF HOLDEN *vs.* INHABITANTS OF VEAZIE.

Penobscot. Opinion April 11, 1882.

Private laws, 1853, c. 134. Pauper settlement. Incorporation of a new town.

The imposition of a liability for the support of a single specific class of paupers upon the new town in an act dividing an existing municipality, does

not necessarily impose upon the remaining portion, the burden of supporting all other paupers not included in such class.

Unless it is apparent that the legislature intended to prescribe a rule for all pauper cases liable to arise between the two sections, and to supersede the general law by the specific provision, cases which do not fall within the specific provision will be governed by the general law.

ON REPORT.

Assumpsit for pauper supplies furnished Charles H. Mann and wife.

Charles H. Mann had never gained a settlement for himself, but had the derivative settlement of his father, Perry Mann.

The opinion states the material facts.

Wilson and Woodard, for the plaintiffs, cited: *Eddington* v. *Brewer*, 41 Maine, 462; *Frankfort* v. *Winterport*, 51 Maine, 445; Private Laws, 1853, c. 134; and 1860, c. 422.

John Varney, for the defendants.

The act of incorporation of Veazie, contained provisions at variance with the general law and the latter must yield. *Lewiston* v. *Auburn*, 32 Maine, 492.

In *Monroe* v. *Frankfort*, 54 Maine, 253, after reciting the act setting off a portion of Frankfort to Monroe, which provided that certain paupers then and thereafter chargeable, were assigned to Monroe, APPLETON, C. J., in the opinion of the court, says: "All other paupers, it would seem to follow, are to be supported by Frankfort."

The courts of this State and Massachusetts, have recognized that upon a division of a town, the act of separation may assign the pauper settlements, irrespective of residence at the time. *Bloomfield* v. *Skowhegan*, 16 Maine, 59; *Lewiston* v. *Auburn*, 32 Maine, 492; *Yarmouth* v. *No. Yarmouth*, 44 Maine, 352; *Southbridge* v. *Charleston*, 15 Mass. 248; *Bridgewater* v. *W. Bridgewater*, 9 Pick. 55; *New Braintree* v. *Boylston*, 24 Pick. 164.

Those who had acquired settlements in Bangor at the time of the separation, may be divided into three classes:

1. Those whose five years' residence had been wholly on what remained Bangor.

2. Those whose five years' residence had been wholly on what was made Veazie.

3. Those whose residence had been partly in one section and partly in the other.

The settlement of all three classes were then at Bangor. And the act of separation provided that the new town of Veazie should take the second class, as I have classified them above. That left the settlements of the first and third classes still in Bangor, and Perry Mann belonged to the third class. Residence at the time of the separation, did not control, it required five years' continuous residence to fix the settlement in the new town.

BARROWS, J. The ingenious and carefully constructed argument of the defendants' counsel, will be found when analyzed to bring us, if it is accepted as sound, to the following results: whenever in an act dividing a town, any affirmative provision is made that a certain class of paupers shall be supported by one of the towns, such provision *ipso facto*, imposes the support of all others on the other town; the making of any special provision respecting support of paupers in the act incorporating the new town, supersedes and annuls the operation of the general law, even in cases which are not included in the special provision.

Hence he claims that inasmuch as the act dividing Bangor, and incorporating the new town of Veazie (c. 134, Private Laws of 1853), provides that "all paupers now supported by the city of Bangor, or which may hereafter become chargeable to said city by reason of settlement gained in the territory included in the town of Veazie, shall be hereafter supported by and chargeable to said town of Veazie," it follows that all paupers whose five years' continuous residence giving them a settlement was, though partly, not wholly upon "the territory included in the town of Veazie," are to be supported by Bangor, and that the descendants of Perry Mann who was residing in Veazie at the date of its incorporation, and had then gained a settlement by five years' residence there and in other parts of Bangor, are chargeable not to Veazie, but to Bangor by virtue of this provision. We do not think such a construction ought to prevail. It is carrying the doctrine of *expressio unius exclusio alterius*, too far.

That maxim, while it is capable of wide and useful practical application, is of such a character that "great caution is requisite in dealing with it." Broom's Legal Maxims, 627. This observation is fortified by the remarks of the court, in *Saunders* v. *Evans*, 8 H. L. Cas. 729; *Eastern Arch. Co.* v. *The Queen*, 2 El. & Bl. 906, 907, and *Bostock* v. *N. Staffordshire Railway*, 4 El. & Bl. 832, where Lord CAMPBELL says in so many words, "in construing instruments so loosely drawn as these local acts, we can hardly apply such maxims as that 'the expression of one thing is the exclusion of another' or that 'the exception proves the rule.'" It is the intention of the legislature, which we are to discover from the language used. If they had intended by declaring Veazie liable for the support of a particular class of paupers to exonerate it from the support of others who would belong to it under the general law, it is more natural to suppose that they would have added to the provision above quoted from the act, the four words which would have made that intention clear, "all others to Bangor."

It is by no means apparent from the making of this single imperfect provision, that the legislature intended to interfere with the general law applicable in such case as this, or that they designed to establish rules which should govern in all cases that were liable to arise between Bangor and Veazie.

The provision itself is not inconsistent with the general law as applied to a case like Perry Mann's. It may have been inserted *ex abundanti cautela*. It may be the not uncommon case where a feeble and ill-sustained effort at clearness and precision results under the manipulations of ingenious counsel, in the obscurity which it was designed to avoid.

Though there might be a necessary implication that Bangor should provide for those who had acquired a settlement by a five years' residence wholly in what remained Bangor after the division, still the case of Perry Mann whose settlement had been gained by a residence partly on one section and partly on the other, would be a *casus omissus*, to be governed by the general law. There is no provision in the special act at variance with the general law, so far as such a case as his is concerned.

The case differs in its essential facts from that presented in *Lewiston* v. *Auburn*, where the pauper had gained his settlement by a five years' residence wholly on that part of Minot which was not incorporated into Auburn.

We think that the settlement of the paupers here in controversy must depend upon the general law as in *Eddington* v. *Brewer*, 41 Maine, 462; and *Frankfort* v. *Winterport*, 51 Maine, 445.

Defendants defaulted.

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

BEZAR B. HARVEY *vs.* EPHRAIM A. DODGE.

Franklin. Opinion April 11, 1882.

Practice. Exceptions.

If the justice presiding at *nisi prius* in allowing exceptions requires the excepting party to present a report of the evidence to make part of the exceptions, a neglect or refusal to furnish such report is of itself sufficient cause for overruling the exceptions. The order to present such a report is a proper one, when necessary for the court here to see what the testimony was upon which the instructions excepted to were based; and it is absolutely necessary for the excepting party, upon whom devolves the burden of showing that he has been aggrieved by erroneous rulings, and he must accordingly present enough of the case to enable the full court to determine, not merely that there may have been an error prejudicial to the excepting party, but that there actually was one.

To state in the charge facts proved and not controverted is not expressing an opinion upon issues of fact arising in the case within the meaning of stat. 1874, c. 212. If the presiding justice inadvertently assumes as uncontroverted matters in evidence upon which either party proposes to raise an issue to the jury, it is the duty of his counsel to call the attention of the judge to the position taken in behalf of his client so that the mistake may be rectified before the jury retire. If he neglects to do this it may properly be considered as a waiver of all right to except on that score.

ON EXCEPTIONS.

Replevin. The plaintiff and his attorney were the only witnesses called in the case. Verdict was for plaintiff.

The opinion states the case presented by the defendant's exceptions.

P. H. Stubbs, for the plaintiff.

S. Clifford Belcher, for the defendant.

There was no argument for the defendant before the law court.

BARROWS, J. From the general tenor of defendant's exceptions we infer that the design of the counsel presenting them was to raise the question whether the judge presiding at the trial did not "express an opinion upon issues of fact arising in the case."

Doubtless it would be easy to conceive of cases in which some of the language quoted from the charge would amount to such an expression of opinion. But it is incumbent on the excepting party, if he would sustain his exceptions to present enough of the case to enable us to determine, not merely that it may have been but that it was so.

The presiding judge required the excepting party to furnish a report of the evidence, and the exceptions were allowed upon that condition, the judge, apparently, being of opinion that they would not truly present the case unless the evidence went with them.

There were only two witnesses called in the case, both of them by the plaintiff, and the condition could not have been burdensome. But the defendant, apparently apprehensive that a report of the evidence upon which the charge was based would not aid his exceptions, prefers to submit them without furnishing it, excepting also to the order requiring him to make it a part of the exceptions.

If the defendant had had any just cause to complain of the charge this report could not fail to make it appear. In its absence we cannot presume that the charge was in violation of the statute. The presumption is the other way. The only reasonable inference from its non-production is that it would have justified the charge.

Issues of fact are sometimes presented by the pleadings which vanish when all the evidence has been heard. These are not "issues of fact arising in the case" within the purview of the statute of 1874, c. 212.

That the presiding judge may properly require the excepting party to present in his exceptions such parts of the testimony as

may have a bearing upon the pertinency and propriety of the instructions, was settled in *Lewis* v. *Smart*, 67 Maine, 207. These exceptions should be overruled as incomplete for non-compliance with this order, were there no other reason apparent on the face of them. A statement by the judge in his charge of matters proved and not controverted, is not an expression of opinion upon an issue of fact arising in the case. *McLellan* v. *Wheeler*, 70 Maine, 285.

If the presiding judge inadvertently assumes as uncontroverted any matter of fact in evidence upon which either party proposes to raise an issue to the jury, it is the obvious duty of counsel to call the attention of the judge to the position taken in behalf of his client, so that the mistake may be rectified before the case goes to the jury. If he neglects to do this, it may properly be considered as a waiver of exceptions on that score.

Exceptions overruled.

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

WILLIAM G. SHATTUCK, and others, Appellants from decision of COUNTY COMMISSIONERS.

York. Opinion April 14, 1882.

Ways. Elliot Bridge Company.

The charter of the Elliot Bridge Company (Private Laws of 1879, c. 128,) contains in section 6 a provision in these words, "Provided no way shall at any time hereafter be located, or existing way altered, leading from said Bridge towards York beach in the town of South Berwick, which shall be for the necessary convenience of said company unless the entire cost and expense of building and maintaining such new way, or altering such way shall be defrayed by said company during the continuance and maintenance of said toll bridge," *Held:*

1. That this provision is not to be construed as prohibiting the location of any way required by common convenience and necessity.

2. Ways that are located upon the face of the earth in accordance with such description which necessarily contribute to the increase of the income to be derived from the bridge come within the meaning of the phrase "for the necessary convenience of said company."

3. The question of whether a way comes within such description is within the jurisdiction in the first instance of the county commissioners if it is a highway, or if it is a town way with the municipal officers of the town as one of the matters to be adjudicated upon in locating the way, subject to appeal to court and to be finally passed upon by a committee. It is not sufficient that the committee adjudge the way to be of common convenience and necessity, but they must also adjudge after due notice to and hearing of the bridge company whether the way will be a necessary convenience to that company.

4. It is not material that the bridge company do not ask for the way or that none of the petitioners for a way are owners in the bridge.

ON EXCEPTIONS.

Appeal from county commissioners.

The opinion states the case and the material facts.

Nathaniel Hobbs, for the petitioners.

If the court is to receive evidence as to the matter requested in said objections, it will also appear that said "Elliot Bridge Company" have already expended several hundred dollars in building a way from said new bridge to the highway in said South Berwick, a distance of about three-fourths of one mile, which act on the part of said bridge company is in accordance with the intention of the legislature, and the meaning of the provision of § 6, c. 128, private and special laws of 1879.

If the way is for the necessary convenience of said company, the county commissioners have no authority to lay it out. *Commonwealth* v. *Cambridge*, 7 Mass. 166.

The "essential question is whether public necessity and common convenience require the laying out or alteration." *Park* v. *Boston*, 8 Pick. 218; *Gay* v. *Bradstreet*, 49 Maine, 580; R. S., c. 18, § 4.

George C. Yeaton, for the appellees, cited: *McCulloch* v. *Maryland*, 4 Wheat. 316; *Montague* v. *Richardson*, 24 Conn. 338; *Stuyvesant* v. *The Mayor*, 6 Cow. 588; *Jerome* v. *Ross*, 7 John's Ch. 315; *Hays* v. *Briggs*, 3 Pitts. 504; *The Ship Fortitude*, 3 Sum. 228; *The Bank Herald*, 8 Ben. 409; *The Amelie*, 6 Wall. 18; *The Plymouth Rock*, 7 Ben. 448; *Curtis* v. *Leavitt*, 15 N. Y. G. 168; *Morris* v. *State*, 31 Ind. 189; *Hitchcock* v. *Holmes*, 43 Conn. 528; *M. and St. P. R. R. Co.* v. *Crawford Co.* 29 Wis. 116.

DANFORTH, J. By c. 128 of the private laws of 1879, the legislature granted a charter to the Elliot Bridge Company, giving it the right to build "a bridge over the Salmon Falls River, between the town of South Berwick in this state and the town of Rollinsford, in the state of New Hampshire," and to take such rates of toll for the use thereof, as the county commissioners for York county might establish.

Section 6 of the act reads as follows, viz: "Provided, no way shall at any time hereafter, be located, or existing way altered, leading from said bridge towards York Beach, within the town of South Berwick, which shall be for the necessary convenience of said company, unless the entire cost and expense of building and maintaining such new way, or altering such way, shall be defrayed by said company during the continuance and maintenance of said toll bridge."

The company have accepted their charter with this condition in it and have erected and so far as appears are now maintaining their bridge, taking toll for the use of it. It is therefore bound by its terms whatever may be a fair and reasonable interpretation of them.

The language of the proviso is explicit and includes all ways within the town of South Berwick leading from said bridge towards York Beach, "which shall be for the necessary convenience of said company."

It appears that certain persons petitioned the county commissioners, representing "that the road leading from the new bridge across the Salmon Falls River, though the towns of South Berwick, etc. to a point in York, . . . is narrow, hilly and very circuitous, and needs to be widened, straightened and in some places to be new located." What was the action of the commissioners on this petition, the case does not show except as we may infer it from the report of the committee and the arguments of counsel. But it does appear that a committee was appointed upon an appeal and that they have made a report in which it is adjudged, "that as the common convenience and necessity require the *location* as prayed for in the original petition, the judgment of said county commissioners on the aforesaid

petition, should be in the whole reversed." The acceptance of this report was the question before the court. The appellees filed written objections to its acceptance, alleging in substance and offering to prove that the way prayed for comes within the proviso of the charter and asking that the report may be amended so as to show that fact, or judgment be entered, upon condition that the way be built or altered at the expense of the bridge company. The appellants have filed a written answer denying these allegations and claiming that the report should be accepted notwithstanding the objections and "without receiving evidence upon the matter therein alleged." This claim was overruled by the presiding justice and it is upon exceptions to this ruling that the case is before us.

It is not apparent how, in the present state of this case, an acceptance of this report is to be of any avail to the appellants. The petition as we have it in the argument of counsel, and no doubt correctly, asks that a way already located "be widened, straightened and *in some places to be new located.*" We may infer that the commissioners refused the prayer of the petition. The committee reverse this and say that the *location* should be made as prayed for. As there is no particular location prayed for it may be difficult for the commissioners to ascertain and carry out the judgment of the appellate court if one should be entered upon that report. But this question is not raised by the objections filed. It is simply whether the way described in the petition comes within the condition of the charter and whether evidence is admissible to show it; with perhaps the additional question whether the condition asked for can be inserted in the judgment.

It is evident that this last cannot be done in the present state of the case. Upon that question the interests of the bridge company are deeply involved. It does not appear that they have been notified or in any way made a party, which is clearly necessary before judgment can be entered against them.

It is also clear that the appellees should have an opportunity to be heard upon that matter. Their interests are involved. The

condition was undoubtedly inserted in the charter for their protection. It does not appear that they have been heard, nor does it appear that there has been any adjudication upon that question. They ask to be heard upon it now and upon the question of the acceptance of the report. In the absence of any record evidence, showing that their rights have been passed upon by the proper tribunal, it is certainly proper that they should be heard far enough to show whether such an adjudication has been had, before the report is accepted, or before judgment is entered, unless the law gives them an opportunity before some tribunal in the future; or can this court upon a hearing as to the judgment to be rendered adjudicate upon the rights of all parties involved in this question? Here then is a preliminary question of jurisdiction necessarily involved.

This court is evidently not the place for such hearing and adjudication. It can only hear the parties before it. It does not originate the process; its jurisdiction is only appellate. No parties can be added after it comes into this court, the notices are already given and by the court from which the appeal is made. When the report of the committee comes in, it can only be accepted, rejected or recommitted. No alteration can be made in it, for if there were it would not be the judgment of the committee as it is required to be, and if it is accepted, judgment must follow in accordance with its terms. Still there must be some tribunal to decide questions like this in case of a disagreement of parties. Shall it be in the tribunal, locating the way to be exercised at the time, and as a part of the process of location? or when the question of building and paying the expense is raised? It must clearly be the one or the other, and in either case it will belong to the same tribunal, that is, with the county commissioners, if as in this case it is a highway, or if a town way with the municipal officers of the town. It would seem necessarily to follow that jurisdiction in this case, of the question under consideration, must be with the county commissioners subject to the right of appeal, perhaps to be exercised at the time of laying out, and as a part of that process, one of the things to be then adjudicated upon, or subsequently when the expense of construction is to be defrayed.

The former proposition is evidently that which is contemplated by law. The statute contemplates that such a way may be located. The prohibition is conditional and not absolute. No other provision, except the general one for the location of ways is made, no other tribunal for that purpose is established. The condition is attached to the way. It is not a question as to whether the way shall be located, but is incident to and connected with the location. It is important that this question should be adjudicated upon in the beginning, not only that it may be known who is to bear the expense of building, but also that of maintaining. The law never contemplated that there should be a question to be settled by the courts as often as the necessity for repairs may come up, and it may be as claimed by both parties that if the road should be located upon this report, it would be conclusive upon the town, and upon it would devolve the responsibility for building and repairs, with the consequent liability for damages arising from defects. Hence the act says plainly, no such road shall be located, unless the company shall bear these burdens, and the law cannot be complied with unless the location and imposition of these burdens are concurrent acts.

There are two propositions involved in the proviso to the charter. The description of the way upon the face of the earth and the necessary convenience to the company. The first would need no evidence, but must be apparent upon the face of the petition; the latter may be more difficult of solution and might require evidence. From the suggestions already made it follows that when a way is prayed for, leading from said bridge towards York beach, within South Berwick, the bridge company should be notified, and if the location or alteration is found to be of common convenience and necessity, it should then be considered and adjudicated upon, whether it is or is not "a necessary convenience" to the bridge company. If it is so found, the law is peremptory that it shall not be located, unless the company shall defray the expenses of building and maintaining. If not so found it may be located, and built and maintained at the expense of the town.

Whether the county commissioners did so adjudicate, and that was a part of the judgment reversed by the committee, does not

appear. If it should so appear upon a hearing, the rights of the parties may perhaps be preserved without a recommittal. If there was no hearing and adjudication upon that point, it would seem necessary to make such a disposition of the case as will secure one.

It is, however, claimed in behalf of the petitioners that the report of the committee should be accepted without a further hearing, because,

1. If the way by its location is brought within the description named in the condition, still it is not for the "necessary convenience" of said bridge company. This may be true. But the appellees assert the contrary. It is, therefore, a question of fact which must be settled by the proper tribunal. The reasons given in the answer "because said way is not necessary or indispensable to the maintenance or operations of said bridge and is not petitioned for by said company, nor in its behalf," are hardly sufficient to prevent a hearing. The way may not be indispensable to the operations of said bridge, and yet it may be a "necessary convenience," and this is all the law requires. It does not even require that it should be a convenience and necessity. If it did that, the term necessity could have no other meaning than that attached to it in the location of ways which must be of common convenience and necessity. Here the term necessary is not applied to the bridge at all. It is an adjective and qualifies convenience and that alone. The bridge was built for the benefit of the company, that it might make a profit from it. This profit is the convenience of the company. It may be an awkward use of the word, but no other meaning can be attached to it in the connection in which it is found. If then the way is so located that it necessarily will increase the profits of the company arising from the use of the bridge, it is "for the necessary convenience of said company." Nor is it necessary that the company should petition or ask for said way, nor is it material that any of the petitioners are or are not owners or interested in the bridge. Nothing of the kind is incorporated into the proviso, nor will any such fact change or modify its meaning.

2. The fact that the committee have adjudged the way to be of common convenience and necessity, is not conclusive upon

this question. It may be that if the way should be located without any further adjudication, it may be conclusive upon the town's liability to build and maintain it. But the fact that it is of common convenience and necessity, is not inconsistent with its being "a necessary convenience" to the bridge. On the other hand the two would be very likely to coincide. If the way leads from the bridge and is so located that the most or all the travel passing over it, must also pass over the bridge, the very fact that it is of common convenience and necessity, would be very pertinent proof that it would also be a necessary convenience to said company. It may be too, that the building of the bridge may be the material, if not the only cause why this way, located as it is, is of common convenience and necessity. Having an outlet at and over the bridge, that taken away might probably make a very material difference in the amount of travel over it, which would be an important fact bearing upon the question of its public utility. It is possible that it may be conclusive in this respect, and that the legislature seeing this, thought it more in accordance with justice, that a way made necessary to the public convenience by the bridge, and at the same time necessarily contributing materially to the income derived from the bridge, should be paid for by the bridge company, rather than by the town.

3. It may be, and probably is true that the legislature did not intend to deprive the citizens of York county of a way, which their common convenience and necessity require. It may be that if the statute requires that construction, it might be declared unconstitutional, as excepting a portion of the citizens from the benefits of a general law. But it does not contemplate that such a way shall not be located. It only provides in a certain contingency how the expenses of its construction shall be defrayed. This question, however, is not now before us, and can only be raised by the bridge company when it is a party, refusing to pay the expenses of construction on the ground that the statute leaves it optional upon its part to pay or refuse. It will be sufficient to consider that question when the company refuses to perform the condition of a charter granted for its benefit, and by it accepted and acted upon.

The exceptions in this case present the simple question as to whether any evidence should be received upon the matters alleged in the objections filed, or whether the report of the committee should be accepted without a further hearing. From the foregoing suggestions, it is apparent that injustice may be done unless there is a hearing. What was the evidence offered does not appear, nor does it appear that any was received, although the ruling was in favor of it. It is certain the ruling did not dispose of the case, and it is, therefore, prematurely here. We have discussed these questions because they have been argued, and may render some assistance in a further hearing of them either at *nisi prius*, or before the tribunal whose duty it is to adjudicate upon the location of the way, and upon the questions raised by the provisions in the bridge charter. As this court can do nothing but accept, reject, or recommit the report, it is clear that such evidence and such only can be received as will enable it to adopt such one of these alternatives as may best protect the legal rights of the parties, but these rights must be ascertained in accordance with the foregoing suggestions, by the locating tribunal, with the proper parties before it and upon the proper evidence.

Exceptions dismissed.

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

INHABITANTS OF THE COUNTY OF PISCATAQUIS

vs.

INHABITANTS OF THE TOWN OF KINGSBURY.

Penobscot. Opinion April 15, 1882.

Debt. Scire facias.

Where an execution against a town is returned, by an officer, satisfied by a sale of real estate situated in the town, but not belonging to any of its inhabitants, the execution not running against such real estate, and the sale for such reason being a nullity, the money paid by the purchaser may be recovered back of the creditor as paid to him by the purchaser by mistake.

When the creditor pays it back voluntarily, he may revive his execution either by *scire facias* or an action of debt; the two forms of action being in this State, where property is sold upon execution and not levied upon by appraisal and set off, concurrent remedies.

REPORT on agreed statement of facts.

Debt on a judgment recovered at the October term, 1873, of this court in Penobscot county, for four hundred and ninety-five dollars and forty-eight cents debt, and sixteen dollars and eight cents costs of suit.

The material facts are stated in the opinion.

Joseph B. Peaks, county attorney for Piscataquis county, for the plaintiffs, cited: *Hayford* v. *Everett*, 68 Maine, 505; *Gooch* v. *Atkins*, 14 Mass. 378; *Greene* v. *Hatch*, 12 Mass. 195; *McLellan* v. *Whitney*, 15 Mass. 137; *Ware* v. *Pike*, 12 Maine, 303; *Steward* v. *Allen*, 5 Maine, 103; *Dennis* v. *Arnold*, 12 Met. 449; *Pillsbury* v. *Smyth*, 25 Maine, 427; *Grosvenor* v. *Chesley*, 48 Maine, 369; *Soule* v. *Buck*, 55 Maine, 30; *Prescott* v. *Prescott*, 62 Maine, 428; S. C. 65 Maine, 478.

Wilson and Woodard, for the defendants.

Under a statute provision for the collection of a debt against a town, an auction of lands by a sheriff takes place. The maxim "*caveat emptor*" applies to such a sale. Addison on Contracts, vol. 2, (Morgan's ed.) § 614; Kent's Commentaries, (12th ed.) vol. 4, page 435, N. G.

One Charles A. Everett was purchaser at the sheriff's sale. He paid his money and took his deed. The sheriff took the money of the purchaser, and paid it to the execution creditor. The creditor never met the purchaser, made no covenants with him, did not know him in the transaction. The creditor only knew, that having placed his execution in the hands of an officer, that officer paid him his money.

The execution creditor brings this, his action, to recover back the money, which he had been foolish enough, or indiscreet enough, or generous enough to pay to the purchaser.

Suppose that the law of the case is, as we contend, such that Mr. Everett could not have recovered back his money by law for the

reason that the doctrine of "*caveat emptor*" applies, would the plaintiffs' counsel pretend that the voluntary acts of the parties could confer rights that the law refused? *Smith* v. *Painter*, 5 S. and R. 223; *Friedly* v. *Scheetz*, 9 S. and R. 156; *Auwerter* v. *Mathiot*, 9 S. and R. 397; *Wadler* v. *Far. Bank*, 11 S. and R. 134; *Ware, Exr.* v. *Pike*, 12 Maine, page 306, as to payment without suit.

The warrant for this present proceeding is found, or supposed to be found in statutes or decisions giving to parties, who, being creditors in executions have caused levies to be made upon real estate or supposed real estate of debtors, and upon failure of title or defective proceedings, remedy has been sought through the courts by action of debt upon judgment or *scire facias* to revive the judgment for the reason that the plaintiff had taken nothing by his proceedings, but in the case at bar the plaintiff, the county of Piscataquis, had taken every thing by its proceedings, having got its, or their, debt in full by the sale at public vendue. Freeman on Judgments, 2d ed. § § 478, 479.

A second answer to this action is that, if the plaintiff has any remedy under such a state of things, this is a case of mistaken remedy. This question has been thoroughly considered in Massachusetts, in *Perry* v. *Perry*, 2 Gray, 326.

This is a case of the sale of an equity of redemption, and purchase by a third party, and the statutes of Massachusetts in force at the time and cited, will be found to contain the same provisions as the statutes of the State of Maine. R. S., of Mass. c. 73, § 20, corresponds to c. 76, § 17 of our R. S., and § 21 of same c. in Mass. R. S., corresponds to § 18 of c. 76 of our R. S. § § 31, 37, 38 of same c. in Mass. R. S., correspond to § § 27, 28, 29 of c. 76, R. S. of Maine.

It seems that under former statute provisions in Massachusetts, the cases *Gooch* v. *Atkins*, 14 Mass. 378, and *Greene* v. *Hatch*, 12 Mass. 195, were decided, holding the doctrine that debt upon judgment would lie in such a case, but, after the change, which leaves the statute in Massachusetts the same as ours, the doctrine is announced and maintained by sound reasoning that *scire facias* is the exclusive remedy. See case *Dennis* v. *Arnold*, 12 Met. 449; see also *Dewing* v. *Durant*, 10 Gray, 29.

PETERS, J. The county of Piscataquis recovered a judgment against the town of Kingsbury; took out an execution thereon running only against the property of the inhabitants of the town; caused the real estate of non-residents to be sold upon the execution to a third person, who was a bidder therefor at the sheriff's sale; the sale was declared to be void (*Hayford* v. *Everett*, 68 Maine, 505); and the county, repaying the money to the purchaser, sues this action to get the judgment renewed. The execution was not a nullity, but gave no authority to proceed against the particular kind of property sold.

It is contended, by the defendants, that no action lies; that, as to the purchaser, the rule of *caveat emptor* applies; that the purchaser had no right of action against the creditor for the price paid; and that the creditor cannot revive a right of action by a voluntary repayment to the purchaser.

We cannot concede this position to the defendants. We think it was a case of money paid by common mistake and without consideration, and recoverable back. The mistakes of fact were several. The clerk omitted to make out a complete execution—the mistake of a draftsman—that was a mistake of fact. 1 Story's Eq. Jur. § 115. Then the parties made a mistake of fact, in supposing the execution to be properly issued. Then, it may be assumed, perhaps, that the parties did not know that the land sold did not belong to residents, inasmuch as the land was advertised for sale as belonging to owners unknown. A mistake of title may be a mistake of fact. Private right of ownership is, generally, a matter of fact, while it may be also the result of matter of law. *Shaw* v. *Mussey*, 48 Maine, 247; Benj. Sales, 415, 419. This latter statement would not apply where a purchaser has received that which he really intended to buy, although the thing bought should turn out worthless; as, for instance, where a man buys all the title another man has, and takes a quitclaim deed, and it turns out that the grantor had no title. *Butman* v. *Hussey*, 30 Maine, 263. Here the title was well enough, but there was a lack of sufficient instrumentality employed to convey it to the purchaser. In some of the states the right to recover back money paid under such circumstances is granted by statute; and it has been conceded by several judicial decisions.

Stoyel v. *Cady*, 4 Day, 222; *Flagg* v. *Dryden*, 7 Pick. 56; *Wilson* v. *Green*, 19 Pick. 433; see *Pillsbury* v. *Smyth*, 25 Maine, 427, 432.

The defendants contend that *scire facias*, and not debt, is the proper remedy to revive the judgment; that debt does not lie at common law; and that, if it once did lie, it has been abolished by R. S., c. 76, § § 17, 18.

First: Is debt a permissible remedy at common law? It was early held to be so in Massachusetts. *Greene* v. *Hatch*, 12 Mass. 195; *Gooch* v. *Atkins*, 14 Mass. 378. In *Green* v. *Bailey*, 3 N. H. 33, it was held that debt is an appropriate remedy where a levy is irregular and void on its face, but not where the trouble is that the execution is levied upon land not the property of the debtor. In *Fish* v. *Sawyer*, 11 Conn. 545, it was decided that debt, as well as *scire facias*, is a proper remedy to revive a judgment, when a levy is for any cause void; a proceeding authorized by the uniform usage and practice in that state. The question was much discussed, in our own state, in *Ware* v. *Pike*, 3 Fair. 303, and was decided in accordance with, and largely upon the strength of, the Massachusetts cases before cited; and it was there held that debt and *scire facias* were concurrent remedies.

In *Perry* v. *Perry*, 2 Gray, 326, the Massachusetts court, per METCALF, J., denied that debt would lie at common law to revive a judgment which had been levied upon real estate; and we are asked by the defendants to accept the doctrine declared in that opinion. We see no sufficient reason to induce us to do so, and think that a rule of law so long ago established and for such length of time acted upon, affording a fair and efficacious remedy to parties, should not, for merely technical objection, be readily disregarded. If the principle, upon which the earlier Massachusetts cases were grounded, cannot be traced to the old common law itself, it is just as binding, though it may have been engrafted upon the system during some of the stages of its subsequent evolution and growth. Those early decisions in Massachusetts, decided at the beginning of the century, although repudiated by the expressions contained in *Perry* v. *Perry*, must be regarded as a reliable proof of the practice and opinion in this matter at that

early day. And "*communis opinio*," said Lord ELLENBOROUGH, in *Isherwood* v. *Oldknow*, 3 M. and S. 382, "is evidence of what the law is—not where it is an opinion merely speculative and theoretical floating in the minds of persons; but where it has been made the groundwork and substratum of practice." It is not easily seen wherein this engraftment upon the English common law, if it be such, can be regarded as at all trenching upon any of its ancient maxims or principles. Broom, Max. 104; 3 Bl. Com. 160, 421; Spauld. Prac. 507.

Has the remedy, by an action of debt, been abolished or superseded by statute? It has been, as far as levies by appraisal and set-off are concerned. *Grosvenor* v. *Chesley*, 48 Maine, 369. But not in cases of a sale upon execution of an equity or of any other interest in land. See the remarks upon this question of TENNEY, J., in *Pillsbury* v. *Smyth*, 25 Maine, 427, upon pages 430 and 431; in which case this point is virtually determined adversely to the present defendants.

An examination of the statutory provision (R. S., c. 76 § § 17, 18) will show several difficulties in the way of its application to a case like this. "A creditor, who has received seizin of a levy," must sue out the *scire facias*. In the first place, a sale is not a levy, in the sense of § 17. In the next place it is not "a creditor" who receives the seizin, but, if there be a seizin in such case, the *purchaser* receives it. Then, in the sense of that section a seizin is not deliverable to a purchaser. Then, further, the remedy is given, "when the execution has been recorded" in the registry of deeds; but, when a sale is made, the statute does not require the execution to be recorded; only the officer's deed of equity need be. R. S., c. 76 § § 15, 33. It is "the creditor" who must sue out the *scire facias*, and to whom a tender of a deed of release is to be made, in order to make an irregular levy good. But the creditor in this case has made no levy, and has acquired no title, regular or irregular, voidable or void. The title goes to a purchaser, and the purchaser has no claim whatever against the debtor, and cannot maintain a suit against him. It must be seen that the sections cited are most thoroughly inappropriate to embrace the case before us.

The case of *Perry* v. *Perry*, 2 Gray, 329, *supra*, is greatly relied upon by the defendants upon this point; a case arising upon a statute not in all respects the same as ours. There is no provision in the statute upon which that case is founded, that a deed may be tendered to the creditor; and it provides that a *scire facias* may be commenced after the execution is "returned" or recorded, while our statute omits the word returned; and the result was carried in that case, in a measure, from the necessity of extending thereto the remedy of *scire facias*, as the same case decides that debt at common law would not lie, a declaration of the law which, as applicable to our own practice, we do not assent to. Further, it appears that in Massachusetts the remedy of *scire facias* is extended by statute to all cases of sales of personal property upon execution, where the title fails to be in the debtor, a fact which went to influence the result in the case cited. We have no such statutory provision. The authority of that case does not convince us that our own statute should receive the judicial construction contended for.

Whether it would or not be wise to extend *scire facias* to all sales as well as levies, as an exclusive remedy, now that real estate, by c. 80, of the acts of 1881, may in all cases be sold upon execution as well as be levied upon, is a question for the legislature.

Defendants defaulted.

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

ASENATH SMART *vs.* JOHN WHITE.

Penobscot. Opinion April 15, 1882.

Excessive fee for obtaining a pension. Excess recovered back. U. S. R. S., § 5485. Practice.

The United States statutes provide severe penalties against any person taking or contracting to take from a pensioner more than the statutory price allowed for obtaining a pension. And taking an excessive sum is *per se* an unlawful and punishable act; although the taker intended no wrong or injury; and practiced no deceit or duress; the intention is not an element of the offense.

To constitute a merely statutory offense, of which a morally wrong intent is not a necessary ingredient, guilty knowledge or intent need not be alleged or proved, where the statute, as in this case, evidently dispenses with the necessity in order to make its provisions sufficiently effective.

Money taken from a pensioner exceeding the statutory allowance for services in obtaining a pension, may be recovered of the taker by the pensioner, although obtained from him without any wrongful intention, and whether the pensioner when paying or allowing the sum, knew of the statutory protection or not. The parties do not stand *in pari delicto.*

If the offense is merely statutory and not in itself immoral, a person may recover back money paid under an illegal contract, to the party who is wholly or principally the wrong doer, in cases where the object of the statute creating the illegality, is to protect one class of men against another, or where the illegal contract has been extorted from one party by the oppression of the other.

In such a case, the defendant is not screened from liability because he was an agent merely, and had paid the money to his principal before suit brought or demand made upon him. He is a principal in perpetrating the wrong.

It is too late, after verdict, to complain that a presiding judge, mis-stated testimony to the jury. The judge's attention should be called to the matter before the jury retires, so that he can correct himself, if he has fallen into error.

ON EXCEPTIONS and motion to set aside the verdict.

Assumpsit for money had and received from the pension money of the plaintiff.

The opinion states the case and the material facts.

P. G. White, for the plaintiff, cited: 7 Green. 134; 10 Allen, 76; 11 Cush. 57; 11 Mass. 376; 61 Maine, 376; 4 Mass. 491; *Taylor* v. *Jaques*, 106 Mass. 291; U. S. R. S., § § 4445, 5484, 5485, 4785; 2 Pars. Contr. 254, (4th ed.); *Concord* v. *Delaney*, 58 Maine, 316; *Worcester* v. *Eaton*, 11 Mass. 376; *Bliss* v. *Thompson*, 4 Mass. 491; *White* v. *Franklin Bank*, 22 Pick. 181; *Jones* v. *Barkley*, 2 Dougl. 684; Dicey on Parties, 277; *Elliott* v. *Swartwout*, 10 Peters, 158; *Ripley* v. *Geltson*, 9 Jola. 201; *Frye* v. *Lockwood*, 4 Cowan, 456; *Snowdon* v. *Davis*, 1 Taunt. 357; *Hearsey* v. *Pruyn*, 7 John. 182; *Fowler* v. *Shearer*, 7 Mass. 14; *Call* v. *Houdlette*, 70 Maine, 313; *Townsend* v. *Wilson*, 1 Camp. 396; Story, Agency, § 300; Wharton, Agency, § 520.

Barker, Vose and Barker, for the defendant.

The contract made by the defendant in behalf of the town of Levant, with the plaintiff, was that he would aid her in obtaining her pension, if she would pay over to the town the amount which she might receive as arrears of pension, on account of what she was indebted to the town. This she did less fifty dollars, and the amount the town thus received was less than half what the town expended on account of the plaintiff. This was not a payment of an excessive amount, or any amount, to Mr. White, as fees for obtaining a pension. He was not paid anything for his services, not even the ten dollars allowed by statute. He was not to be paid anything for his services by the plaintiff. She was not to pay anybody anything for White's services, and she did not. She simply agreed to pay something towards her indebtedness to the town, and that is all she did.

This agreement didn't profess to be a mortgage, pledge, assignment or transfer of her pension. It was an agreement not prohibited by statute or good morals, and having carried out the agreement in part, she cannot now repudiate. Bigelow on Estoppel, 51, 515.

As a matter of fact, the original agreement was repudiated by the plaintiff, and what money she paid over to Mr. White for the town, she did voluntarily after the receipt of her pension, when she had a right to appropriate it as she pleased, and did appropriate a little over a hundred dollars (all but fifty dollars) in part payment of a debt she owed the town.

Counsel contended that this could not be called payment under duress, citing: Cooley on Torts, 506; *Fellows* v. *Fayette*, 39 Maine, 561; *Harmon* v. *Harmon*, 61 Maine, 229; 1 Pars. Contr. 321; *Seymour* v. *Prescott*, 69 Maine, 376.

On the question of new trial, counsel cited: Hilliard, New Trials, (2d ed.) 459; *Hunnewell* v. *Hobart*, 40 Maine, 28; *Pollard* v. *G. T. Ry. Co.* 62 Maine, 93.

The presiding justice instructed the jury: "I now come to the time when the check was received. The pensioner had the check, it was her property. She indorsed it to the defendant White. What does White say? He swore in clear and explicit terms that he claimed the money by virtue of and under the bar-

gain of April, 1879, under that contract, that he got the check by virtue of that contract. If he got that check and the money on the check by virtue of that contract as he swears he did, he had no business with it, and the plaintiff has the right to recover."

This was an error in fact and in law. *Morris* v. *Platt*, 32 Conn. 75; *Hill* v. *Canfield*, 56 Penn. St. 454; *Care* v. *Williams*, 2 Cald. 239; *Chappell* v. *Allen*, 38 Mis. 213; *Elliott* v. *Swartwout*, 10 Peters, 137; *Mowatt* v. *McClelan*, 1 Wend. 176.

PETERS, J. Section 5485, U. S. R. S., provides thus: "Any agent or attorney, or any other person instrumental in prosecuting any claim for pension or bounty land, who shall directly or indirectly contract for, demand, or receive or retain any greater compensation for his services or instrumentality in prosecuting a claim for pension or bounty land, than is provided in the title pertaining to pensions, or who shall wrongfully withhold from a pensioner or claimant the whole or any part of the pension or claim allowed and due such pensioner or claimant, or the land warrant issued to any such claimant, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall for every such offense be fined not exceeding five hundred dollars, or imprisonment at hard labor, not exceeding two years, or both, at the discretion of the court." Another provision of the federal statutes prohibits any sale, pledge or assignment of any claim, right or interest in any pension which has been or may be granted, pronouncing all such transfers void.

The plaintiff, who was entitled to a pension, had been supported by the town of Levant as a pauper. The defendant, an overseer of the poor of the town, assisted her to obtain her pension, under a verbal agreement with her, he said, that whatever back pay might be received should be applied towards her indebtedness to the town for her support. The verdict finds the fact, that the defendant got the back pay from her, under and by force of the contract, excepting that he allowed her to retain fifty dollars of the amount, to induce her to carry the contract (with that variation) into effect.

The presiding judge, in his charge, had ruled, substantially, that the plaintiff had a legal right to dispose of the pension check

or its proceeds as she saw fit; that she could voluntarily pay with it her indebtedness to the town; that, although the agreement was not binding upon her, still, if she concluded to carry out the agreement, and without fraud or duress paid the money to the town, the payment would be binding upon her; but that, if the defendant obtained the money from her by means of the contract, without her knowing that she was not compelled to pay it over, then the payment would not be binding upon her, and the money could be recovered back. Thereupon, the defendant requested the court to give the following ruling to the jury: "If the jury find that this money was paid voluntarily by Mrs. Smart to John White, as one of the overseers of the poor for the town of Levant, without fraud or duress, *even though paid by mistake*, and he had paid it over to the town of Levant before receiving notice from her that she claimed to recover it back, then he is not personally responsible to the plaintiff." This request was properly refused.

The defendant's counsel must have intended, by the phrase, "paid by mistake," a mistake of law, meaning to assert the proposition that the money could not be recovered back, if she paid it in fulfillment of the contract by a mistake of law upon her part; that is, an ignorance upon her part that such a contract was illegal and void.

It cannot be pretended that the defendant should be shielded by any plea of an ignorance of the statute upon his part. It matters not, that he intended no wrong or injury and practiced no duress, and knew not of the statute. The statute does not make the actual intention of its violator an element of the offense. It does not prescribe the penalty against a person who shall *fraudulently* contract for and receive for services a greater share of a pension than the law allows. Taking the excessive sum is *per se* an unlawful and punishable act. It is well settled, upon the great weight of authority, that, in merely statutory offenses, of which a morally wrong intent is not a necessary ingredient, guilty knowledge or intent is not necessary to be either alleged or proved, where the statute creating the offense evidently dispenses with such necessity. The statute in question is founded

upon a policy of the federal government to protect a class of persons who might be incompetent fully to protect themselves, and it must necessarily be very absolute and rigorous in order to be effective. *State* v. *Smith*, 65 Maine, 257; *State* v. *Goodenow*, *Id.* 30; *Com.* v. *Railroad*, 112 Mass. 412, and cases cited. See 12 Amer. Law Rev. 469, where the question before stated is elaborately discussed and the authorities collected.

But the plaintiff stands in a different attitude. If her pension money was taken from her through a contract declared to be void by the statute, she can have its restoration. She would be entitled to recover it back, even had she known the law, and *a fortiori* entitled, not knowing it. The parties do not stand *in pari delicto*. The penalty of the statute is levelled at him and not at her. The punishment is to be inflicted upon the taker and not upon the giver. She is to be protected, not punished. Her ignorance of the law, or her folly, if not ignorant of it, is excusable, but his is not. He commits a wrong; she does not. She cannot defraud herself. The statute would be nullified by a different interpretation.

The principle, that, where the offense is merely *malum prohibitum*, and not in itself immoral, a person may recover back money paid under an illegal contract to the party who is wholly or principally the wrong doer, runs through a long line of decisions which bear more or less analogy to the present case. The case at bar is a stronger case for the application of the principle than most of them. In Smith's Con. 204, it is said there is an exception to the rule or maxim, *in pari delicto, potior est conditio defendentis*, "where the illegality is created by some statute, the object of which is to protect one class of men against another, or where the illegal contract has been extorted from one party by the oppression of the other." And it is there further said: "In cases of this sort, although the contract is illegal, and although a person belonging to the class *against* whom it is intended to protect others, cannot recover money he has paid in pursuance of it, yet a person belonging to the class to be protected may, since the allowing him to do so renders the act more efficacious." The English cases quoted by the author to illustrate

the principle, are many and various. In *Smith* v. *Cuff*, 6 M. and Selw. 160, Lord ELLENBOROUGH says: "This is not a case of *par delictum*, but of oppression on one side, and submission on the other; it can never be predicated as *par delictum*, when one holds the rod, and the other bows to it; there was an inequality of situation between the parties."

In *Curtis* v. *Leavitt*, 15 N. Y. 9, it was held that, "where a contract otherwise unobjectionable, is prohibited by a statute, which imposes a penalty upon one of the parties only, the other party is not *in pari delicto*, and upon disaffirming the contract, may recover, as upon an implied assumpsit, against the party upon whom the penalty is imposed, for any money or property which has been advanced upon such contract." Other New York cases are to the same effect. *Schermerhorn* v. *Talman*, 4 Kernan, 93, and *Tracy* v. *Talmage*, *Idem*, 162, are to the same point, and contain copious citations of analogous cases. Benj. on Sales, (3rd Amer. ed.) § 509, note c.; and cases cited.

In *White* v. *Franklin Bank*, 22 Pick. 181, where a plaintiff had deposited money in a bank, repayable at a future day, in violation of a statute of Massachusetts, he was allowed to recover back the deposit, upon the ground that, although both parties were culpable, the defendants were the *principal* offenders. The court there said that, to deny the action, would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to take an advantage of the unwary and those who had no knowledge of the law or the illegality of such transaction. In *Lowell* v. *Boston and Lowell R. R. Co.* 23 Pick. 24, the same doctrine is restated and reaffirmed, as applicable to another class of facts. In *Atlas Bank* v. *Nahant Bank*, 3 Metc. 581, 585, the same court, speaking of the decision in *White* v. *Franklin Bank*, says: "To have decided otherwise would have given effect to an illegal contract, in favor of the principal offender, and would have operated as a reward for an offense which the statute was intended to prevent." In *Walan* v. *Kerby*, 99 Mass. 1, in construing an act relating to the sale of intoxicating liquors, the court say: "The seller and buyer of intoxicating liquors sold in violation of law are not *in*

pari delicto, because the latter is guilty of no offense. When the purchaser seeks to recover back the price he has paid, the illegality of the transaction, of which he offers evidence, is wholly on the part of the defendant, and he himself is not *particeps criminis*."

Other illustrations of the principle are found in many other cases. The doctrine is commented upon in *Concord* v. *Delaney*, 58 Maine, 316; is considered in Connecticut in the case of *Cameron* v. *Peck*, 37 Conn. 555; and elaborately discussed in New Hampshire, in the cases of *Prescott* v. *Norris*, 32 N. H. 101, and *Butler* v. *Northumberland*, 50 N. H. 33, 39.

If, then, there was such a contract between the plaintiff and the defendant, as before stated, it was illegal and void, and the defendant is not allowed to deny that he knew it to be illegal and void. He would be the principal if not the sole offender in the transaction. If the plaintiff assented to the payment under and by force of the contract because she was mistaken as to her legal rights, and did not know of the protection vouchsafed to to her by the statute, she was defrauded. In this view the different terms of the requested instruction are repugnant to each other. They are tantamount to this rendering: "If paid without fraud or duress, excepting such as may arise from the illegality of the transaction, he knowing and she not knowing that the contract was in violation of law." But that would be a fraud. The requested instruction was, therefore, self-contradictory — a *felo de se*.

The defendant cannot be screened from liability because he paid the money to the town before notice to pay back. The money was illegally in his hands. The rule of *respondeat superior* does not apply. The defendant was the active and efficient party in perpetrating the wrong complained of. *Call* v. *Houdlette*, 70 Maine, 308, and cases.

It is contended that the judge misstated to the jury some of the testimony of the defendant. Were it so, the objection comes too late after verdict. The judge's attention should have been called to the matter before the jury retired, so that he could correct himself, if he had fallen into error. But the case most

amply shows the complaint to be unfounded. Judges must allude to, and more or less repeat the evidence, in summing up to the jury, and it is impossible in all cases to preserve the exact words of witnesses. In this case no improper departure was indulged in. The defendant's statements were not misrepresented. Neither upon the law nor upon the facts should the verdict be disturbed.

Motion and exceptions overruled.

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

W. A. L. RAWSON, administrator,

vs.

MYRA H. KNIGHT, administratrix.

Knox. Opinion April 17, 1882.

R. S., c. 82, § 87. Witness. Executors and administrators. Evidence. Rule 22, S. J. C. Notice to produce papers. Practice. Waiver.

An interested witness, who is not a party, can testify in favor of one party in a suit where the adverse party is an administratrix.

Where the plaintiff, in a suit against an administratrix, contends that the thirty days notice required by the statute to be given administrators as a preliminary step to the suit, was given her by service upon her agent with her consent, and there is a conflict of evidence upon the issue whether such assent was given, it is competent for the plaintiff to show the general business relations between the defendant and the person upon whom the service was made, and that such person had been and was at the time the defendant's agent and attorney in other business connected with the same estate.

Where a party to a suit gives the adverse party notice to produce a paper at the trial, that is a sufficient notice to produce the same paper at any subsequent trial of the same cause.

Upon the issue whether or not there was a waiver by an administratrix of the thirty days personal notice upon herself, it was not error to instruct the jury, "If Stetson [plaintiff] made a verbal demand or claim upon Mrs. Knight [administratrix] in person for the bonds, and she told him to go and see Montgomery, that he was doing her business for her and would attend to it, it is competent evidence upon which the jury may find that she waived the service of the written notice upon her personally, and that service upon Montgomery would be sufficient."

Where the question pertained to the construction to be given to an agreement or paper reading as follows:

"Boston, October 29, 1875.

I have this day received of Ruel Philbrook a bill of sale of all the furniture and fixings in number six and seven, Bowdoin square, now owned and occupied by Ruel Philbrook of Boston, to secure to John B. Stetson, for the redemption of two five hundred bonds, which was placed in the hands of John Burbank to raise the sum of one thousand dollars; and should the bond not be redeemed by said Philbrook and delivered to the said Stetson, I agree to indorse over said bill of sale to Mrs. J. C. Stetson, or to any one she may dictate, at any time after sixty days from date hereof. Said bill sale is subject to a mortgage of the same furniture and fixtures given to James Mahoney of the city of Boston, and said Mrs. J. C. Stetson is to have full power to hold and execute said bill sale as I myself. E. G. Knight."

Held, that there was no error in submitting to the jury to decide under the evidence whether the paper was in fact intended by the parties as a settlement of any previous oral agreement, or intended to be merely collateral and additional thereto.

ON EXCEPTIONS.

This case was once before presented to the law court and reported. 71 Maine.

Assumpsit for the value of two United States government bonds of five hundred dollars each, alleged to have been loaned by the plaintiff's intestate to the defendant's intestate, October 29, 1875.

The opinion states the questions and material facts presented by the exceptions.

A. P. Gould, for the plaintiff, cited: *State* v. *Patterson*, 68 Maine, 473; *Todd* v. *Whitney*, 27 Maine, 480; *Homans* v. *Lombard*, 21 Maine, 308; 1 Whart. Ev. 161; *Roberts* v. *Spencer*, 123 Mass. 397; Sedg. Cons. of Stat. Law, 87; *H. and Q. B. and T. Cor.* v. *Norfolk*, 6 Allen, 356; *Ayer* v. *Spring*, 10 Mass. 83; Chit. Pl. (8th ed.) 549; 3 Saunders Pl. and Ev. 241; Howe's Pract. 241; *M. and S. Fund* v. *Rowell*, 49 Maine, 330; *Gunnison* v. *Lane*, 45 Maine, 165; *Walker* v. *Sanborn*, 46 Maine, 470.

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

The testimony of John B. Stetson, an interested witness, was improperly admitted. R. S., c. 82, § 87; Stat. 1875, c. 83;

Jones v. *Simpson*, 59 Maine, 180; *Hunter* v. *Lowell*, 64 Maine, 572.

Evidence of the general agency of Montgomery for the defendant was inadmissible and irrelevant, and it tended to affect and control the verdict. That was the reason why it was introduced, and it seriously affected the rights of the defendant. *Warren* v. *Walker*, 23 Maine, 460; *Mussey* v. *Mussey*, 68 Maine, 348; *Ellis* v. *Short*, 21 Pick. 142; *Farnum* v. *Farnum*, 13 Gray, 508; *Brown* v. *Cummings*, 7 Allen, 507; *Ellingwood* v. *Bragg*, 52 N. H. 488; *Oxnard* v. *Swanton*, 39 Maine, 125.

When a new trial is granted in a cause for any reason, the plaintiff begins *de novo*. The parties are in no way affected by the fact that there has been a previous trial. All the steps of a trial must be taken. If either party wants to show the contents of papers in the possession of the other notice required by the rules must be given. *Holley* v. *Young*, 68 Maine, 215.

There was no waiver of notice by the defendant, and the evidence to prove it was incompetent, and the instruction of the presiding justice upon this point was erroneous. *Linscott* v. *Trask*, 35 Maine, 150; 1 Greenl. Ev. § 2; *Johnson* v. *Knowlton*, 35 Maine, 467; *Sawyer* v. *E. S. Co.* 46 Maine, 400; Co. Lit. 352; *Heane* v. *Rogers*, 9 B. and C. 557; *Dezell* v. *Odell*, 3 Hill's 224; *Lawrence* v. *Brown*, 1 Selden, 401.

The construction of the paper given by Knight to Stetson, October 29, 1875, was for the court. *Wilson* v. *Hanson*, 12 Maine, 58; *Miller* v. *Lancaster*, 4 Maine, 159; *Sylvester* v. *Staples*, 44 Maine, 496; *Cocheco Bank* v. *Berry*, 52 Maine, 293; 1 Greenl. Ev. § § 4, 277.

Counsel further elaborately argued this branch of the case.

PETERS, J. The defendant being an administratrix, a witness for the plaintiff was objected to, because pecuniarily interested in the result of the suit. It was decided in *Gunnison* v. *Lane*, 45 Maine, 165, that an interested witness could testify, and that it was a party only who could not, in a case where the adverse party "is an administrator or executor, or made a party as an heir of a deceased party." The words "any cases" in § 87, c. 82, R. S., would make the section clearer, if made to read as if

written, "any parties." *Nash* v. *Reed*, 46 Maine, 168; *Millay* v. *Wiley*, *Id.* 230; *Wentworth* v. *Wentworth*, 71 Maine, 72.

It was a point with the plaintiff, to prove, that the thirty days notice to the administratrix, required by statute as a preliminary step to the suit, was given to her by a service upon her agent with her consent. To strengthen the probability of the fact contended for by the plaintiff, he was permitted to show that the person, upon whom the service was made, had been, and at that time was, the defendant's agent and attorney in other business connected with the same estate. It is not always easy to determine just how far such evidence as this is legally admissible. But we think that, there being a conflict of oral testimony upon the issue whether such an assent was given or not, it was competent for the plaintiff to show what the general business relations between the defendant and such person were. The evidence relates to the situation of parties. It was more likely that the defendant would entrust such business with a friend than with a stranger. Therefore it was not improper for the jury to know that the attorney, upon whom the service was made, was a business friend and not a stranger. The case of *Eaton* v. *Telegraph Co.* 68 Maine, 63, 67, is quite like this case, upon this point. See *State* v. *Witham*, 72 Maine, 531, 537.

The plaintiff gave notice to the defendant, before a previous trial of this cause, to produce a paper in her or her attorney's, possession. The court ruled, correctly, that this was notice to produce at the second or any subsequent trial of the cause. The notice, by the rule, is, to produce "on trial" of the cause. If produced at the first trial, it should have remained on file, to be used at another trial. If a party is notified that a paper is wanted at one trial, it is or should be known by such party that, if there be a new trial, the paper will be wanted again. The case of *Holley* v. *Young*, 68 Maine, 215, makes against the defendant upon this point, although cited in her behalf.

Upon the issue, whether there was or not a waiver by the defendant of the thirty days personal notice upon herself, the court gave to the jury this (requested) instruction: "If Stetson made a verbal demand or claim upon Mrs. Knight in person for the

bonds, and she told him to go and see Montgomery, that he was doing her business for her and would attend to it, it is competent evidence upon which the jury may find that she waived the service of the written notice upon her personally, and that service upon Montgomery would be sufficient." This is complained of by the defendant. The ruling was that the evidence was competent, not that it was conclusive; that it *might* prove the creation of an agency, not that it *did* prove it; the effect and value of the evidence were left for the jury to determine. And taking into consideration the nature of the business, the situation of the parties, and the point to be made out, we think the jury were justified in their conclusion that the fact in issue was, by such evidence, satisfactorily proved. The point was a preliminary one, upon which the real merits of the controversy between the parties did not rest, but was of vital consequence to the plaintiff.

All the remaining questions in the case are resolvable into one, pertaining to the construction to be given to the agreement or paper following: "Boston, October 29, 1875. I have this day received of Ruel Philbrook a bill of sale of all the furniture and fixings in number six and seven, Bowdoin square, now owned and occupied by Ruel Philbrook of Boston, to secure to John B. Stetson, for the redemption of two five hundred bonds, which was placed in the hands of John Burbank to raise the sum of one thousand dollars; and should the bond not be redeemed by said Philbrook and delivered to the said Stetson, I agree to indorse over said bill sale to Mrs. J. C. Stetson, or to any one she may dictate, at any time after sixty days from date hereof. Said bill sale is subject to a mortgage of the same furniture and fixtures given to James Mahoney of the city of Boston, and said Mrs. J. C. Stetson is to have full power to hold and execute said bill sale as I myself. E. G. Knight."

There was evidence tending to show that the two bonds named in this paper had been loaned by the plaintiff's intestate to the defendant's intestate; that the receiver had been pressed to return the bonds or pay the money for them; that excuses and postponements followed; that finally this paper was delivered,

signed by the defendant's intestate alone. It was claimed, at the trial, by the defendant, that this paper, *ex priprio vigore*, was a substitute for and an extinguishment of all prior oral agreements about the bonds, if any such agreements were made. The plaintiff's position was, that the paper was, at most, only a collateral contract. The question was submitted to the jury to decide, under the evidence, whether the paper was, in fact, intended by the parties as a settlement of any previous oral agreement, or whether it was intended to be merely collateral and additional thereto.

There was no error in this ruling. The paper was not difficult to interpret. But the use to be made of it, after its meaning was ascertained, was the question. It belongs to that class of papers which do not declare upon their face the purposes for which they are intended. It does not contradict them to show for what they were intended. For instance: A note of hand may be given for an account. The meaning and legal effect of the note cannot be doubted; but, whether it is a payment of the account, or only collateral to it, may be shown by other evidence. If, however, it is declared in the note itself, that it is in payment of the account, that would settle the question. So, if, in this case, the paper had furnished evidence upon its face of the application and use to be made of it, that would have forbidden any other construction. But it does not. It is susceptible of being a part of a previous, or the whole of a new, transaction. *State* v. *Patterson*, 68 Maine, 473.

Exceptions overruled.

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

EDWARD ALDEN *vs.* CHARLES W. GODDARD and others, executors of the will of FRANCIS O. J. SMITH.

Waldo. Opinion April 28, 1882.

Practice. Statute of limitations. Evidence. Confidential communications. Contract.

Where a case is presented to the law court upon an agreed statement which assumes without objection the existence of certain facts, such facts cannot be controverted in argument before the court *in banc.*

The defendant's intestate residing out of the State, when the contract in suit was executed, such residence in the absence of any proof to the contrary, is presumed to continue and will prevent the operation of the statute of limitations.

It is competent for an attorney who prepares a bill in equity signed and sworn to by his client, and filed in court, to testify where his client was described in said bill as residing, and such statement involves no violation of professional confidence.

Nor would it be a confidential communication if verbally stated to him by his client while the bill was in preparation.

In an action upon a claim purchased by the plaintiff at a sale of a bankrupt's effects, the bankrupt may be called by the plaintiff to testify, touching the same, although the party defending is an executor or administrator.

In 1862, A sold and conveyed to S, certain real estate in Illinois. In April, 1870, an agreement was entered into between the parties by which A was to re-purchase all the property he had conveyed to S in 1862, for the amount of the purchase money paid him by S, and interest. . . . . On April 4th, 1870, the parties met and found the amount due S, to be sixty-three thousand nine hundred and ninety-three dollars and thirty-seven cents. A gave S his three promissory notes of five thousand dollars each, leaving a balance due on account, of forty-eight thousand nine hundred and ninety-three dollars and thirty-seven cents. At the same time S gave his bond in which, in consideration that A would pay his three notes for five thousand dollars each, and in consideration of the further payment to be made by said A, on the execution of the deed hereinafter mentioned, of forty-eight thousand nine hundred and ninety-three dollars and thirty-seven cents, with interest from the date thereof, until such payment, he covenanted, &c., and obligated himself upon the fulfillment of said payment by said A or his assigns, within ninety days, to re-deed the premises described in A's deed of 1862, excepting what may have been sold. The ninety days expired and the payments were not made. On the twenty-sixth of June, 1870, S, by his indorsement on the bond, agreed to extend the within obligation twenty days from date, if certain things therein stated were done. The twenty days expired and the payments were not made. On the thirteenth of August, 1870, the parties met again, and A agreed in writing to accept S's draft on him for fifty thousand dollars, payable in sixty days, upon which writing S made the following indorsement: "If I shall draw upon said A, as above, I hereby agree at the same time, to transmit to him the title deeds, certificate of stock," . . which form the consideration of said acceptances, S never drew upon A, and on the sixteenth of September, 1870, notified A by letter, that he regarded the bond of April 4th, as no longer binding on him by reason of non-compliance on his part and that he held the fifteen thousand dollars, in partial liquidation of damages sustained thereby. In an action to recover the fifteen thousand dollars paid as aforesaid by A against S's executors,

Held: that the bond had expired; that there was no extension of it nor any waiver by S of a strict compliance with its terms, and that the action would not lie.

Payments made in part fulfillment of a contract cannot be recovered back by the party in fault for its non-performance.

On report of facts agreed.

Assumpsit for money had and received, brought under the provisions of R. S., c. 66, § § 13, 14, against the executors on an appeal by them from the decree of the probate court, Cumberland county, accepting the report of commissioners of insolvency on the estate of said Smith, allowing the plaintiff the sum of twenty-four thousand nine hundred and sixty-five dollars and seventy-nine cents.

The material facts are fully stated in the opinion.

Bion Bradbury and *Joseph Williamson*, for the plaintiffs.

Charles W. Goddard, *John A. Waterman* and *Daniel W. Fessenden*, for the defendants.

APPLETON, C. J. This is an action of assumpsit for money had and received under the provisions of R. S., c. 66, § § 13, and 14, against the defendants as executors on an appeal by them from the decree of the probate court, accepting the report of the commissioners of insolvency on the estate of Smith.

The questions in controversy relate to certain transactions between Hiram O. Alden, and defendants' testator, which occurred in 1870. The plaintiff claims as the purchaser of certain demands of said Alden against Smith, at a bankrupt sale of the assets of Alden.

The defendants interpose numerous objections to the plaintiff's right to recover, as well as to the reception of the evidence by which that right is attempted to be supported.

1. It is objected that there is no proof of the bankruptcy of Alden, or of the appointment of his assignee, or of the authority of the assignee to sell.

The case comes before us upon an agreed statement of facts. That statement assumes the bankruptcy of Alden, the appointment of his assignee, and the authority to sell. No objection is made to the transfer by the assignee to the plaintiff, of the claims in controversy. The objection now taken, was not reserved, nor was it intended to be.

2. The statute of limitations is relied upon as a bar to the plaintiff's claim.

The bond of Smith to Alden was dated April 4, 1870, and was to terminate in ninety days, unless there was an extension of the

same. Smith died on October 14, 1876. If this were all, the claim would be barred.

But this ground of defence assumes the continued residence of Smith in this State. But the proof shows the fact to be otherwise. Hiram O. Alden testifies that on the fourth of April, 1870, Smith was then residing at Williamsburg, New York, where the contract was signed. In the November following, Smith swore to his bill in equity against H. O. Alden, in which he is described as of Brooklyn, New York, at his own instance. On May 29, 1871, he states under his own hand, that neither he nor any attorney of his resided in Cumberland county.

Residing in New York when the contract of April 4, 1870, was signed, such residence in the absence of any proof to the contrary, is presumed to continue.

The evidence negatives a continued residence of six years in this State since the contract was made or since the supposed right of action accrued.

3. The evidence of Mr. Bradbury is clearly admissible. He testifies that Mr. Smith signed a bill in equity against Alden, in which he is described as of Brooklyn, New York, and swore to the same. The only objection is, that this is a professional communication. But it is only stating what appears of record. No exception is taken that it states the contents of a bill in equity, or a portion of it. This statement involves no violation of professional confidence. Anybody who examined the bill, could state the same facts as the witness. Nor can the statement of his place of residence be deemed a confidential communication. Indeed, it was well said by BEST, C. J., in *Broad* v. *Pitt*, 3 C. and P. 518, "I think this confidence in the case of attorneys, is a great anomaly in the law." It requires limitation rather than extension.

4. Objection is made to the testimony of Alden, the bankrupt. But he is not a party to the suit. He is not interested in its result. He is not excluded by any statutory provision. The rules of the common law would admit his testimony. It was properly admitted. *Jones* v. *Wolcott*, 15 Gray, 541.

5. It seems that on October 28, 1862, Hiram O. Alden sold and conveyed to Smith for the consideration of thirty-three thou-

sand four hundred and sixty-eight dollars, a quarter of his interest in certain real estate in Wilmington, Illinois, together with certain personal property.

In April, 1870, an agreement was entered into between said Smith and Alden, by which Alden was to repurchase all the property which he had conveyed to Smith on October 28, 1862, at the price for which it had been sold, with interest on that sum and any advances made by Smith at the rate of eight per cent. *per annum*.

Accordingly on the fourth of April, 1870, the parties met. The amount due Smith was found to be sixty-three thousand nine hundred and ninety-three dollars and thirty-seven cents. Alden gave three promissory notes, each for five thousand dollars on time, which were paid by him, and the amount of which, and interest, is sought to be recovered in this suit. These notes were deducted from the amount found due, leaving a balance of forty-eight thousand nine hundred and ninety-three dollars and thirty-seven cents due. At the same time Smith gave his bond, in which, in consideration that Alden would pay or cause to be paid three certain notes for five thousand dollars each, and "in consideration of the further payment to be made to the undersigned by said Alden, on the execution of the deed hereinafter mentioned, of forty-eight thousand nine hundred and ninety-three dollars, with interest from the date hereof, until such payment" he covenanted and promised and obligated himself "on the fulfilment of said payments of the notes above described, and the completion of the said other payments by said Alden or his assignees within ninety days," to reconvey the premises described in the deed of Alden and wife, to him dated October, 1862, of lands in Wilmington, Illinois, excepting what may have been sold, &c.

The ninety days expired. The stipulated payments were not made.

On June 26, 1870, Smith, by his indorsement on his bond to Alden, agreed if certain things therein stated were done "to extend the within obligation twenty days from date."

The obligee in the bond, Alden, had not complied with its conditions. His rights under it were forfeited. Both parties so

understood it; Alden, by desiring and receiving an extension, Smith, by giving it.

The twenty days elapsed, and the necessary payments had not been made, except the notes as before stated, Smith having executed his deed ready for delivery on payment of the amount due.

On the thirteenth of August, 1870, the parties again had a meeting. At that time Alden gave Smith authority in writing, to draw on him for fifty thousand dollars, which he was to accept, payable in sixty days, at the same time referring to certain gentlemen as vouchers for his pecuniary responsibility, and giving assurances that Smith might rely upon that sum within the time mentioned.

Upon this writing, Smith made the following indorsement: "If I shall draw upon said Alden as above, I hereby agree at the same time to transmit to him the title deed, certificates of stock in the Kankakee Company, &c. which form the consideration for said acceptances. Francis O. J. Smith."

It is claimed that here is an extension of the bond. We think not. Smith did not draw. There is no waiver of a strict compliance with the terms of the bond, but rather the reverse. As references were made as to Alden's responsibility, it might reasonably be expected that Smith would make all needed inquiries before making any drafts on him. If doubtful of his solvency, there was no reason why Smith should draw, and every reason why he should not. If he should draw and transmit the "title deed," &c. he would be utterly without security in case the acceptances of Alden should not be paid. If a renewal of the bond or a waiver of its forfeiture, it was conditional, dependent on the will of Smith. He not drawing, Alden acquired no new rights by the transactions of August 13th. The bond had been previously forfeited, and for aught then done it so remained.

On September 16th, 1870, Smith gave notice in writing, that he regarded the bond of April 4th, as no longer binding on him, on account of his failure to comply with its terms, and that the fifteen thousand dollar payment would be held as a forfeiture in partial liquidation of damages, &c.

6. The payment of the three notes of five thousand dollars each, by Alden, was made in part fulfilment of a valid contract. It was his fault that the balance remaining unpaid was not paid within the time stipulated. The contract between the parties was a fair one. The payments made were in part fulfilment of the contract. They were so received. Smith never waived his rights. He never promised to repay. It is not a case where the law will imply such a promise. *Rounds* v. *Baxter*, 4 Greenl. 454; *Appleton* v. *Chase*, 19 Maine, 74; *Hill* v. *Fisher*, 34 Maine, 143.

It seems that Smith died October 14, 1876. It is a significant fact that this claim was permitted to slumber for over six years, and till after the death of Smith.

The view we have taken of the case disposes of the claim for repayment of the three notes, each for five thousand dollars.

There are two other notes in controversy. If they are to be regarded as in part payment of the bond, the same result must follow, as in case of the other notes. If not, then there is no proof of any assignment or transfer of them to the plaintiff. In either event the plaintiff must fail.

Judgment for defendants.

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

BARROWS, J., did not sit, being related to one of the defendants.

LLEWELLYN J. MORSE and others, petitioners for partition,

vs.

JOHN DOLE and others.

Penobscot. Opinion May 1, 1882.

R. S., c. 91, § § 27 and 28. Liens on buildings and lots.

The lien given by R. S., c. 91, § 27, for labor performed, or materials furnished, in the erection of buildings, does not take precedence of a mortgage, otherwise valid and recorded before the labor or materials were contracted for; the mortgagee not being the party by virtue of a contract with whom, or by

whose consent, the services were rendered or the materials were supplied. The written notice to prevent the lien mentioned in R. S., c. 91, § 28, (stat. 1876, c. 140,) is not required where the labor or materials were furnished without the mortgagee's knowledge.

Aliter, as to work done or materials furnished after the record of the mortgage, but under a legal contract, then in force, with the mortgagor in possession.

ON REPORT.

Law court to render such judgment as the rights of the parties require.

Petition for partition.

The opinion states the case and material facts.

Barker, Vose and Barker, for the plaintiffs.

The contracts were made with the owner before the mortgage was made, and fully performed before these petitioners knew of the mortgage. The lien continues. 126 Mass. 274; 103 Mass. 227, 470; 117 Mass. 179; 52 Maine, 293.

Where a contract of this nature is made and partly performed before execution of a mortgage, the lien will operate from the commencement of such labor, or the furnishing such materials even as against the mortgage, notwithstanding some part of the materials may have been furnished, and labor performed, after the execution of the mortgage, and have priority. Any other rule would render the lien of the mechanic and material man next to, if not quite a sham and delusion. *Jones* v. *Swan*, 21 Iowa, 181; *Vito Viti* v. *Dixon*, 12 Mo. 481; 51 Iowa, 184; 22 Wis. 602; 33 Am. R. 124.

Wilson and Woodard, for the defendants, as to the lien of Morse and Company, cited: *Bicknell* v. *Trickey*, 34 Maine, 273; *Sheridan* v. *Ireland*, 61 Maine, 486.

In the last revision of the statutes the language of the lien law was changed from "on any interest such owner has in the land or in the equity of redemption if under mortgage," to "on any interest such owner has in the same." See R. S., 1871, c. 91, § 27; stats. 1869, c. 57; 1868, c. 207; R. S., 1857, c. 91, § 16; stat. 1858, c. 92; R. S., 1840, c. 125, § 37; stats. 1837, c. 273; 1821, c. 196, § 1.

This change of the last revision effected no change in the law. *Woodworth* v. *Grenier*, 70 Maine, 242; *Hughs* v. *Farrar*, 45 Maine, 72; see *Cocheco Bank* v. *Berry*, 52 Maine, 293; *Kenney* v. *Gage*, 33 Vt. 302; *Iron Co.* v. *James*, 51 Vt. 240; *Gilman* v. *Disbrow*, 45 Conn. 563; *Small* v. *Robinson*, 69 Maine, 425.

Nothing can make the lien superior to the mortgage unless it was furnished under a contract made prior to the record of the mortgage by which Morse and company were bound to furnish. If there had been such a contract the mortgage made after its date might not defeat the lien. *Gale* v. *Blakie*, 126 Mass. 274.

As to Getchell and others, their judgment embraced a nonlien item. Their contract was for building a new house, not for any repairs. See *Baker* v. *Fessenden*, 71 Maine, 292; *Lombard* v. *Pike*, 33 Maine, 141.

Their judgment speaks for itself. Freem. Judgments, § 275; *Cragin* v. *Carlton*, 21 Maine, 492.

SYMONDS, J. The lien given by R. S., c. 91, § 27, for labor performed, or materials furnished, in the erection of buildings, does not take precedence of a mortgage, otherwise valid and recorded before the labor or material, were contracted for; the mortgagee not being the party by virtue of a contract with whom, or by whose consent, the services were rendered or the materials were supplied.

In such case, where materials are delivered, or work is done, under a contract with the mortgagor, who is in possession and completing the house, subject to the mortgage, it is only to the equity of redemption that the lien attaches; only to such interest in the premises as belongs to the man by whose contract or consent the labor or materials are furnished. The lien can hold against such a mortgagee, only in cases where he has become a party to the delivery of the materials, or to the work done, by consent tacitly or expressly given. The law was so declared in *Cocheco Bank* v. *Berry*, 52 Maine, 293, 304, cited for the respondents, and no change in this respect was intended by the later acts, nor by the revision of 1871. The contract or consent of the owner must go along with the delivery of the

materials to give the lien, and when these are made part of a mortgaged estate, at least the knowledge of the mortgagee must in some way appear, before the written notice mentioned in R. S., c. 91, § 28, (amended 1876, c. 140,) can be required from him in order to prevent a later claim from taking precedence of the mortgage. It is only to the extent that the mortgagor is the owner, within the meaning of R. S., c. 91, § 27, that his consent can give the lien; that is to say, only within the limits of a mortgagor's interest.

In order to give the statutory lien on a vessel, no contract or consent of the general owner is in terms required. The language of the two sections differs in this respect. So many distinct considerations, too, affect the law relating to liens on vessels, that little is gained by attempting an analogy between them and the mechanic's lien under the statute on buildings erected, altered or repaired. In this last case, it is clear that no agreement between the mortgagor and the mechanic or the material man, after the mortgage is recorded, can subject the structure, or the lands on which it stands, to an incumbrance, great or small, which displaces the mortgage, without the knowledge or against the will of the mortgagee.

In the present case, there is no evidence that the respondents, the mortgagees, had any knowledge whatever, at the time, of the rendering of the services or of the delivery of the materials, for which the lien is claimed. The contrary, rather, is proved. Their consent, therefore, cannot be implied. Nor was the written notice mentioned in § 28 required of them to prevent the lien.

Many of the articles included in the lien judgments, on which the levies were made which gave the petitioners their claim of title, were delivered after April 20, 1877, the date of the record of the mortgage to the respondents. The cases cited sufficiently show that a judgment which includes both lien claims and non-lien claims is not effective as a judgment for a lien. If these later items, then, are not lien claims the petitioners' source of title is the attachment, which in each instance was later than the record of the respondents' mortgage.

But it is claimed that while these articles were delivered after April 20, 1877, they were delivered under contracts in force

between the petitioners and the mortgagor when the mortgage was given and recorded, by which the petitioners were under a legal obligation to deliver them; so that the mortgagor could have demanded the delivery as a legal right, and held them in damages if they did not comply.

To whatever extent this is true, we think it would give the lien as against the mortgage. In such case, the mortgagor remaining in possession and control without interference on the part of the mortgagee, performance of the contract under which the lien accrued would give the prior right. Whether the mortgagee might have taken possession and discharged the contract, or refused to accept anything more under it, and thereby have prevented the extension of the lien, is not the question here. The mortgagor remained in possession and accepted the materials and labor charged. Under these circumstances, the security of the lien which the law attached to the performance of the contract was superior to all later incumbrances upon the interest which the contracting owner had in the premises at the date of the contract. The mortgagor, allowed by the later mortgagee to remain in position to enforce the contract and compel its performance, must be in position, also, to give the lien on his interest as it stood when the contract was made; the lien on that interest being legally the inseparable companion of the contract, keeping pace with it as fast as it is performed. *Gale* v. *Blaikie*, 126 Mass. 274.

So far as the first class of petitioners are concerned, those who compose the firm of Morse and Company, no such contract is proved. It is their own statement that their agreement was to furnish the lumber, *or a portion of it at any rate;* without specifying the amount, or that it was to be all that went into the house. "I agreed to sell him what lumber he wanted from time to time to put into that house. At any time if we had thought we were not going to get our pay, we should have felt at liberty not to furnish it." The whole statement of Mr. Morse, in regard to the matter, shows that the firm was not compelled by the force of any contract to deliver lumber after the date of the respondents' mortgage. They did not act upon such an understanding of it.

Their judgment included items which as against the mortgage are non-lien claims, and the levy of the execution issued upon it, if otherwise effective, left their interest still subject to the rights of the mortgagees. They have no right of partition of the real estate with them. As to these petitioners, judgment must be rendered against them, and for the respondents for costs.

As to the other petitioners, composing the firm of Getchell, Leighton and Company, we think the evidence rather inclines in favor of their claim, that all the items charged in their bill were furnished under a contract in force when the mortgage was given.

The only witness on this point so states it; that the mortgagor "was bound to call upon us for everything in our line, extra or not. We did the work rather low and that was a part of the contract, to furnish all the extras." There are contradictions in his testimony, and it is with some hesitation that we reach this result.

The judgment which Getchell, Leighton and Company, recovered against the mortgagor having been rendered on default, all the items in the account annexed with the prices were thereby admitted. There was an error in the addition by which the balance due was reduced two dollars below what actually appeared to be due on the account. The sum of two dollars is more than the two non-lien claims charged. They amount only to one dollar and fifty cents. Under the circumstances, we think their presence in the account does not prevent the judgment being effective as one for a lien. Upon correct computation of the items admitted by the default, the judgment did not exceed the amount of the lien claims.

As to the petitioners composing the firm of Morse and Company, partition denied, with costs for respondents.

As to the petitioners composing the firm of Getchell, Leighton and Company, judgment for partition prayed for, with costs.

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

GEORGE STETSON and another, appellants, *vs.* CITY OF BANGOR.

Penobscot. Opinion May 1, 1882.

Ways. Dedication. Damages. Appeal. Practice.

Where a way is laid out upon land which had been dedicated to the public, an appeal cannot be sustained in behalf of the owner of the fee from an award of nominal damages, only.

ON REPORT.

Appeal from the doings of the authorities of the city of Bangor, in laying out so much of York street as is westerly of Exchange street in Bangor, where one dollar was allowed as land damages. The appeal to the Supreme Judicial Court only relates to damages. By the terms of the report if the appeal can be sustained the cause is to stand for trial.

Charles P. Stetson, for the plaintiffs.

The city claims that there was a dedication of the locus, or part of it, by the original proprietors, and that according to the principles laid down in *Stetson* v. *Bangor*, 60 Maine, 313, and in *Bartlett* v. *Bangor*, 67 Maine, 460, appellants are not entitled to damages. Our answer to that is that the case at bar differs from those cases in that the appellants in this case had made valuable erections upon the premises—a wharf and buildings, and had maintained them, having an adverse, uninterrupted, open and exclusive possession by themselves and their tenants from 1845 or 1846, to the time of the laying out, a period of some twenty-seven years.

We think that the weight of the authorities sustains the position that the claim of a city in a street or land dedicated for a street, may be barred by a non-user and by adverse possession. 3 Kent's Com. 451, note; 2 Dillon on Municipal Corporations, § 668; *Cincinnati* v. *Evans*, 5 Ohio, 594.

In *Bartlett* v. *Bangor*, page 466 of 67 Maine, Judge WALTON says: "And such right of way is not lost by mere non-use. An adverse use, such as placing upon the land buildings or other

permanent obstructions to all possible travel over it if acquiesced in for a sufficient length of time might have that effect."

I refer also to *Knight* v. *Heaton*, 22 Vermont, 480; *Webber* v. *Chapman*, 42 N. H. 332.

Another and different question arises as to part of the land taken by the location of the street, namely, the strip six and one-half feet in width, extending from Exchange street to the stream. This strip is outside of the street opening as laid down on the original plan and the appellants are entitled to damages for this parcel unless barred by the bond given by them in 1845.

It will be noticed that this bond provides as follows: "And it is agreed that neither this obligation nor said city order shall be used in evidence in any action now pending or which may be hereafter pending to try the question of public way, highway or town way or any other easement over that part of York street west of Exchange street."

This case is to be decided upon such testimony as is legally admissible.

This bond is not legally admissible and cannot therefore be used or considered in the case, and cannot bar appellants' right to recover damages for the six and a half feet. *Copeland* v. *Taylor*, 99 Mass. 615; 1 Greenleaf on Evi. § 192.

T. W. Vose, city solicitor, for the defendant, cited: *Stetson* v. *Bangor*, 60 Maine, 313; *Bartlett* v. *Bangor*, 67 Maine, 460; *Commonwealth* v. *Blaisdell*, 107 Mass. 234; 2 Dill. Mun. Corp. (2d ed.) § § 512, 530, 513; *St. Vincent Orphan Asylum* v. *Troy*, 32 Am. R. 286, (S. C. 76 N. Y. 108); Washburn on Easements, 556; *Farrar* v. *Cooper*, 34 Maine, 394; *Davis* v. *Bangor*, 42 Maine, 522; *Abbott* v. *Abbott*, 51 Maine, 575; *Simmons* v. *Cornell*, 1 R. I. 519.

SYMONDS, J. The principles on which *Stetson* v. *Bangor*, 60 Maine, 313, and *Bartlett* v. *Bangor*, 67 Maine, 460, were decided, applied to the facts of this case, establish a dedication to the public of York street in Bangor, as delineated on the original proprietors' plan, in 1810, sixty feet wide, and extending easterly from the Kenduskeag river, at all stages of the tide, beyond the point where the appellants claim damages for the

new location in 1873. The same cases hold that the opening of a public street over land so dedicated authorizes an award of nominal damages only to the land owner. This is not denied. But it is sought to distinguish the present case from those cited, on the ground that, in 1873, the possession of the premises by the appellants had been of such a character, and for such a length of time, as to defeat the original dedication and extinguish the public right, and thereby entitle them to recover the full value of the land included within the limits of the new location of the street in that year.

Where, as here, the limits of land dedicated to public use can be made certain by records or monuments, it would seem that under our statute, R. S., c. 18, § 76, a period of at least forty years must elapse to give any adverse right of possession; that even buildings or fences fronting on such land will not be deemed the true boundaries, as against records or monuments, unless they have been there so long. In this case, occupation of any part of the land by buildings or other erections for twenty-seven years is the extent of the appellants' claim.

The statute cited is the only one in this state which in this respect limits the common law force of the maxim, *Nullum tempus occurrit regi.* Broom's Legal Maxims; *Comm.* v. *Blaisdell*, 107 Mass. 234; *Cutter* v. *Cambridge*, 6 Allen, 20.

Except for this statute a period of sixty years, under earlier statutes which are part of our common law, would at least be required to bar such public right.

But the questions, what length of time is required to extinguish the public easement in land fully dedicated to the public, and was there such a complete dedication, accepted by the public, are not necessarily involved in the decision of this case. There was at least the incipient dedication defined in *Bartlett* v. *Bangor*, *supra*, which gave irrevocably to the purchasers of lots a right of way in the streets laid down upon the plan, and when "land thus already burdened with a perpetual and indefeasible right of private passage over it is taken for a public street, the owner is entitled to no more than nominal damages." Moreover, if the period of limitation were fixed at twenty years, so that such an incipient dedication might be defeated by the permanent obstruc-

tion of the way by buildings or otherwise, acquiesced in for that time, the evidence in this case would not sustain the claim that the right of way in the street as originally marked on the proprietors' plan had been lost.

The appellants have not been in exclusive possession since the deed to them in 1845. Their occupancy has been to a large extent consistent with all the purposes for which the way was required. The wharf at the river end of the street can scarcely be regarded, under the circumstances disclosed, as a permanent obstruction of travel. The public right has always been exercised more or less. The encroachments upon it have been repeatedly resisted. The street commissioner has entered upon the premises in different years and several times hauled in gravel to keep the way in repair. By direction of the city council he threw down a wall that the appellants were building within the limits in 1845. The whole subject has been one of contention and conflicting claims, of negotiation or of litigation, from that time to the present. Indictments for obstructing the way were found against the appellants in 1847, and were pending till 1853. The appellants had a right to make such use of the land as was not inconsistent with the public right of way. We think there has been no period of even twenty years when their possession, beyond the limits of this rightful use, has been exclusive, peaceable, uninterrupted, or in any sense by acquiescence of the city or public.

So far, then, as the way located in 1873 was within the limits of York street on the original plan, it was over land dedicated to the public, and the appeal from the award of nominal damages only cannot be sustained.

The arrangement, proposed by the appellants in August, 1845, and accepted by the city, by which the public easement over a strip six and one-half feet wide on the southerly side of York street between Exchange street and the river was discontinued, and a strip of equal width was added to the northerly side of the street, from the lands of the appellants, was a new dedication of land to the public. The discontinuance was procured upon the offer and promise of the appellants to substitute the same width of land on the opposite side; and upon their bond conditioned "to allow said city and the public the same right of

use in six and one-half feet extending northerly from the northerly line of York street . . . . that the said city or public now has to York street."

The doctrine of estoppel lies at the basis of all dedications, and makes them irrevocable. The appellants could not by their act, by their agreement to widen the street northerly out of their own lands, induce the city to narrow it on the south, erect buildings upon the part so discontinued, and then successfully deny the right of way over the substituted strip of land. They agreed to dedicate and did dedicate the six and one-half feet on the north to the public, to the same extent to which it should be legally determined that York street was dedicated. The city accepted that agreement and acted upon it, allowed the appellants the full benefit that accrued to them therefrom, and now rightfully assert the public easement in the new dedication which was received in exchange for the surrender of the old.

It is true that neither the bond nor the proceedings of August, 1845, are to be "used in evidence in any action now pending or which may be hereafter pending to try the question of public way, highway, town way or any other easement," in York street.

We do not use them for that purpose. Whether York street was a way dedicated to the public in such sense as to preclude the recovery of more than nominal damages on this appeal, or not, we determine without reference to this agreement to narrow on the south and widen on the north. But having decided that question on distinct grounds, we then find that the proceedings of August, 1845, give the city and the public the same rights in the strip added on the north, as previously they had within the limits of York street; namely, the right of public way by dedication.

None of the appellants' land, except that so dedicated, having been included in the location of 1873,

The appeal from the award of nominal damages is dismissed.

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

JANE L. PREBLE, appellant in probate, *vs.* HARRIET R. PREBLE.

Hancock. Opinion May 1, 1882.

Executors and administrators. Witnesses.

An executor or administrator cannot testify in his own behalf in support of his private claim against the estate, which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff.

ON REPORT of the presiding justice.

An appeal from the allowance of Harriet R. Preble's alleged private account, she being the administratrix of her late husband, Benjamin Preble; the appellant, herself an heir, appearing for his heirs. The estate had been represented insolvent and commissioners appointed.

As to the charges for personal property (not money) the defence was the statute of limitations; six years elapsed after the charges and before the death of the intestate, which occurred on January 26, 1879, the claimant was his wife during that period of time. If those charges are legally barred by the statute of limitations, they are to be stricken from the claim. If not thus barred, or if it is a matter of discretion with the trial court, whether such a defence shall be allowed or not, then as to those items a trial is to be had.

As to the remaining items (for money,) the heirs contended that a claim for them cannot be legally sustained, against their objection to the admission of such evidence, by either her own testimony or by her affidavit accompanying the claim. If that be so, then those items were to be expunged from the account. But if otherwise, or if it be a matter of discretion with the trial judge to admit such evidence or not, then as to those items a trial is to be had.

Upon a decision by the law court of the law questions presented, the case to be remanded to the trial court, for an arrangement and settlement of the case accordingly.

E. Hale and *L. A. Emery*, for the appellant, cited: *Eveleth* v. *Crouch*, 15 Mass. 307; *Withee* v. *Rowe*, 45 Maine, 571; R. S., c. 82, § 87; 1 Whart. Ev. 466; *Warner* v. *Fowler*, 8 Md. 25; *Ela* v. *Edwards*, 97 Mass. 318; *Morse* v. *Page*, 25 Maine, 496; *Gould* v. *Carlton*, 55 Maine, 511.

A. P. Wiswell, for the administratrix.

The claim of an administrator against an insolvent estate is to be examined and allowed by the judge of probate, and by him annexed to the list of claims. R. S., c. 66, § 8, that involves an examination of the claimant. Other creditors in case of an appeal in relation to their claims may be examined on oath as before the insolvent commissioners, and thus become a witness in their own behalf in the discretion of the court. R. S., c. 66, § 15; *Gould* v. *Carlton*, 55 Maine, 511.

Where the appeal is from the allowance of an administrator's account the same proceedings must be had before the justice of the supreme court of probate as before the judge of probate.

Counsel further argued the question of the statute of limitations.

SYMONDS, J. The administratrix of an insolvent estate, on appeal by an heir from the allowance in the probate court of her private claim against the estate, seeks to sustain it by her own testimony.

Is she a competent witness?

"The rules of evidence in special proceedings of a civil nature, such as before . . . . . courts of probate, shall be the same as herein provided for civil actions." R. S., c. 82, § 89; *Withee* v. *Rowe*, 45 Maine, 585.

"Nor have we more enlarged jurisdiction for the application of principles of equity, when exercising appellate authority as a court of probate, than we should have as a court of common law; for the rules of evidence, as well as of property, bind us equally in either capacity, except where by statute a difference is made." *Eveleth* v. *Crouch*, 15 Mass. 309.

It is clear that the testimony of the administratrix, a party to the record and directly interested in the event of the suit, is excluded by the common law. The statute which forbids the

excuse or exclusion of witnesses on these grounds does not apply generally to cases in which one of the parties is the legal representative of a deceased person, but on the contrary usually excludes the survivor from testifying in his own favor, when the death of the other party to the contract or cause of action has rendered it impossible to have his evidence at the trial. In the excepted cases, in which the statute applies, notwithstanding the death of the adverse party, there is no provision that an executor or administrator, presenting a private claim against the estate, may testify in his own behalf in its support, adversely to the estate which he nominally represents, but which in that instance is the real defendant against which he is proceeding as plaintiff. The statute does not make the administratrix a competent witness, in this proceeding.

In *Ela* v. *Edwards*, 97 Mass. 318, it was held that an executor is not a competent witness in his own behalf to sustain a claim for services rendered to the testatrix in her lifetime. "The party plaintiff to the contract in issue and on trial, as well as the plaintiff of record, was the appellant in his individual right. The party defendant was the estate, of which the appellant was the executor, but which was necessarily represented in this proceeding by the party objecting to the appellant's claim. The statute regulating the competency of parties to the record as witnesses applies equally to probate proceedings and to actions at law. The fact that the appellant was obliged to make his individual claim by stating it in his account rendered to the court of probate, instead of in a declaration in an action at common law, gave him no right to testify in his own favor since the death of the person whom he alleged to have made the contract which was the foundation of the claim." *Higbee* v. *Bacon*, 8 Pick. 483; *Bailey* v. *Blanchard*, 12 Pick. 165; *Granger* v. *Bassett*, 98 Mass. 468.

The duty of the executor or administrator to verify his account by oath, the power of the probate court to subject him to examination under oath, upon matters concerning his relations to the estate, his accounts and administration, are well recognized by the decisions cited. These result from his acceptance of the trust

over which that court has supervision; or come directly by statute. They gave him no advantage as a witness, when he assumes the position of creditor of the estate. *Higbee* v. *Bacon*, 7 Pick. 14; *O'Dee* v. *McCrate*, 7 Green. 467; *Pope* v. *Jackson*, 11 Pick. 117; *Bradley* v. *Veazie*, 47 Maine, 85; *Sigourney* v. *Witherell*, 6 Met. 558; *Gould* v. *Carlton*, 55 Maine, 511.

As the statute of limitations is not urged in argument as a defence, it may properly be assumed that the lapse of time, during coverture, would not bar any items otherwise valid and proved.

According to the terms of the report the case is remanded for trial.

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

JENNIE A. ROWELL in equity *vs.* HENRY S. JEWETT and another.

Somerset. Opinion May 4, 1882.

Mortgage — redemption of. Tender. Interest. Rents and profits. Statement of account.

A mortgagee is not obliged to accept a tender of the amount due on the mortgage, from one who holds but a moiety of the equity of redemption, and when there is a dispute as to the title to the equity, in redemption and discharge of the whole mortgage.

And when a tender is refused under such circumstances, the interest on the mortgage debt does not stop at the date of the tender. Nor will interest stop when it appears that the person making the tender had the use and benefit of the money tendered from and after the time when it was made.

Where one went into possession of real estate under a conditional deed from the mortgagor, and, before the entry of the mortgagor for breach, became the tenant of the mortgagee, the latter is chargeable for rents and profits from the time when the mortgagor made a formal entry upon the premises to re-possess herself for breach of the conditions of her deed.

Where the tenant of the mortgagee in possession, expended two hundred and fifty dollars for a barn on the farm, and ten dollars for a pump, both of which were judicious under the circumstances, the mortgagee may be allowed for such expenditures in the statement of the account; but he cannot be allowed for fifty dollars paid counsel in a process of forcible entry and detainer against a tenant when it appears that the case went to judgment in his favor and the parties to the recognizance settled the rents and costs, and the mortgagee does not disclose how much he thus received.

Where the master in chancery fixes upon a fair value for the annual rent from the evidence submitted to him, and he is not requested to report that evidence to the court, and does not, his conclusion must be deemed to be correct.

ON REPORT.

Bill in equity to redeem mortgaged premises.

The case went to a master to state the account and was reported from the March term, 1881, upon the following stipulation:

"The master's report in this case was made at this term. It presents certain findings and an alternative report. The complainant filed exceptions to the master's report in certain particulars. By agreement, the report and the exceptions are to be submitted to the law court, to be disposed of as the court here should do, and direct such order or decree as shall be in accordance with the legal rights of the parties."

The opinion states the questions raised by the exceptions to the master's report.

D. D. Stewart, for the complainant.

It was the duty of the defendant to have taken so much of the tender as was due on the mortgage. *Dean* v. *Washburn*, 17 Maine, 102; *Saunders* v. *Frost*, 5 Pick. 267; 2 Jones, Mortgages, § § 893, 894, 899; *Tucker* v. *Buffum*, 16 Pick. 49; *Kartright* v. *Cady*, 21 N. Y. 353; *Otis* v. *Barton*, 10 N. H. 433; *Sargent* v. *Graham*, 5 N. H. 440.

The tender and refusal stopped the running of interest. *Brown* v. *Simmons*, 45 N. H. 213; *McNeil* v. *Call*, 19 N. H. 403; *March* v. *R. R. Co. Id.* 372; *Tucker* v. *Buffum*, 16 Pick. 46.

It was not necessary to bring the tender into court. *Colby* v. *Stevens*, 38 N. H. 191; *Tucker* v. *Buffum*, 16 Pick. 46; *Richards* v. *Pierce*, 52 Maine, 561; *Hubbell* v. *Moulson*, 53 N. Y. 225; *Bailey* v. *Metcalf*, 6 N. H. 156; *Graham* v. *Linden*, 50 N. Y. 547.

The master found as correct, that Jewett told Mitchell, who was on the place at the time, as the time expired to go to work and keep the farm up, and if Mitchell wanted to redeem, he

would give him a chance. That was in February 28, 1872; and Jewett testified, "He has been in possession of the place ever since under me." Then Jewett should be charged in the statement of the account with rents and profits from that date. *Jewett* v. *Cunnard*, 3 Woodb. and M. 300; *Dela* v. *Stanwood*, 62 Maine, 574; 2 Jones, Mortgages, 1114; *Harrison* v. *Wyse*, 24 Conn. 1; *Kellogg* v. *Rockwell*, 19 Conn. 446; *Reitenbaugh* v. *Ludwick*, 31 Penn. St. 131; R. S., c. 90, § § 2, 19; *Farwell* v. *Sturdivant*, 37 Maine, 308; *Saunders* v. *Frost*, 5 Pick. 269.

Folsom and Merrill, for the defendants.

Jewett should be accountable for what rent he actually received, and no more. The master's report shows that he received no rent prior to commencement of process of forcible entry and detainer, May 16, 1876. Prior to that, Mitchell was in possession as mortgagor, under the mortgagee. That was all Jewett's testimony meant. He was not under him as tenant. See 1 Smith's Leading Cases, 888, (Am. ed.); 1 Hilliard Mort. 218; *Connor* v. *Whitmore*, 52 Maine, 185; *Astor* v. *Hoyt*, 5 Wend. 603; *Walton* v. *Cronly*, 14 Wend. 63; *Calvert* v. *Bradley*, 16 How. 58; Daniel's Ch. Pr. 1239, 1248; *Bailey* v. *Myrick*, 52 Maine, 136; *Gordan* v. *Lewis*, 2 Sumner, 143; 4 Kent's Com. 166, (5th ed.); *Charles* v. *Dunbar*, 4 Met. 498; *Simmonds* v. *Jacobs*, 52 Maine, 153; *Howe* v. *Russell*, 36 Maine, 115.

LIBBEY, J. In this case, the master reports the facts upon which the amount due between the parties can be computed according to law; and he reports two computations based upon different legal propositions, the first of which he says he thinks correct, but reports all the facts for the decision of the court. The plaintiff excepts to the rules adopted by the master in each computation, and the case comes before this court on report for such a decree as the judge, at *nisi prius*, should enter. The case is properly before us for such a decree as should be made upon the facts reported by the master, without regard to his statement of the accounts.

This suit was commenced December 6, 1875, and has twice been before this court. 69 Maine, 293; 71 Maine, 408. On the

twenty-ninth of March, 1875, the plaintiff obtained from a bank, eight hundred dollars, for the purpose of making a tender to the defendant, Jewett, and on the same day made the tender to him to redeem the whole mortgage. The tender was not accepted by the defendant, and the plaintiff paid the money back to the bank on the same day, paying nothing for the use of the money.

The first point raised by the plaintiff is, that the tender should stop the interest on the note secured by the mortgage.

When this case was before this court upon the merits, (69 Maine, 293) it was held that the plaintiff could not maintain her bill to redeem, without making Fifield Mitchell a party, and having the question of the title to the equity of redemption, as between said Mitchell and herself, settled in this suit; and it was also held that, in any event, she had the right to redeem from the Burrill mortgage held by the defendant, Jewett, one undivided half of the premises only. Under these facts existing at the time of the tender, we think Jewett was not obliged to take it in redemption and discharge of the whole mortgage. He had a right to have the disputed title to the equity first settled, and then the tender should have been made to redeem the undivided half only.

But we think the plaintiff's position is not tenable for another reason. She had the benefit of the use or interest of the money tendered, and in such case she should account for the interest and the defendant should have the benefit of it. *Tucker* v. *Buffum*, 16 Pick. 46. This would be equivalent to the interest on the mortgage debt; therefore the tender should not affect the computation of interest. It was sufficient to authorize the maintenance of the bill, but should have no other effect.

The next objection raises the question, from what time shall the defendant, Jewett, be charged with the rents and profits of the premises? In his first computation the master commences May 22, 1876; and in his second, February 28, 1872. The defendant claims that the second date is the true time. We think neither is correct.

Fifield Mitchell was in possession of the mortgaged premises under a conditional deed from the plaintiff's testator to him, prior

to November 19, 1873, when she made a formal entry upon the premises, to repossess herself thereof, for breach of the conditions of her deed; and on the twenty-seventh of November, 1873, she commenced a writ of entry therefor against the defendants. Prior to that time the relation between Mitchell and Jewett was that of equitable mortgagor and mortgagee, and such that Jewett was not accountable for rents and profits to any one, but he and Mitchell appeared and defended the suit of the plaintiff's testator, prosecuted after her death by the plaintiff, on the ground that the defendant, Jewett, held the Burrill mortgage, and that Mitchell was in possession of the demanded premises under him as his tenant, and thereby prevented the plaintiff from getting possession. He thus held her out of possession, on the ground that he was holding it by his tenant under that mortgage. We think he should be held to account to the plaintiff for the rents and profits, from the commencement of that suit, November 27, 1873.

The master finds that in 1877 the farm needed a new barn to take the place of one which had been recently destroyed by fire, and that in the summer, before haying, Mitchell erected one at an expense of two hundred and fifty dollars. This expenditure was a judicious one in the proper management of the farm. In 1879 he expended ten dollars for a pump which was judicious and proper. The defendant is accountable for rents and profits on the ground that he was in possession, receiving them by his tenant, Mitchell, and we think he is entitled to have these expenses allowed precisely as if they had been made by himself. The plaintiff has the benefit of them and it is equitable that she should be charged with them in stating the accounts.

The next objection is to the allowance to the defendant of fifty dollars paid counsel in a suit of forcible entry and detainer, commenced by him against Mitchell for possession of the farm in May, 1876. The case was appealed by Mitchell to the Supreme Judicial Court, and he entered into a recognizance with sureties according to law, for intervening costs and rents. The suit went to judgment in favor of Jewett in January, 1881; and he settled

with the parties to the recognizance for the costs and rents, but does not disclose what rent or costs he received. Upon these facts we think he should not be allowed the fifty dollars in the statement of the accounts.

The next and last exception taken is that the master should have allowed more than one hundred dollars per year for the rents and profits of the premises. He fixed their fair value from the evidence submitted to him. He does not report the evidence upon which he formed his judgment, and it does not appear that he was requested to do so. There is nothing in the case which shows that his conclusion was not correct.

To prevent further delay we have stated the accounts between the parties in accordance with the foregoing rules, and find the amount that will be due on the mortgage on the twenty-seventh of March, 1882, will be two hundred and fifty-three dollars and seventy-five cents, one half of which must be paid by the plaintiff to redeem her undivided half of the premises. The proper decree will be drawn and transmitted to a justice of the court for signature, for redemption of the mortgage and for costs, in accordance with the foregoing conclusion, and the determination of the court in this case, as appears by the opinion, 71 Maine, 412.

Decree accordingly.

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

PORTLAND AND HARPSWELL STEAMBOAT COMPANY, in equity,

vs.

JOSEPH A. LOCKE, administrator on the estate of CHARLES SAWYER.

Cumberland. Opinion May 4, 1882.

Trust funds. Equity.

A bill in equity against an administrator stated in substance that the deceased at the time of his death had on deposit in a bank in his own name and "upon his individual account" $898.08 and that "said deposit included and covered"

a balance of $559.35 held by the deceased in trust for the plaintiff, and the prayer was that the administrator be required to pay over for the benefit of the plaintiff, such balance.

Held, that the identity of the trust funds was lost and the *cestui que trust* stood no better than other creditors of the estate.

On demurrer to a bill in equity.

Bill in equity by William H. Fessenden "delegated and authorized by said company to act for it in closing up its affairs."

The following are the averments of the bill considered in the opinion.

"And your orator avers, that thereupon, to wit: On the twenty-sixth day of July, A. D. eighteen hundred and seventy-seven, the said John S. Morris, in payment of the sum due in the premises from him to the said Portland and Harpswell Steamboat Company, delivered in hand and paid to the said Charles Sawyer, so as aforesaid authorized to receive the same, forty-five hundred dollars in good and lawful money, which said sum of money, to wit, said forty-five hundred dollars, he, the said Charles Sawyer, then and there, to wit: at said Portland, on July twenty-sixth, A. D. eighteen hundred and seventy-seven, received as the funds, property and money of the Portland and Harpswell Steamboat Company, aforesaid, and in trust for said Portland and Harpswell Steamboat Company.

"And your orator further avers that on the twenty-sixth day of July, aforesaid, the said Charles Sawyer deposited upon his individual account, in the Merchants' National Bank — a national banking association, established and existing under the laws of the United States of America, and having its banking house and place of business at said Portland, — said sum of forty-five hundred dollars, so as aforesaid received by him.

"And your orator shows that on the twenty-fourth day of September, A. D. eighteen hundred and seventy-seven, said company, at a meeting thereof then held, voted that the said Charles Sawyer be instructed and authorized to pay all bills outstanding against said company, approved and passed by the directors of said company. . . .

"And your orator shows and avers, that of and from said sum of forty-five hundred dollars, so as aforesaid, by said Sawyer

received in trust for said company, there remained, after such payments had been made and paid, as aforesaid, by him the said Sawyer, a balance of five hundred fifty-nine dollars and thirty-five cents, in the said trust of him, the said Sawyer, on deposit, as aforesaid, in said bank: which balance of five hundred and fifty-nine dollars and thirty-five cents the said Sawyer never paid to said company, or to any person for or on account of said Company.

"And your orator avers that the said Charles Sawyer died on the twenty-eighth day of October, A. D. eighteen hundred and seventy-seven, leaving a will executed by him on the 28th day of June, A. D. 1876; that on the first Tuesday of December, A. D. eighteen hundred and seventy-seven, Joseph A. Locke, of said Portland, this defendant, was, by the honorable judge of probate for said county of Cumberland, duly appointed administrator, with the will annexed, of the estate of said Charles Sawyer, deceased, and thereupon the said Locke was duly qualified to act as such administrator, and entered upon the performance of the duties of such office. . . .

"And your orator has been informed, and believes it to be true, and thereupon avers that on December 18th, A. D. 1877, the said Locke, as such administrator, withdrew and received from said bank the deposit of said Sawyer, remaining and being in said bank at the time of his death, to wit: the sum of eight hundred ninety-eight dollars and eight cents, which said deposit and sum of eight hundred ninety-eight dollars and eight cents, so withdrawn and received by said Locke, included and covered said balance of five hundred fifty-nine dollars and thirty-five cents, so by said Sawyer held, on said deposit, in trust for said company as aforesaid. . . .

"To the end therefore that the said defendant . . . may be decreed to pay to your complainant for said Portland and Harpswell Steamboat Company said balance of five hundred fifty-nine dollars and thirty-five cents, said money so by said Sawyer at his death held, and so by this defendant received in trust for said company, and that said complainant may have such further and other relief as the nature and circumstances of the case may require and to your honors shall seem meet." . .

Henry W. Swasey, for the plaintiffs.

Here is a trust that remained open in the respondent's testator at his death, and the assets which said testator held as trustee and received by respondent, are held by him upon the same terms and trusts as said testator held them. The case as stated in the bill and admitted by the demurrer falls peculiarly within the jurisdiction of a court of equity. Perry on Trusts § § 245, 264, 344: R. S., c. 77 § 5, Fourth; 65 Maine, 180; 67 Maine, 514.

Joseph A. Locke, for the defendant.

WALTON, J. We do not find it necessary to consider the technical objections made to the maintenance of this suit, for we are satisfied it cannot be maintained upon its merits. The bill states in substance that Charles Sawyer, at the time of his death, had on deposit in one of the banks in Portland, in his own name, and "upon his individual account," $898.08; and that "said deposit included and covered" a balance of $559.35, held by said Sawyer in trust for the Portland and Harpswell Steamboat Company; and the prayer of the bill is that the defendant, as administrator upon said Sawyer's estate, may be required to pay over said balance to the plaintiff for the benefit of said company. It is plain from these statements that the trust funds were not only deposited to the private and individual account of Sawyer, but that the funds had in some way become mixed with other funds belonging to him; for the balance claimed to be due from him to the company is considerably less than the amount remaining on deposit in the bank. The identity of the trust funds is therefore lost; and, in such a case, the *cestui que trust* can stand no better than other creditors. *Goodell* v. *Buck*, 67 Maine, 514.

Bill dismissed, with costs.

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

JOHN GIVEN *vs.* AMHERST WHITMORE, administrator of the estate of THOMAS GIVEN.

Cumberland. Opinion May 4, 1882.

Statute of limitations, avoidance of.

To sustain an averment in a writ, commenced against an administrator more than two years after notice of his appointment, that the cause of action had been fraudulently concealed from the plaintiff by the defendant, the plaintiff testified that the defendant promised before he was appointed administrator that he would see to the plaintiff's account against the estate and this the defendant had neglected to do. *Held*, that here was not evidence from which a jury could find a fraudulent concealment of the cause of action. The plaintiff's cause of action, if he had one, could not be thereby concealed.

ON EXCEPTIONS.

Assumpsit on an account annexed for labor and sundries.

The writ was dated December 7, 1878.

Plea, general issue, with a brief statement of *plene administravit* and statute of limitations.

The defendant was appointed administrator on the third Tuesday of April, 1876, and gave the notice of his appointment required by law, and ordered by the judge of probate within three months thereafter.

The plaintiff presented his claim in writing to the administrator and demanded payment November 5, 1878.

The writ contained the following averment: "And the plaintiff avers that after the said Whitmore took upon himself the trust of administrator, aforesaid, and before the purchase of this writ, the plaintiff's right and cause of action was fraudulently concealed from him, the said plaintiff by the said Whitmore, and that a fraud was within that time committed by the said Whitmore which entitles the plaintiff to this action."

At the trial the plaintiff testified in relation to signing the petition for the appointment of the defendant as administrator.

"I told him [Whitmore] I couldn't sign it till — I should have to see my counsel, that I had bills against the place and I didn't want to sign anything without having some one to advise me.

At that he told me I didn't need anybody, that he could see to everything himself. I mentioned about my bills. I rather wanted a counsel any way, because I was hard of hearing, I told him. He told me I didn't need any, it would only be an expense to me to get a counsel, and he would do everything I wanted him to, that is, I understood him so.

Question. Whether or not he said anything to you about paying your account that you spoke to him about?

Answer. No; he said he would see to it, he would see to my account.

Question. What did you understand by that?

Answer. I understood him that he would see to my account. He said it two or three times when he was persuading me not to get a counsel.

Question. State whether you believed what he told you?

Answer. I did after a while. I did not at first, because I dared not sign till I was certain."

After the evidence for the plaintiff was closed, the presiding justice ordered a nonsuit, and to this the plaintiff alleged exceptions.

Henry Orr, for the plaintiff.

Weston Thompson, for the defendant.

WALTON, J. This is an action against an administrator. It was not commenced within the two years mentioned in the act, 1872, c. 85. To avoid this ground of defense the plaintiff averred in his writ, and claimed at the trial, that his cause of action had been fraudulently concealed from him by the defendant. But there was no evidence that would justify the jury in finding such a concealment, and the presiding judge ordered a nonsuit. We think the nonsuit was right. The only evidence offered in support of the alleged fraudulent concealment was the testimony of the plaintiff that the defendant, before he was appointed administrator, promised that he would see to the plaintiff's account against the estate, which he neglected to do. But the making of such a promise, and its nonfulfillment, could not conceal from the plaintiff the fact, if it was a fact, that the estate

was indebted to him. His cause of action, if he had one, could not be thereby concealed. His cause of action is an account annexed to the writ for work and labor performed for the deceased in his lifetime, and for seventy-five or a hundred other items of cash paid for groceries and other articles. The plaintiff's delay in presenting and prosecuting his claim may have been caused by the defendant's promise, but his knowledge of the fact that he had such a claim could not be thereby obliterated. The defendant may have been guilty of such fraud or negligence as would give to the plaintiff a right of action against him; but such right would have to be enforced in another and a different form of action from the one now before us, and the defendant would have to be sued in another and a different capacity from the one in which he is now sued.

There is another averment in the plaintiff's writ intended as an avoidance of the statute of limitations. It is an averment that assets came into the hands of the defendant within six months of the time when the action was commenced. But there is no evidence whatever in support of this averment, and it will not be further noticed.

We think a nonsuit was properly ordered.

Exceptions overruled.

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

CHRISTOPHER SEVERANCE *vs.* HIRAM C. JUDKINS.

Penobscot. Opinion May 5, 1882.

Malicious prosecution. Pleading. Perjury.

In an action for malicious prosecution, the plaintiff must allege and prove the fact of such prosecution and its termination in his favor.

At common law the perjury of a witness affords no ground of action for damages. Such an action is authorized by R. S., c. 82, § 124, but it applies only in civil suits.

Though the conviction of a minor son of an offense may be unjust and procured by fraud and perjury, and through a conspiracy to accomplish such a purpose

an action by the father for damages occasioned thereby, is not maintainable while such conviction remains unreversed.

ON REPORT.

The opinion states the case.

N. Wilson, for the plaintiff.

The declaration shows that the trial justice before whom the proceedings were had, which occasioned the damages complained of, had no jurisdiction, and his acts and doings were wholly null and void. *Buffum* v. *Ramsdell*, 55 Maine, 252; *Sidensparker* v. *Sidensparker*, 52 Maine, 481; *Gilbert* v. *Duncan*, 65 Maine, 469.

The counsel further elaborately argued the case contending that the fraud and perjury and subornation of perjury by the defendant, and the indecent haste of the proceedings, and the lamentable consequences, all occasioned heavy damages to the plaintiff, for which the law must afford relief, and this was a proper remedy.

C. A. Bailey, for the defendant, cited: *O'Brien* v. *Barry*, 106 Mass. 303; *Hamilburgh* v. *Shepard*, 119 Mass. 30; *Dunlap* v. *Glidden*, 31 Maine, 435; *Sayles* v. *Briggs*, 4 Met. 421; *Stewart* v. *Sonneborn*, 98 U. S. 187; *Burt* v. *Place*, 4 Wend. 591; *Cloon* v. *Gerry*, 13 Gray, 201; *Mellor* v. *Baddeley*, 6 C. & P. 374; S. C. 2 C. & M. 675; *Whitney* v. *Peckham*, 15 Mass. 243; *Ulmer* v. *Leland*, 1 Greenl. 135; *Witham* v. *Gowen*, 14 Maine, 362; *Payson* v. *Caswell*, 22 Maine, 226; *Parker* v. *Huntington*, 7 Gray, 36.

APPLETON, C. J. The plaintiff in his declaration, alleges that the defendant wickedly, maliciously intending and contriving to wrong and injure him, and without probable cause, on the eighth of October, 1877, made and swore to a complaint before David Norton, a trial justice, for the county of Penobscot, against his (plaintiff's) minor son, Ivory E. Severance, for unlawfully, wilfully and maliciously breaking, injuring and defacing a building or house of his (defendant's) without his consent; that said Norton issued upon said complaint, a warrant against his said son; that he was arrested, brought before said justice, tried by him, and found guilty upon the false and perjured testimony of the defendant and one Frederick Ray, whom the defendant had

suborned; that he was immediately on the twenty-third of October, 1877, sentenced by the magistrate before whom he was tried, to the Reform School, during his minority; that he remained there till he was discharged therefrom on April 14, 1879, and returned home and died. And the plaintiff further avers "that by reason of said false, wicked and malicious charges and complaint and warrant and trial thereon, and the sentence aforesaid, and the enforcement of said sentence, by reason thereof, and on account of and in consequence of said false and untrue charges, and evidence as hereinbefore set forth, he was greatly injured in his feelings and suffered the loss of the services and labor of his said minor son, and also lost his society and companionship, and was put to great trouble and expense in providing and caring for him, and his said son also suffered in reputation, mind and body, and his sickness and death were the results wholly induced and caused as aforesaid, all which have been and are an injury and damage to the plaintiff," &c.

To this the defendant demurred, and there was a joinder in demurrer.

The magistrate had jurisdiction. His judgment is in full force, and neither reversed nor annulled.

This would seem, so far as can be judged from the declaration, to be an action by a father for the malicious prosecution of a deceased son, the judgment rendered against the son remaining in full force. However groundless, malicious or destitute of probable cause the prosecution may have been, the son, if living, could not, in this state of facts, have maintained an action for the wrong done.

In an action for malicious prosecution, the plaintiff must show the fact of the prosecution and its termination in his favor. *Sayles* v. *Briggs*, 4 Met. 421. To sustain such suit, it must be averred and proved that there has been a failure of the proceedings against the plaintiff which constitute the ground of his complaint. *Stewart* v. *Sonneborn*, 98 U. S. 187. If the action is commenced while the malicious suit or a prosecution is pending, it cannot be maintained. *O'Brien* v. *Barry*, 106 Mass. 303; *Hamilburgh* v. *Shepherd*, 119 Mass. 31. In *Mellor* v. *Baddeley*, 2 C. & M. 675, it was held that a conviction unreversed, consti-

tuted a complete answer, as showing probable cause for instituting the prosecution. The declaration is fatally defective, unless it set forth the termination of the suit against the plaintiff and in his favor. *Davis* v. *Clough*, 8 N. H. 157.

It is alleged that the conviction of the son was procured by the perjured testimony of the defendant, and one Ray, whom he suborned. At common law, the perjury of a witness affords no ground of action. An action upon the case does not lie for perjury of a witness, whereby the plaintiff recovered less damages in trover. *Damport* v. *Simpson*, Cro. Eliz. 520. It does not lie by one party to a suit against his opponent for falsely swearing before an auditor, and thereby procuring a judgment. *Curtis* v. *Fairbanks*, 16 N. H. 543. Nor, for suborning a witness to swear falsely in another suit, whereby judgment was rendered against the plaintiff. *Smith* v. *Lewis*, 3 Johns. 157. In certain cases, this action for perjury is authorized by R. S., c. 82, § 124, but it applies only in civil suits.

Though the conviction of the son was unjust and was procured by fraud and perjury, and through a conspiracy to accomplish such purpose, an action is not maintainable while such conviction remains unreversed. *Dunlap* v. *Glidden*, 31 Maine, 435.

It is abundantly manifest that the plaintiff's son could not have maintained an action for malicious prosecution against the defendant, his conviction remaining unreversed and in full force. The fact of conviction would negative want of probable cause as against the son. This fact is of equal force as against the father. Indeed it is difficult to see upon what ground the father could maintain an action for a wrong done the son when the son could not—the wrong done the son being primary and immediate, while the injury done the father is secondary and consequential.

It will be seen by R. S., c. 142, § 3, that the magistrate had jurisdiction to impose the sentence imposed. But whether he had or not, the defendant is not shown in any way responsible for its imposition.

Judgment for defendant.

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

HOWARD P. WIGGIN *vs.* LEVI TEMPLE.

Sagadahoc. Opinion March 24, 1882.

Tax deed. Stats. 1874, c. 238; 1879, c. 117; 1880, c. 214.

If the recitals of a tax deed do not show that the tax had remained unpaid for a term of nine months from the date of assessment before giving notice of the sale the deed will not be efficacious to pass the title. It will be the same if the recitals do not also show that the notices of the sale were posted in the same manner and in the same places that warrants for town meetings are required to be posted; also if they do not show the length of time or manner of giving the personal notice of the sale to the owner or occupant; also if they do not show that there was an offer to sell such fractional part as may be necessary to pay the tax and charges.

Where the tax deed upon its face is not effective to pass the title to the property, a party, contesting its validity, will not be required to deposit with the clerk, the taxes and charges, before he can be permitted to commence or defend the action in which he contests the validity of the deed.

ON REPORT.

Writ of entry to recover possession of certain real estate in Bath. Writ dated July 28, 1880. Plea, *nul disseizin.*

The title of plaintiff's grantor to the premises rested upon the following deed.

"To all persons to whom these presents shall come, I, Howard P. Wiggin, a collector of taxes for the city of Bath, in the county of Sagadahoc, and State of Maine, for the year one thousand eight hundred and sixty-seven, send greeting: Whereas, the assessors of the city of Bath aforesaid, have assessed Levi Temple the sum of twenty-two and fifty hundredths dollars for a tax as a resident proprietor or occupant of real estate in said Bath, in the lists of assessments they have committed to me to collect; and whereas no person has appeared to discharge the said tax, although I have advertised the same, and also the time and place of sale, by posting up advertisements six weeks prior to the time of sale; and I have lodged a copy of said advertisement with the clerk of said Bath, and given personal notice in writing as required by law.

"Therefore know ye, that I, the said H. P. Wiggin, collector of taxes aforesaid, in consideration of the sum of twenty-six dollars and seventy-six cents, to me paid, for discharging the said taxes and necessary intervening charges by Joseph M. Hayes of Bath, in the county of Sagadahoc and State of Maine, do hereby give, grant, sell and convey to the said J. M. Hayes his heirs and assigns forever, all of the following described real estate, taxed as aforesaid, viz: four houses and lots on Winslow street, ward three, and bounded as follows: North, by Winslow street; east, by land of Henry Donnell and William Winslow; south, by land of David W. Standish, and west, by land occupied by Henry Varney, the same having been struck off to the said J. M. Hayes, the highest bidder therefor, at a public auction, notified and held at the city treasurer's office, in said Bath, on the twenty-sixth day of May, eighteen hundred and sixty-eight in pursuance of the aforesaid notice.

"To have and to hold the same to the said J. M. Hayes his heirs and assigns to his and their own use forever; subject however, to the right of redemption of the owner thereof, or his heirs or assigns, at any time within the time specified by law, from the time of sale as aforesaid.

"In witness whereof, I have hereunto set my hand and seal this twenty-sixth day of May, eighteen hundred and sixty-eight.

H. P. Wiggin, city collector. [Seal.]

Signed, sealed and delivered in presence of H. M. Bovey."

Duly acknowledged and recorded.

Henry Tallman, for the plaintiff.

W. Gilbert, for the defendant.

DANFORTH, J. In the report of this case it is provided that if the collector's deed to Hayes under whom the plaintiff claims, "is not efficacious to pass the title, the plaintiff is to become nonsuit."

There are several errors in the deed either one of which must be deemed fatal to its efficacy. In the recitals it does not appear that the tax assessed upon the defendant and committed to the collector "had remained unpaid for the term of nine months from

the date of the assessment" before giving notice of the sale, or that the notices thereof were posted "in the same manner and at the same places that warrants for town meetings are therein required to be posted," or the length of time or manner of giving the personal notice to the owner or occupant, all of which seem to be required by R. S. c. 6, § § 167, 168, as amended by c. 238 of the acts of 1874.

But especially is there not only an omission to show that there was an offer to sell such fractional part as might be necessary to pay the tax and charges, but it appears affirmatively that it was sold as a whole, "the same having been struck off to the said J. M. Hayes, the highest bidder therefor." *French* v. *Patterson*, 61 Maine, 209; *Whitmore* v. *Learned*, 70 Maine, 279; *Allen* v. *Morse*, 72 Maine, 502.

But the plaintiff contends that if the deed is not efficacious to pass the title it is sufficient to require the defendant to deposit with the clerk the taxes and charges before he can be permitted to defend the action or contest the validity of the deed. In other words that he must make this deposit or submit to a default before a *prima facie* case is made against him.

But if the deed is insufficient to pass the title, it can have no other effect than simply to give the defendant notice that the plaintiff claims under a tax title, the validity of which is involved in the trial. Still no proof is given to show any right whatever in the plaintiff, or in fact that any tax has been assessed upon the land in controversy. If the statutes require the construction claimed their constitutionality might well be doubted. True the law gives a lien upon land for taxes assessed thereon. The legislature has provided how that lien shall be enforced. It has also passed laws establishing what evidence shall be sufficient *prima facie* to show when the legal measures for enforcing the lien have been pursued. So far its authority has not been questioned. But when it is claimed that the defendant must have judgment against him, without any evidence to sustain it, unless the amount of another and distinct claim is first deposited for subsequent litigation, another and a very different question is presented, a question as to whether he is not liable to be deprived

of his property in a way other than "by the judgment of his peers, or by the law of the land," or "without due process of law." But we are of the opinion that the statutes applicable to this case, not only do not require, but are not susceptible of, the construction claimed. In *Orono* v. *Veazie*, 57 Maine, 517, a case similar to this, it was held, upon what we deem sound reasons, not only that the plaintiff must make out a *prima facie* case, but that the defendant might be heard in all legal objections to such evidence before he was obliged to pay the taxes and charges. The law in relation to the question now involved is substantially the same as then. In that case the land was taxed as non-resident. In this case the tax is assessed upon a resident. R. S., c. 6, § 174, require substantially the same proceedings and the same *prima facie* evidence in the latter case as was there required in the former. By c. 234 of the acts of 1874, this law was amended so as to entitle the plaintiff to judgment upon the production of the collector's deed duly executed and recorded, unless payment of taxes and charges was made. But by the express terms of § 2 this act could not apply to previous sales and does not therefore apply here as this sale was made in 1868. The next change was made in 1878, c. 35. This act however was an amendment only of the first section of that of 1874 leaving the second in full force, so this latter act does not apply. The result is that c. 6. § 174 of the R. S., must control this case except so far as it is modified by the act of 1879, c. 117, as amended by c. 214 of the acts of 1880. This does not purport to be an amendment of any previous acts but an addition to c. 6, R. S. It does not allude to any proof necessary to entitle the plaintiff to recover but provides that the party contesting the sale of land for non-payment of taxes shall not be permitted to commence, maintain or defend any action involving the validity of such sale until he shall have deposited with the clerk of the court the amount of such taxes and charges.

It does not in terms repeal any former acts. It is inconsistent with the last part of § 174, R. S., as it makes a new and different provision in regard to the payment to be made and must control in that respect. It is not inconsistent with the first part of that

section, or so much of it as relates to the amount of evidence necessary to make a *prima facie* case. Nor does it purport to embody all the provisions of the law upon the subject matter. It is an act in addition to and not a revision of c. 6, R. S., or any part of it. The amount of evidence necessary to authorize a judgment is one thing, the payment required to permit a party to defend, is another and a very different thing, therefore both provisions may stand together without any conflict. They did stand together when *Orono* v. *Veazie* was decided, in the same section to be sure, but nevertheless the two distinct and separate propositions, just as distinct as now, and that which related to the payment just as emphatic as a condition of defence, as the deposit is under the last act. The same is true of the law of 1874 and its amendment, the detail being somewhat changed but the general provisions the same in principle. If the legislature had intended to repeal that part of the act which regulates the effect of the evidence and its admissibility it is inconceivable that its intention should not have been made apparent. As it has not done so, it follows that the principle settled in *Orono* v. *Veazie* must govern this case and, as provided in the report, the entry must be,

Plaintiff nonsuit.

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

HOWARD B. WYMAN *vs.* WILLIAM B. ROBINSON, and others.

Kennebec. Opinion May 9, 1882.

Bond, judgment on. Interest on the penalty.

A recovery upon a penal bond may be had against principal and sureties for an amount exceeding the penalty, to the extent of the interest upon the penalty from the date of the breach; such interest being no part of the penalty, but damages for its non-payment after it has become due.

A plaintiff in replevin gave a bond for one hundred and ten dollars, while the goods replevied greatly exceeded that amount in value. The defendant in replevin recovered for the value of the goods against a third party, into whose hands the goods came, and the plaintiff in replevin paid that judgment. *Held*, to be no defense to an action upon the bond for the unsatisfied damages.

ON REPORT from superior court.

Debt on bond. Writ dated April 2, 1878.

March 12, 1874, the defendant Robinson replevied of the plaintiff a yoke of steers, alleging their value to be fifty-five dollars, and with the other defendants, Abram W. Heath and A. K. Swift, as sureties, gave the bond for one hundred and ten dollars, now in suit. Judgment was for the defendant for a return of the property replevied and one dollar damages, and costs of suit taxed at ninety-six dollars and sixty-two cents.

A writ of restitution issued August 27, 1877. The officer made return that he could not find the property and returned the writ unsatisfied. His fees thereon amounting to three dollars and forty cents.

May 23, 1878, the plaintiff commenced an action of trover against Franklin Bowan who had purchased the steers of Abram W. Heath for one hundred and twenty dollars, and of which sum Heath had deposited one hundred and ten dollars in the hands of an attorney to pay the obligation of the replevin bond.

The judgment in the action of trover was for one hundred and fifty dollars and interest from the time of the demand in August, 1877. Heath employed counsel to defend that suit, and paid the judgment therein rendered.

It was admitted that the value of the steers described in the bond in August, 1877, was one hundred and fifty dollars.

The law court were to draw inferences as a jury might, and render such judgment as the law and evidence legally admissible might require.

At the September term, 1878, the death of defendant Robinson was suggested and the suit was discontinued as to him.

G. T. Stevens, for the plaintiff, cited: *Lockwood* v. *Perry*, 9 Met. 440; *Cook* v. *Lothrop*, 18 Maine, 260; *Arnold* v. *Bailey*, 8 Mass. 145; *Mattoon* v. *Pearce*, 12 Mass. 406; *Smedes* v. *Houghtaling*, 3 Caines, 48 (2 Am. Dec. 250); *Graham* v. *Bickham*, 2 Yates, 32; 4 Dallas, 143; 1 Am. Dec. 328, note; *Brainard* v. *Jones*, 18 N. Y. 35; *State* v. *Sandusky*, 46 Mo. 377; *Tyson* v. *Sanderson*, 45 Ala. 364; *Hughes* v. *Wickliffe*,

11 B. Mon. 202; *Carter* v. *Carter*, 4 Day, 30; 2 Greenl. Ev. § 263, and cases there cited.

H. M. Heath, for the defendants.

The defendant Heath should not be compelled to pay the penal sum of the bond but once. That the bond was so small was no fault of his.

In no event can the judgment in this suit be rendered for a greater sum than the penalty of the bond. The decisions cited by counsel do not sustain his position.

The "note" in 1 Am. Decisions, page 328, cited by counsel, is fatal to his position. Pages 338 and 339 of note are devoted to a discussion of the question, "can the recovery exceed the penalty?" On page 339 it is said, "It is undoubtedly true as a general rule, that in actions upon penal bonds with collateral conditions, the plaintiff can never recover more in the shape of damages than the penalty. Bonds for the prosecution of appeals, bonds given by public officers for the faithful discharge of their duties, injunction and *replevin* bonds are of this class. *Branscombe* v. *Scarborough*, 6 A. & E. 13; *Balsey* v. *Hoffman*, 13 Pa. St. 603; *Clerk* v. *Bush*, 3 Cow. 151; *Fairlie* v. *Lawson*, 5 Cow. 424; *Farrar* v. *Christy*, 24 Mo. 474; *United States* v. *Magill*, Paine, C. C. 669," and then follow the words quoted by counsel. The whole context should be construed together, and when so taken is fatal to the plaintiff's position upon this branch of the case. Further, the cases cited by counsel are all instances of bonds conditioned for payment of money at a time certain, or that might be made certain by demand. Plaintiff never gave the surety opportunity to pay. Shall he profit by his own laches?

PETERS, J. The important question presented by this case, is, whether, in an action upon a replevin bond against principal and sureties, when the damages exceed the penalty of the bond, the recovery must be limited to the penalty, or whether it may exceed the penalty so far as to include interest upon the amount of the same from the date of the breach of the bond. We think the reasonable doctrine to be that, so far as necessary to secure the damages sustained by the obligee, the recovery may go

beyond the sum of the penalty, by allowing interest on such sum from the date of the breach; such interest not to be considered as any part of the penalty, but as damages for the non-payment or detention of the penalty after it becomes payable and due.

It is commonly said that the damages cannot exceed the penalty of a bond. Rightly understood, the statement is true. But what is the penalty in a bond for the payment of damages? It is the amount which the obligors agree to pay, if the whole penalty be needed for the purpose, for the damages sustained by the obligee by a breach of the bond, the amount to be paid as soon as the breach occurs. The obligee is to have the penalty at a particular and definite time. Immediately upon a breach of the bond the penalty is due to him. If he gets it then, he gets what the contract provides; if he gets it later, he gets less than what the contract provides. If, then, the penalty be paid after the breach, interest should be added for the detention of the penalty, to make it equivalent to a payment at the date of the breach.

After the penalty is forfeited, it becomes a debt due. The sureties then stand in the relation of principals to the obligee, owing him so much money then due. To ascertain the precise sum may require calculation, but that is certain which can be made certain. The rule, common to contracts generally, applies, that where money is due and there is a default in payment interest is to be added as damages. The defendants should pay damages for detaining the damages which they bound themselves to pay at a prior date. The penalty of the bond is payable because the principal did not fulfill his obligation; the interest is the penalty upon the sureties for not fulfilling theirs.

In some cases, courts appear to have been reluctant to allow the interest to commence before the date of the writ upon the penal bond. But why not, logically, from the default as well as from the date of the writ? Interest is allowable from the date of a writ, only because a defendant is considered in default from that date. Why not to be reckoned from an earlier date, if the default ante-dates the writ? In some cases, of course, it would not; in this case it does. It might as well be urged that the

costs of an action upon a bond should not be allowed, as that no interest should be, where the costs would carry the execution beyond the penalty named in the bond, for costs are as much of the nature of a penalty as interest is when interest is allowed as damages.

We feel strongly assured that the rule, as declared by us, is maintained by a great majority of the leading American authorities. There appears to be some obscurity and confusion in quite a class of cases, growing out of the want of distinction between what is debt or penalty, and what is merely damages for a detention of the debt or penalty some courts trusting to the general rule, without stopping to notice differences. Mr. Sedgwick seems to think that, by the English cases, the penalty is regarded as being the absolute limit of recovery (2 Sedg. Dam. 6th ed. 262). Still, there is some contrariety of view in the English cases, and Sergeant Williams struck the key of the doctrine, in his note to the case of *Gainsforth* v. *Griffith* (1 Saund. 51, note 1), saying: "But cases may occur, where the obligee may recover more than the penalty of the bond, as where, by the breach of the condition, the penalty becomes a real debt due from the obligor to the obligee."

It was decided in the early case of *Williams* v. *Willson*, 1 Vt. 266, that interest upon a penalty could be added to the amount of the penalty, as damages for detention. In *Perit* v. *Wallis*, 2 Dall. 252, SHIPPEN, J., expresses the idea in common sense terms, saying: "In short, the five thousand pounds (penalty), paid with interest at this day, is not, in fact or law, more than the five thousand pounds paid without interest, at the day it became due." In *Carter* v. *Carter*, 4 Day, 30, it was well stated by counsel, *arguendo*, that where the whole penalty is given, it becomes a liquidated sum, and, as such, will carry interest; and, in same case, it was said, *per curiam*, "The penalty becomes forfeited on the first breach; and as it then becomes a debt due unconditionally to the obligee, the court may allow interest from that time, but can never exceed the penalty with interest on it from the first breach."

In *Smedes* v. *Houghtaling*, 3 Caines, 48, it was admitted that interest might be recovered against a principal beyond the penalty

of a bond. It is difficult to appreciate any difference between the liability of a principal and that of a surety on a penal bond. The liability of all the obligors is expressed in precisely the same terms. In *Clark* v. *Bush*, 3 Cow. 151, SAVAGE, Ch. J., after reviewing such leading authorities as were in existence at the date of that case, says: "The weight of those authorities is, I think, in favor of the doctrine, that in debt on bond nothing more than the penalty can be recovered, at any rate, nothing beyond that and interest after a forfeiture, even against the principal obligor." The case of *Brainard* v. *Jones*, 18 N. Y. 35, a case upon a replevin bond, is like the case at bar, assimilating it in all particulars, and it was there determined, that interest could be added to the penalty from the date of the judgment in the original action, that being the date of the breach of the bond; and the opinion in that case, after a clear and convincing argument of the question, concludes with these words: "The question, in short, is not what is the measure of a surety's liability under a penal bond, but what does the law exact from him for an unjust delay in payment after his liability is ascertained and the debt is actually due from him."

In *United States* v. *Arnold*, 1 Gall. 348, STORY, J., said: "Notwithstanding some contrariety in the books, I think the true principle supported by the better authorities, is, that the court cannot go beyond the penalty and interest thereon from the time it becomes due by the breach." In *Bank of United States* v. *Magill*, 1 Paine, (C. C. R.) 661, THOMPSON, J., gave interest only from the date of the action, upon the ground that there was no breach in that case till a demand was made, and no demand before the commencement of the suit.

In *Harris* v. *Clap*, 1 Mass. 307 is a very earnest and interesting discussion of the question, in which all the judges actively participated. SEWALL J., said: "This court, especially in a case where a surety may be affected, cannot exceed the express contract of the parties, and the *legal* effect of it. The penalty is recoverable by the express contract of the parties, and the damages, estimated at the lawful interest of the penalty, are the legal effects of their contract." STRONG, J., said: "What then is the law as to going beyond the penalty? The law, as I understand it, says that every man who binds himself in a penalty

is *liable* to pay not only the whole penalty—the debt, but also the legal interest of it as damages for the detention. This rule of law extends to all cases where the condition of the bond is for the payment of money, or where the value of the condition, if I may so express it, is equally capable of being ascertained as though the sum had been expressed in the condition, which is the present case. When the surety entered into the bond he knew, or ought to have known, that he was bound to that extent." DANA, Ch. J., said: "In going beyond the penalty of the bond, the court do not go out of the contract, it is no more than the common case of a bond conditioned for the payment of money lying until the sum mentioned in the condition with interest of it exceeds the penalty, in which cases the court will give the excess as damages for the detention of the debt; in no case, however, going so far beyond the penalty as to exceed legal interest on the penalty. At law the penalty is the debt, and for the detention of the debt, damages real or nominal are always recoverable." *Pitts* v. *Tilden*, 2 Mass. 118, as far as the case goes, follows the line marked out in the preceding case, in respect to allowing interest upon a penalty after it becomes a debt.

In a *per curiam* opinion in *Warner* v. *Thurlo*, 15 Mass. 154, the court is erroneously made by the reporter to say, that it was decided in the case of *Harris* v. *Clap*, *supra*, that damages may be recovered beyond the penalty, not exceeding interest on the penalty from the commencement of the suit, while it is plain to be seen that it was decided by a majority of the judges sitting in that case, that interest should run from the breach of a bond, whenever the breach occurs prior to action brought. But the doctrine was not so firmly established at that day as to be positively accepted by courts without some shrinking in applying it to cases, especially in view of contemporaneous English decisions, positively affirming an adverse view upon the whole question. As before expressed by us, if interest be allowable at all upon a penalty, we cannot see why it should not commence when the defendant is in default for not paying the penalty. Of course, there may be instances where the penalty is not due till demanded, and bringing the action may be the first demand. But in the case now presented for our opinion, a breach is evidenced by the judgment in a previous action. The sureties knew then as well

as now just what their obligation consisted of. Another inconsistency is seen in some of the earlier cases, wherein the doctrine is declared that a greater amount may be awarded against a principal than against sureties upon the same bond, although bound in the same manner and by the same words.

But these illogical distinctions are not kept up in many modern cases. The text of Sedgwick on Damages is, in this respect, corrected by a qualifying note, upon page 262, vol. 2, 6th ed. cited *supra*, where may be found a citation of the principal cases upon both sides of the question. In Field on Damages, § 546, note, the rule deduced from a majority of modern cases is stated thus: "Interest on the penalty is now generally allowed, on the ground that, when there is a breach of the condition of a penal bond, the penalty becomes in law a debt due, and the obligors can discharge themselves from liability on the bond, when the damages exceed or equal the penalty, by the payment of the penalty alone; and if it be not paid at the time of the breach, it should bear interest until paid." See cases there cited. See also, the case of *Bank of Brighton* v. *Smith*, 12 Allen, 243.

There is nothing in the point taken by the defendants, that the plaintiff should credit the value of the replevied goods upon the bond because he recovered their value of a third person who was indemnified by the principal defendant. The bond is collateral to the whole of the principal's liability. That recovery extinguishes or settles only a part of it. The plaintiff claims to recover the damages and costs awarded him by the judgment in the action of replevin, and an officer's fee on the writ of restitution, with interest thereon; and is entitled to recover ninety-seven dollars and sixty-two cents, and interest from March 31, 1877, the date of the judgment therefor, and three dollars and forty cents, the officer's fee, and interest on that item from November 14, 1877.

Bond declared forfeited. Judgment for $110, the amount of penalty, as debt, and interest thereon, as damages, enough to make the amount recovered equal to the claims as above reckoned.

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

WILLIAM B. BAKER and others *vs.* CHARLES ELLIOT.

Waldo. Opinion May 9, 1882.

Contracts. Surety. U. S. Mail.

The plaintiffs entered into an agreement with F, for whom the defendant was surety, to carry the mail from A to B, and back, according to the provisions of a contract between said F and the United States, to carry the mail between said points, and save said F harmless therefrom. By arrangement between the plaintiffs, communicated to F who made no objections, the route between A and B was divided between them — two of the plaintiffs agreeing to carry the mail a part of the distance, and two the residue of the route. *Held:*

1. That the surety was not thereby discharged.
2. That the contract having been performed, and the price agreed having been paid to F, that upon his decease an action was maintainable against the surety for the amount unpaid.

ON report, the court to draw inferences as a jury might, and render judgment according to the legal rights of the parties.

Debt on contract under seal.

The material facts are stated in the opinion.

J. W. Knowlton, for the plaintiffs, cited: Bouvier's Law Dict. "Suretyship," "Guaranty"; Story, Contr. § § 858, 861; *Hunt* v. *Adams*, 6 Mass. 519; *Cobb* v. *Little*, 2 Maine, 261; *Childs* v. *Wyman*, 44 Maine, 433; *Blanchard* v. *Wood*, 26 Maine, 358.

Thompson and Dunton, for the defendant.

When the new parol contract was made between these plaintiffs, and assented to by Fuller, by which the plaintiffs agreed that William B. Baker and D. F. Sanborn were to carry the mail from Augusta to Palermo, for four hundred and fifty dollars per year, and the other two plaintiffs from Palermo to Belfast, for eight hundred dollars per year, it rendered inoperative and void the written contract upon which the defendant was surety, and which was declared upon in the writ.

A contract in writing and under seal may be thus varied or waived altogether by a parol agreement. *Monroe* v. *Perkins*, 9 Pick. 298; *Bean* v. *Jay*, 23 Maine, 117; *Adams* v. *MacFar-*

lane, 65 Maine, 143; *Brinley* v. *Tibbetts*, 7 Maine, 71; *Gage* v. *Coombs*, 7 Maine, 394; *Medomak Bank* v. *Curtis*, 24 Maine, 36; *Wiggin* v. *Goodwin*, 63 Maine, 389; *Whitcher* v. *Hall*, 8 D. & R. 22; (5 B. & C. 269.)

This change of the contract upon which the defendant was surety without his knowledge or consent, discharged him. The plaintiffs must prove a literal performance on their part in order to hold the defendant as surety. *Witcher* v. *Hall*, *supra*; *Andrews* v. *Marrett*, 58 Maine, 539.

APPLETON, C. J. On the third of March, 1873, David Blinn Fuller, with the defendent as surety, entered into a contract with the government of the United States, to carry the mail from Augusta to Belfast and back, from July 1, 1873, to June 30, 1877, for thirteen hundred and forty-nine dollars, payable quarterly; "said pay to be subject, however, to be reduced or discontinued by the postmaster general, as hereinafter stipulated, or to be suspended in case of delinquency."

On the ninth day of May, 1873, these plaintiffs entered into a contract with Fuller, and the defendant as his surety, to transfer the mail on route, number seventeen, from Augusta to Belfast, from July 1, 1873, to June 30, 1877, six times a week, as provided in the contract of Fuller with the government, for the sum of twelve hundred dollars a year, payable quarterly, as the payments were to be made to Fuller.

The evidence shows the contract to have been performed. Indeed, it is not pretended, that the compensation was reduced or suspended by reason of any delinquency or failure in its performance.

The contract having been performed, it is not denied that that payment has been made. Fuller having deceased, the testimony of his son, who was his administrator, having been taken, he in no way denies the receiving of the money due on the contract of the father, or its full performance.

Shortly after the making of the contract in suit, D. W. Baker and Knowlton made an arrangement with the other two co-plaintiffs to divide the route between them. They were to carry the mail from Branch Mills, Palermo, to Belfast, and Sanborn and W. B.

Baker were to carry the mail from Branch Mills to Augusta. The parties arranged as to the division of joint compensation between themselves. This was communicated to Fuller, who made no objections. Sanborn and W. B. Baker have been paid for the amount they were to have for their part of the line. This suit is brought for the benefit of Baker (D. W.) and Knowlton, who claim that one hundred and twenty-three dollars and seventy-five cents remain unpaid, for which this suit is brought.

The original contract between the parties is in force. It has neither been annulled nor rescinded.

The defence rests upon the ground that this arrangement between the plaintiffs as to the carrying of the mail, and assented to by Fuller, was an alteration of the contract, by which the defendant, who is a surety, is released. We think not. The contract of the plaintiffs with Fuller and the surety was joint. They were jointly bound in case of its non-performance. It was immaterial to Fuller whether all or part only took an active part in it, provided its terms were fully complied with. He had no control over their action. He could not determine the several parts of each in its performance. If unperformed or negligently performed, his claim was against all. The notice given to him was a mere matter of courtesy. The plaintiffs might have changed or modified it the next hour, and Fuller would have had no ground of complaint. His complaint could only arise when the contract was unperformed. It was nothing to him by whom performed. It is equally obvious that this was a matter in no way affecting the liability of the surety.

The defendant says the amount due has been fully paid. It is conceded that Sanborn and William B. Baker have been fully paid their share for the labor done by them in accordance with the agreement between them and their associates. But the plaintiff Knowlton testifies that there is a portion of the pay for services rendered, to wit: one hundred and twenty-three dollars and seventy-five cents, which is still due. The testimony of the administrator, Fuller, is indefinite. He produces no receipts. He knew of the division as to labor and as to compensation between the plaintiffs. He does not state to whom nor when the pay-

ments were made. When he might have removed so easily all doubt on the subject, particularly after the prolonged litigation in relation to the amount in question, and has failed to do so, we think payment is not satisfactorily established. The contract having been performed and payment not shown, the plaintiffs are entitled to recover.

The contract of Fuller with the government was excluded at the defendant's instance. The copy is under the seal of the department, and attested by the acting postmaster general. It was therefore properly admissible. But whether in or out, the contract between the parties is clear and explicit, and whether that be regarded as part of the case or not, no failure or neglect of duty is shown.

The principal in the contract having died, the plaintiffs were under no legal obligation to proceed against him, or his administrator. The surety was liable for the performance of the contract, and the action is well brought against him.

Judgment for plaintiffs for $123.75 and interest.

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

CECIL J. BURRILL *vs.* DAVID STEVENS.

Somerset. Opinion May 9, 1882.

Fraud. Promissory notes. Contracts.

When one obtains property by a purchase upon credit with a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods, it is such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretences.

This general principle is especially applicable in cases where written instruments and negotiable papers have been fraudulently obtained from the makers.

Where the payees of a promissory note obtained it upon a promise in writing on their part to deliver to the maker at a future time five mowers of different prices and four plows, with a positive and predetermined intention entertained and acted upon at the time never to deliver such mowers and plows, and subsequently delivered two of the plows; *Held*, in an action by an indor-

see of the note against the makers, that the contract of the payees of the note was an entirety; that the plaintiff was entitled to recover at the agreed price for the two plows furnished, less the damages sustained by the defendant for a non-delivery of the balance of the articles at the contract price.

ON EXCEPTIONS AND REPORT.

Assumpsit on the following note:—

"Embden, Maine, October 1, 1874.

One year after date, I promise to pay to the order of C. B. Mahan, agent, four hundred twenty-two dollars, at the first National Bank, Skowhegan, Maine.
Value received.

David Stevens."

Plea, general issue, with the following brief statement:

"And by way of brief statement under the statute, the defendant further says, that said note was procured by fraud and fraudulent representations and that no consideration was ever received for the same, and that the considerations promised utterly failed, and said note never had any validity whatever by reason of said fraud and misrepresentations, and total failure and want of consideration, all of which the plaintiff well knew."

The verdict was in favor of the plaintiff for sixteen dollars and fifty-four cents.

The plaintiff moved to set aside the verdict and also filed exceptions to so much of the charge of the presiding justice as defines what would constitute a fraud in the inception of the note in order to vitiate it, the gist of which is contained in the following extract:

"Now I instruct you as a matter of law, that if it was the mind, the motive, the intent of Thompson, the agent of the company, when he obtained the note, to sell it, and then that the contract on the part of the agricultural works should not be performed, it was such a fraud as would vitiate it. Such is the law. I so instruct you."

The plaintiff also excepted to so much of the charge as authorized the jury to offset any damages that the defendant may have suffered by the non-fulfillment of the contract to deliver mowing machines and plows against the value of the plows actually delivered and received by the defendant.

Other material facts are stated in the opinion.

Joseph Baker, for the plaintiff.

The verdict should be set aside. The utmost that the defendant could expect from the evidence, if the law was correctly stated by the presiding justice, would have been a verdict against him for the agreed price of the two plows, $23.50 with interest five and one-fourth years. The verdict was only $16.54. This alone is a sufficient reason to set it aside.

The plaintiff was the purchaser for value of the defendant's promissory note before maturity and the promise of the payees of the note was a good and sufficient consideration. *Burrill* v. *Parsons*, 71 Maine, 282.

But it is said that the note was procured from the defendant by fraud and misrepresentation on the part of the payees. To have constituted a fraud there must have been misrepresentation or false pretences. But there were none. The payees gave a written contract which spoke for itself, which the maker could construe as well as the payees. One contract was the consideration for the other. The failure of one to keep his promise would not excuse the other under the circumstances of this case. But this would be no evidence of fraud. The non-fulfillment of a contract is not evidence of fraud.

The unexpressed intention of the payees, not to deliver the goods, if there had been such an intention, was not such a fraud as will vitiate the note. The fraud must consist of a false representation of an existing fact, not a secret intention. It must have been such a false representation as was calculated to and did induce the plaintiff to sign the note. *Long* v. *Woodman*, 58 Maine, 49.

The instruction that the defendant could offset his damages for the non-fulfillment of the contract of the maker of the note in this suit was erroneous. This plaintiff shouldn't pay such damages. He was not to perform the contract. The rule of law, where there is a partial failure of consideration like this, is to deduct from the whole note, the contract price of the articles not delivered and leave those delivered as they stood in the contract.

The counsel further ably argued the motion to set aside the verdict upon the question of fraud at the inception of the note, contending that there was not sufficient evidence to support a verdict which affirmed that the payees of the note at the time of taking it and giving their contract did not intend to perform their contract.

D. D. Stewart and A. H. Ware, for the defendant, cited: 49 Maine, 422; Bigelow on Frauds; *Berry* v. *Alderman*, 14 C. B. 95; *Smith* v. *Sac. County*, 11 Wall, 147; *Harvey* v. *Towers*, 6 Exch. 656; *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; *Smith* v. *Braine*, 16 Ad. and El. (N. S.) 244; *Hall* v. *Featherstone*, 3 Hurls. and Nor. 284; *Munroe* v. *Cooper*, 5 Pick. 413; *Bowker* v. *Hoyt*, 18 Pick. 555; Bouvier's Law Dict. "Fraud;" *Oxnard* v. *Swanton*, 39 Maine, 125; *Farrar* v. *Merrill*, 1 Maine, 17; *French* v. *Stanley*, 21 Maine, 512; *Howard* v. *Miner*, 20 Maine, 325; *Thatcher* v. *Dinsmore*, 5 Mass. 302; *Bliss* v. *Negus*, 8 Mass. 46; *Hill* v. *Buckminster*, 5 Pick. 391; *Parish* v. *Stone*, 14 Pick. 202; *Slade* v. *Hood*, 13 Gray, 97; *Daggett* v. *Daggett*, 8 Cush. 520; *Swett* v. *Hooper*, 62 Maine, 54; *Roberts* v. *Lane*, 64 Maine, 108; *Field* v. *Tibbetts*, 57 Maine, 358; *Hapgood* v. *Needham*, 59 Maine, 442; *Perrin* v. *Noyes*, 39 Maine, 384; *Aldrich* v. *Warren*, 16 Maine, 465; *Tucker* v. *Morrill*, 1 Allen, 528; *Sistermans* v. *Field*, 9 Gray, 331.

PETERS, J. The defendant gave a negotiable note in consideration of a promise of the payees of the note to deliver to him at a future time certain mowing machines and plows. The note is sued by an indorsee, and one of the grounds of the defense was, that the payees obtained the note with an intention never to deliver the implements, and that the indorsee, who sues the note, was conusant of the fraud.

The instructions to the jury upon that point present the question, whether getting property by a purchase upon credit, with an intention of the purchaser never to pay for the same, constitutes such a fraud as will entitle the seller to avoid the sale, although there are no fraudulent misrepresentations or false pretences.

The question has never been fairly before this court before this time, so as to require a deliberate decision. The plaintiff contends that the question was settled in the negative in the case of *Long* v. *Woodman*, 58 Maine, 49. But that case falls short of meeting the question presented in the present case. The gist of the charge against the purchaser in that case seems to have been that he fraudulently refused to do after the contract what he agreed to do at the time of the contract, the alleged fraud being an intention formed after the contract rather than contemporaneously with it; and that was an action of deceit based upon a broken promise to convey real estate. Of late years, *nisi prius* rulings in our own courts have frequently been in accordance with the law as delivered to the jury by the presiding judge in the case at bar, and we think the doctrine may safely be accepted and approved, both upon authority and principle.

It is the admitted doctrine of the English cases, and is sustained by most of the courts in the United States. In Benj. on Sales, (2d Amer. ed.) § 440, note *e*, very numerous cases are cited to the proposition. *Stewart* v. *Emerson*, 52 N. H. 301, discusses the question at length, and reviews many authorities.

The plaintiff relies upon the objection that it is not an indictable fraud, an argument which seems to have inclined the Pennsylvania court against admitting the principle into the jurisprudence of that state. *Smith* v. *Smith*, 21 Pa. St. 367; *Backentoss* v. *Speicher*, 31 Pa. St. 324. It has been held by some courts to be an indictable cheat, the false pretence being in the vendee's pretendingly making a purchase, while his only purpose is to cheat the vendor out of his goods. It is more often considered, however, as not a matter for indictment. Bish. Crim. Law, § 419. But the objection, taken by the plaintiff, has, generally, been considered as insufficient to override the rule.

But the doctrine governing the case before us should not be misunderstood. To constitute the fraud, there must be a preconceived design never to pay for the goods. A mere intent not to pay for the goods when the debt becomes due, is not enough; that falls short of the idea. A design not to pay according to

the contract is not equivalent to an intention never to pay for the goods, and does not amount to an intention to defraud the seller outright, although it may be evidence of such a contemplated fraud.

Nor is it enough to constitute the fraud, that the buyer is insolvent, and knows himself to be so, at the time of the purchase, and conceals the fact from the seller, and has not reasonable expectations that he can ever pay the debt. Some courts have gone so far as to denominate that a fraud which will avoid the sale. And it may have been so held in bankruptcy courts, in some instances, as between a vendor and the assignee of the vendee. But it would not, generally, be enough to prove the fraud. The inquiry is not whether the vendee had reasonable grounds to believe he could pay the debt at some time and in some way, but whether he intended in point of fact not to pay it.

Nor is it enough, that after the purchase the vendee conceives a design and forms a purpose not to pay for the goods and successfully avoids paying for them. The only intent that renders the sale fraudulent is a positive and predetermined intention, entertained and acted upon at the time of going through the forms of an apparent sale, never to pay for the goods. *Cross* v. *Peters*, 1 Greenl. 378; *Biggs* v. *Barry*, 2 Curtis, (C. C. R.) 259; *Parker* v. *Byrnes*, 1 Low. 539; *Rowley* v. *Bigelow*, 12 Pick. 306. The general principle is found to have been especially applicable in cases where written instruments and negotiable papers have been fraudulently obtained from the makers of them. *Smith* v. *Braine*, 16 A. and Ell. N. S. 244; *Hall* v. *Featherstone*, 3 Hurls. and Nor. 284.

The defendant received a small portion of the goods which were to be sent to him for the note, and the jury were instructed to render a verdict for the price of those articles, less the damages sustained by the defendant for a non-delivery of the balance of the articles at the contract price. That was correct. The defendant was to be no worse off under his contract because he was defrauded than he would have been if not defrauded. Nor does it make a difference that each article was separately priced in the contract. The contract is an entirety, and the damages

are because the articles were not all furnished at the enumerated prices. The plaintiff urges upon our attention that there is no evidence to support any reduction from the price for damages. There is such in the testimony of the defendant.

Motion and exceptions overruled.

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

JULIA G. ASH and another *vs.* JOHN B. HARE.

Knox. Opinion May 9, 1882.

Equity. Contract.

A gave T a deed of certain real estate upon T's agreement to pay certain debts and give A a life lease of the same premises with the privilege to A to redeem the property conveyed. T paid the debts according to agreement but before executing the life lease he died. H purchased T's title to the property from his heirs with a full knowledge of the equitable rights of A. *Held*, in a suit in equity by A against H to enforce the agreement made by T, that H was bound by the equities between A and T; and he was decreed to execute a life lease of the premises to A.

ON REPORT.

Bill in equity to enforce an agreement of the defendant's grantor to give a life lease to the plaintiffs of certain real estate in the possession of the plaintiffs, and to enjoin the defendant from prosecuting his writ of entry against these plaintiffs for the possession of the property.

The opinion states the case and material facts.

Rice and Hall, for the plaintiffs.

D. N. Mortland, for the defendant, in an able argument contended that there was not sufficient evidence here to enable a court of equity to interfere and decree specific performance of a parol contract; and that the contract, if made, was barred by the statute of frauds. Story's Eq. Jur. § § 762, 768, 753; *Stuart* v. *Walker*, 72 Maine, 145.

The court has not the power to compel performance of a verbal contract even under the stat. of 1874, c. 175; *Patterson* v. *Yeaton*, 47 Maine, 308; *Wilton* v. *Harwood*, 23 Maine, 131; *Parker* v. *Parker*, 1 Gray, 409; *Jordan* v. *Fay*, 40 Maine, 130.

Counsel further cited: *Stone* v. *Bartlett*, 46 Maine, 438; *Erskine* v. *Decker*, 39 Maine, 467; R. S., c. 73, § § 8–11; *Phillips* v. *Leavitt*, 54 Maine, 405; *Leavitt* v. *Pratt*, 53 Maine, 147; *Glass* v. *Hulbert*, 102 Mass. 24; *Barnes* v. *B. and M. R. R.* 130 Mass. 388.

APPLETON, C. J. This is a bill in equity and is heard on bill, answer and proof.

The following facts seem to be fully established. Nathaniel Ash, the husband of one of the complainants, died on July 14, 1875, being indebted to the amount of rising four hundred dollars and leaving two pieces of real estate, which, after payment of his debts, he devised to the complainants to hold in common for their lives or the life of the survivor of them, with power to dispose of the same, then to Miriam P. Philbrook, and if she died before the complainants to them in fee. The estate to be subject to certain conditions in the will.

The complainant, Mrs. Ash, owned two tracts of land in her own right. For the purpose of paying the debts of her husband's estate, she, with Miss Hall, the other complainant, conveyed by deed of warranty on December 6, 1876, to John L. Tracy, the land of which Ash died, seized, as well as that which Mrs. Ash owned in fee, with the agreement on the part of Tracy that he should pay the debts of the estate, give them a life lease, and that they might redeem the premises conveyed.

Tracy paid the debts against the estate. A life lease was prepared, but owing to the absence of counsel, whom he wished to consult, it was not signed. After his death, which occurred June 22, 1877, it was found among his papers unsigned.

It is obvious that the conveyance to Tracy was for security for the advances he was to make in payment of the debts of Mr. Ash, and that it was part of the agreement when it was made that the complainants should be protected in the enjoyment of

the premises granted, by a life lease. If they were unable to redeem, their life-estate was at all events to be secured to them.

The parol agreement had been partially executed. The premises had been conveyed. It would have been fraud on the part of Tracy to have retained the estate conveyed, and refuse the performance of the conditions under which he received the conveyance. As between Tracy and these complainants, he would not have been permitted to hold the estate discharged of the performance of his agreement. A court of equity would have enforced its performance. 2 Story's Eq. § § 759–768 *et seq.* *Stinchfield* v. *Milliken*, 71 Maine, 567; *Rowell* v. *Jewett*, 69 Maine, 293.

On September 17, 1879, the defendant, Hare, acquired the Tracy title for the amount which had been advanced for the payments of the debts of the Ash estate. Not having the means to make this payment, he borrowed the amount of General Tillson and mortgaged the land purchased of the Tracy estate to secure the loan made. The title of General Tillson as mortgagee is unquestioned.

It is in evidence that the defendant lived in the family of the complainants, and that he married Miss Philbrook, in whom the estate was ultimately to vest after the death of the complainants, that he made his purchase with a full knowledge of the equitable rights of these complainants, and that Tracy was bound to execute a life lease to them. Taking the estate from the heirs of Tracy with a full knowledge of the equities between the parties to the original agreement, he takes it subject to those equities, which were fully recognized alike by Tracy and his heirs. He stands in the place of Tracy. As Tracy, holding the estate, was bound to give a lease, so the defendant knowing that obligation on Tracy's part, takes the same subject to its performance. *Lewis* v. *Small*, 71 Maine, 553.

The defendant cannot be regarded as mortgagee for the amount advanced by Tracy. The estate is held by General Tillson as mortgagee. To discharge the estate from the mortgage, payment must be made to him. But he is not made a party. His prior rights are in no way to be affected by the decree in this case. Nor indeed do the complainants even offer to redeem

the estate. This, therefore, cannot be regarded as a bill to redeem a mortgage. The proper parties are wanting.

The result is that the defendant be decreed to execute a life lease of the promises in controversy to the complainants for their joint lives and for the life of the survivor, and be further enjoined from prosecuting his suit at law against them, and that the complainants recover costs.

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

BELFAST SAVINGS BANK

vs.

KENNEBEC LAND AND LUMBER COMPANY.

Kennebec. Opinion May 15, 1882.

R. S., c. 81, § 56. Attachment of real estate. Taxes. Tax title. Stat. 1880, c. 214. Practice.

The specification of the claim sued in the writ upon which real estate was attached was "To amount due on account, $707.92. Interest, 75.00," with an additional allegation that under the money count, the plaintiff would claim to recover the balance due on account. *Held*, that these specifications were insufficient under R. S., c. 81, § 56, to create any lien upon the real estate by the attachment.

A sale to pay a tax, where the tax lists were signed by but one assessor, when three were duly elected and qualified, is invalid; and money deposited with the clerk under the provisions of stat. 1880, c. 214, before commencing an action involving the validity of such a sale, must be restored to the party making the deposit.

ON REPORT.

The case and material facts are stated in the opinion.

William H. Fogler, for the plaintiff, cited upon the questions considered in the opinion: R. S., c. 81, § 56; *Saco* v. *Hopkinton*, 29 Maine, 268; *Osgood* v. *Holyoke*, 48 Maine, 410; *Jordan* v. *Keen*, 54 Maine, 417; *Brown* v. *Veazie*, 25 Maine, 362; *Nason* v. *Ricker*, 63 Maine, 383; *Johnson* v. *Goodridge*,

15 Maine, 31; *Bangor* v. *Lancey*, 21 Maine, 472; *Colby* v. *Russell*, 3 Maine, 227; *Foxcroft* v. *Nevens*, 4 Maine, 75.

E. W. Whitehouse, for the defendant.

The claim in the writ, upon which the premises were attached, was sufficiently stated to create a valid attachment of real estate.

It was stated in the account annexed as

Amount due on account,	$707 92
Interest,	75 00
	$782 92

and a memorandum under the money count, that the amount claimed was the balance shown by the account annexed.

The legal presumption is that this was the balance of an account stated, that it was a balance found by an auditor or agreed upon by the parties. *Jordan* v. *Keen*, 54 Maine, 417.

But if the attachment created no lien, the defendants have a good title through the tax deed. The evidence shows that all the steps required by the statutes to be taken in the assessment and commitment of the taxes, and the sale of the real estate were observed.

WALTON, J. This is a real action. Both parties claim title to the land from William K. Lancy,—the plaintiff by a mortgage dated February 15, 1875, and the defendant by an attachment made November 20, 1872, and a levy December 27, 1878, and a sale for taxes made in 1875 for the non-payment of a tax assessed in 1874.

We think the plaintiff is entitled to recover. Its mortgage is unimpeached, and is sufficient to maintain the action, unless the defendant can show a better title.

The defendant's title through their attachment fails for want of a sufficient specification of the nature and amount of their demand. A statute of this State declares that no attachment of real estate on mesne process shall create any lien thereon unless the nature and amount of the plaintiff's demand is set forth in proper counts, or a specification thereof is annexed to the writ. Act 1838, c. 344; R. S., 1871, c. 81, § 56. In the construction of this statute

the court long ago decided that where a writ contains no other description of the plaintiff's demand than this, "To balance due on account and interest, $1500," no valid attachment of real estate can be made upon it. *Saco* v. *Hopkinton*, 29 Maine, 268. The specification in the writ against Lancy was this, "To amount due on account, $707.92. Interest, 75.00," with an additional allegation that under the money count the plaintiff would claim to recover the "*balance*" due on account. These specifications are almost precisely the same as the one held insufficient in the case cited, and are in no respect any more definite. We think they were insufficient under the statute, and the construction which was long ago put upon it, to justify an attachment of real estate and create a lien thereon. The levy is of course unavailing because subsequent to the plaintiff's mortgage. The attachment failing, the levy fails with it.

The defendant's tax title fails because neither the assessment of the tax, nor the list of taxes committed to the collector, were signed by a majority of the assessors. The law requires all assessments of taxes to be under the hands of the assessors; and it is well settled that, to be valid, the lists of assessments must be signed by at least a majority of the assessors. A signing by one, when three are duly elected and qualified, is not sufficient. It is not important in what manner they are signed, whether at the beginning or the end of the list, but they must be signed in some form by at least a majority of the assessors, and in such a manner as to show that they intended to give them their official sanction. The signing of a warrant to the collector is not sufficient. The list of assessments must also be signed. *Colby* v. *Russell*, 3 Maine, 227; *Foxcroft* v. *Nevens*, 4 Maine, 72; *Johnson* v. *Goodridge*, 15 Maine, 29; *Bangor* v. *Lancey*, 21 Maine, 472.

The tax for the payment of which the real estate in question was attempted to be sold, was not so signed. It was signed by only one of the assessors, while the case shows that three were duly elected and qualified. A sale to pay such a tax is invalid; and the other defects in the tax title, claimed by the plaintiff to exist, need not be considered.

An act passed in 1880, declares that no person contesting the validity of any sale of land for non-payment of taxes, shall be permitted to commence, maintain or defend any action at law or in equity, involving the validity of such sale, until he shall have deposited with the clerk of the court in which such action is to be commenced or defended, the amount of all taxes, interest and costs accruing under such sale, and interest thereon, to be paid out by order of court to the party legally and equitably entitled thereto. Act 1880, c. 214. Pursuant to the requirement of this statute one hundred and sixty-six dollars was deposited with the clerk of this court before this suit was commenced. Which is the party "legally and equitably entitled thereto?" The tax not having been legally assessed, we think the money must be restored to the plaintiff. To hold otherwise would make a tax illegally assessed as collectible by a sale of the land as one in the assessment of which all the requirements of the law had been scrupulously complied with.

It will be observed that, in arriving at this conclusion, we have not discussed, and have not undertaken to determine, the constitutionality of the act of 1880, c. 214. That is a question in relation to which we now express no opinion.

The net income of the premises, and for which the defendant is responsible in this action, is admitted to be eighty-seven dollars and seventy-eight cents.

Judgment for plaintiff for possession of the real estate demanded, and for rents and profits, estimated at $87.78, and interest thereon from date of writ; and the money deposited with the clerk of the court ($166), to be restored to the plaintiff.

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

LIBBEY, J., did not sit as he was a stockholder in the defendant corporation.

FRANK M. TRAFTON *vs.* DANIEL S. PITTS, appellant.

Cumberland. Opinion May 16, 1882.

New trial. Jurors. Practice. Evidence.

A motion for a new trial cannot be sustained by evidence of what is said by jurors while deliberating upon a case. Such evidence is illegal and will not be considered by the court. And when by consent of parties jurors have been allowed to view animals claimed to be those in litigation, it is not such misconduct as will support a motion for a new trial, if the jurors look at them a second time when neither the parties nor their counsel are present, and no consent of the parties is given for them to do so.

ON REPORT on motion for a new trial on the ground of misconduct of some of the jurors, from superior court.

Trover for the value of two sheep, originally brought before a trial justice where judgment was for plaintiff, and the defendant appealed.

The verdict of the jury was for plaintiff for eight dollars and eighteen cents.

The material facts upon the question submitted to the court are stated in the opinion.

Nathaniel S. Littlefield, for the plaintiff, cited: *State* v. *Pike*, 65 Maine, 117; *Clark* v. *Lebanon*, 63 Maine, 393.

Caleb A. Chaplin, for the defendant.

The evidence adduced in support of the motion for new trial fully establishes the fact "that there was a deliberate going in search of evidence out of court by jurors, who acted upon the results of their examination themselves, and communicated them to their fellows," as in *Bowler* v. *Washington*, 62 Maine, 302, and *Winslow* v. *Morrill*, 68 Maine, 362. And that they did not decide this case upon such evidence as was produced before them by the parties to the litigation.

The fact that the jury had previously looked at the sheep and examined whatever either party pointed out does not alter the case. Both parties could see what was then pointed out and had

the opportunity to explain by other evidence any matter requiring it; but they were deprived of that privilege in the second examination. The identity of the two sheep was the real question for the jury, for if the plaintiff's sheep were lost, stolen, or had died without any actual or active agency on the part of the defendant, or merely through his negligence, he could not be held for their value in this form of action. *Dearbourn* v. *Union National Bank*, 58 Maine, 273; *Hagar* v. *Randall*, 62 Maine, 439.

WALTON, J. The contention in this case is in relation to the ownership of two sheep. The plaintiff claims that he owns them, and the defendant claims that they belong to him. The action is trover, and was originally commenced and tried before a magistrate. The magistrate decided in favor of the plaintiff, and the defendant appealed. At the trial in the superior court, the defendant brought to court (or rather into the neighborhood of the court) two sheep, which he claimed were the identical sheep in controversy; and, at his request, the jury were allowed to go to the stable where they were and view them. But notwithstanding this, and much other evidence, the jury decided, as the magistrate had decided, that the defendant was guilty of converting to his use two of the plaintiff's sheep. He moves for a new trial because some of the jurors, after the first view, went and took a second look at the sheep, without his knowledge or consent, and without the leave of the court. He claims that this was such misconduct on the part of these jurors as entitles him to a new trial. We think not. If it be conceded that the second view was improper, it seems to us that it was a very harmless proceeding. As the jurors had been allowed to view the sheep once, we fail to see how a second look at them could do any harm. It would not bring before them any new evidence; it would only be a second look at evidence already before them. If the first examination of the sheep was beneficial to the defendant, as he seems to have believed it would be, we fail to see how a second look at them could do him any harm. And we again remind counsel, as we have often done before, that it is useless to attempt to support a motion for a new trial by evidence of

what is said by jurors while deliberating upon a case. Such evidence is illegal and will not be considered by the court.

Motion overruled.
Judgment on the verdict.

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

LYMAN TYLER *vs.* JOSEPH S. FICKETT.

Penobscot. Opinion May 15, 1882.

Deed. Evidence.

Where the description in a deed develops a latent ambiguity, parol evidence is admissible to explain the same. Such evidence is also admissible to show whether a monument partially but erroneously described was the one intended.

While monuments capable of being identified must always control courses and distances, the measurement of the lines, whose courses and distances are given, should not be disregarded in determining the identity of the monuments claimed to be found with those referred to in the deed.

ON REPORT.

This was a real action to recover a lot of land and appurtenances situate in Bangor. The writ was dated September 21, 1880. General issue was pleaded, with brief statement of limitations barring the demandant's right, and claim for betterments.

The case was referred "to find the facts upon legal testimony, and report the same on legal principles, for the decision of the full court on law, with their conclusions, with leave to except." Their award, which was in favor of the plaintiff for a portion of the demanded premises and for his legal costs, made part of the case. The defendant filed the following exceptions thereto:

1. He excepted to the admission of the oral testimony of the Thompsons, to show what was their understanding or intention in defining the line as described in the deed; also to show their understanding or what was meant by the extension of the Odlin road; or to show that at the dates of the deeds they regarded the preliminary survey of the engineers in 1851, or 1852, as the line described; and to their testimony as reported, generally.

2. He also excepted to the conclusions drawn as to the true line described by the words "Odlin road extended," or "extension of the Odlin road," and to the giving effect to such conclusion as the true line; also, to the finding that the true line between the two lots in dispute was any other than the road actually existing and marked in the plan as "traces of a travelled way" leading over the corduroy bridge, as reported.

The exceptions were allowed, and the case reported to the full court, according to the terms of the reference—the court to render such judgment on the facts reported and legally found as the legal rights of the parties require, including the matter of title, boundaries, limitations, and betterments.

(Report of referees.)

. . . . "On the second of February, 1852, the "Odlin road," running from Bangor towards the Hermon line, was accepted and established by the city authorities of Bangor, from its easterly terminus in Bangor, as far towards the Hermon line as the point A, on accompanying plan, but no further.

"Some time after, but prior to October 16, 1852, the street engineers of Bangor, went out to the then westerly end of the "Odlin road,"for the purpose of running out a line for the extension of said road from the point A, westerly to the Hermon line. They were accompanied by Willard Thompson and Thomas R. Thompson, hereinafter mentioned.

"These engineers examined several routes before fixing upon a line, but, at length, they fixed upon a line, and put down stakes to designate the same. This line, so far as relates to this case, we find to be the one designated on accompanying plans, by dotted line, (o o o) C, D.

"This route we find, was understood by said Thompson to be fixed upon by the engineers, as the extension of said Odlin road to the Hermon line. The city of Bangor, however, never laid out any road over this projected line, and no road of any kind was ever built thereon. . . . .

"On the sixteenth of October, 1852, the said Willard Thompson, who then owned the demanded premises, and also land adjoining on the westerly and southerly side thereof, by deed of

that date, conveyed to Thomas R. Thompson a parcel of land, described as follows:

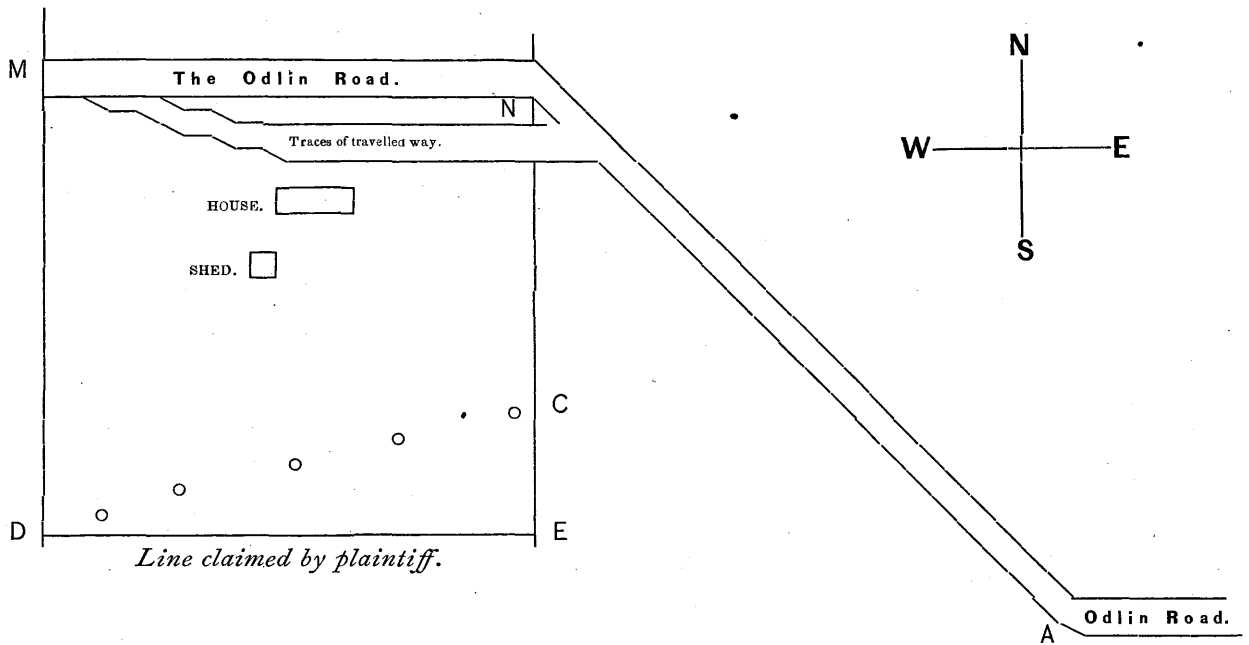
"'A certain parcel of land situated in said Bangor, bounded and described as follows, to wit:

"'Beginning on the westerly line of Bangor, between Bangor and Hermon, at a stake and stones on the northerly line of the continuation of the "Odlin road," so called. Thence running on said Hermon and Bangor line one hundred and thirty-one rods to a birch tree; thence easterly on the line between the German lot, so called, and lot number eight (a part of the land being conveyed) fifty rods, to a spruce tree; thence southerly one hundred and thirty-one rods, to said Odlin road; thence on said Odlin road to the bound begun at; containing forty acres, more or less, being part of the land purchased by myself and Verplast of True and McQuesten.'

"On October 29, 1853, said Willard Thompson, by deed of that date, conveyed to Erastus Gowen a parcel of land described as follows: 'A certain tract or parcel of land, situate in said Bangor, bounded and described as follows, viz: Beginning at an iron post, south corner of Bangor, thence running easterly on Hampden line seventy-two rods to a stake; thence northerly on said Thompson land, forty-five rods to Odlin road extended; thence on Odlin road extended, seventy-two rods to Hermon line; thence on Hermon line forty-five rods, to the first bound, containing twenty acres, more or less.'

"We find that said Willard Thompson and Thomas R. Thompson, at the dates of the two aforesaid deeds, regarded the preliminary survey of 1852, as the true line of the Odlin road extended; and this we find upon the testimony of said Thompsons, which was objected to by the defendant, but which we rule to be legal testimony.

"The said Odlin road was not extended, laid out, and made by the city, westerly of said point A, to the Hermon line, until 1864, and the same road was constructed westerly of the Hermon line, in the town of Hermon, about 1870; but in the meantime the woods roads before spoken of were being used for lumbering purposes, and such other travel as had occasion to go to one or two houses erected in the vicinity of the Hermon line." . . .



M, D, forms a part of the Hermon line. D, E, N, M, were the premises claimed by the plaintiff.
D, C, N, M, were the premises awarded the plaintiff by the referees.

H. R. Mitchell, for the plaintiff, cited: *Wing* v. *Burgis*, 13 Maine, 111; *Tibbetts* v. *Estes*, 52 Maine, 566; *Abbott* v. *Abbott*,

51 Maine, 581; *Stone* v. *Clark*, 1 Met. 378; *Crafts* v. *Hibbard*, 4 Met. 438; *Blaney* v. *Rice*, 20 Pick. 62; *Crafts* v. *Judson*, 119 Mass. 521; *Lincoln* v. *Edgecomb*, 28 Maine, 275; *Stevenson* v. *Erskine*, 99 Mass. 367; *Block* v. *Pfaff*, 101 Mass. 535; *Wilson* v. *Hildreth*, 118 Mass. 575; *Heaton* v. *Hodges*, 14 Maine, 66; *Hamilton* v. *Foster*, 45 Maine, 32; *Ames* v. *Hilton*, 70 Maine, 36.

A. W. Paine, for the defendant, cited: *Green* v. *Lunt*, 58 Maine, 533; *Miles* v. *Barrows*, 122 Mass. 579; *Chester Emery Co.* v. *Lucas*, 112 Mass. 424; *Kellogg* v. *Smith*, 7 Cush. 375; *Cook* v. *Babcock*, 7 Cush. 526; *Stearns* v. *Rice*, 14 Pick. 411; *King* v. *Little*, 1 Cush. 436; *Waterman* v. *Johnson*, 13 Pick. 261; *Frost* v. *Angier*, 127 Mass. 212; *Abbott* v. *Abbott*, 51 Maine, 575; *Loring* v. *Norton*, 8 Greenl. 61; *Lincoln* v. *Wilder*, 29 Maine, 169; *Pike* v. *Monroe*, 36 Maine, 309; *Bradley* v. *Wilson*, 58 Maine 357.

BARROWS, J. The fallacy of the positions taken by the defendant in opposition to the report of the referees consists mainly in the assumption that the phrases "continuation of the Odlin road, so called," and "said Odlin road" in the deed from Willard Thompson to Thomas R. Thompson, dated October 16, 1852, under which the plaintiff derives title, and the phrase "Odlin road extended" in the deed of Willard Thompson to Erastus Gowen dated October 29, 1853, under which the defendant's title accrues, so properly describe and definitely point out one of several wood roads, (made by lumbermen westerly of what was then the westerly terminus of the Odlin road to enable those who were lumbering on various lots in the vicinity to bring out their logs and lumber to that point,) as to exclude parol evidence to show that the grantor in those deeds (under whom both parties claim) and the grantee in the first applied those phrases to designate, not an existing travelled way, but the land covered by a preliminary survey for the extension of the said Odlin road to Hermon line, made and staked out by the street engineers of the city of Bangor some time between February 2, 1852, and October 16, 1852, (when the first deed was given,)

but never in fact actually accepted or opened as an extension of said Odlin road. The call does not accurately describe the monument.

But on the other hand neither of these lumbermen's wood-roads is, properly speaking, a continuation or an extension of "the Odlin road so called." They begin upon the various lots on which the lumbermen were engaged, and run to the westerly terminus of the Odlin road but compose no part of "the Odlin road so called," nor do they or either of them constitute an extension of it, existing or prospective. The road surveyed and staked out by the engineers from the terminus of the Odlin road to Hermon line would, when constructed, answer the call as a "continuation of the Odlin road" or "the Odlin road extended," but it never was actually constructed, and here the case develops a latent ambiguity, to explain which parol evidence is admissible, and was we think properly received by the referees against the defendant's objections. *Crafts* v. *Hibbard*, 4 Met. 438, 452. Where the monument as found on the face of the earth answers the call in some but not in all particulars, the reference to it in the deed is not to be entirely rejected, but "parol evidence is admissible to show whether the monument partially but erroneously described was the one intended." *Abbott* v. *Abbott*, 51 Maine, 575, and cases there cited.

The "traces of a travelled way" which the defendant insists should be regarded as the "continuation of the Odlin road" or as "the Odlin road extended" correspond with no such extension either as contemplated in 1852, at the date of the deed, or as constructed in 1864, long subsequent to both the conveyances from Willard Thompson in which these phrases occur. They certainly answer the call no better than that which was surveyed and staked out for a continuation but not constructed. One of several lumbermen's wood-roads leading *to* a highway known by a distinctive appellation, cannot without doing violence to language be described as an extension of such highway. The identity of a monument existing on the face of the earth with one referred to in a deed is always a question of fact, and so far as the "traces of a traveled way" upon which the defendant relies are concerned,

it seems to have been decided adversely to him by the proper tribunal. We find nothing in the case to lead us to question the conclusion which the referees seem to have reached that neither of these wood-roads was "the Odlin road extended" or "the continuation of the Odlin road," referred to in the deeds. Resort must be had to existing circumstances and to the contemporaneous construction put upon the deeds by the parties interested to ascertain whereabouts on the face of the earth was the line thus erroneously designated. *Stone* v. *Clark*, 1 Met. 378; *Wing* v. *Burgis*, 13 Maine, 111.

The act of Erastus Gowen, under whom the defendant claims, in applying to Thomas R. Thompson for a deed of the land, in 1853, when about erecting the buildings upon the demanded premises is potent evidence against the claim which the defendant now asserts. If the defendant's construction had not been known to be incorrect by both of Willard Thompson's grantees, there would have been no pretence of title in Thomas R. Thompson to any land south of "the traces of the traveled way," and Gowen who was dealing in the same year with Willard Thompson for a parcel of land bounded on the north by "the Odlin road extended" would never have made a verbal contract with Thomas R. Thompson to pay him seventy-five dollars for a parcel of land on the south side of the same road to set his buildings on, which would upon the defendant's interpretation be included in Gowen's purchase from Willard Thompson. But this he did when the whole matter was fresh in the minds of all the parties; and as late as 1871 he or his grantees paid Thomas R. Thompson a considerable portion of the contract price, and thus we have both a contemporary construction by the parties conclusively negativing that claimed by the defendant, and an act invalidating his plea of the statute of limitations, and showing that until a comparatively recent date the defendant's possession was by permission of the plaintiff's grantors.

Another matter which appears in the case strengthens the plaintiff's position and helps to make it clear that the defendant suffered no wrong in the rejection of the wood-road as not being the monument named in the deeds as "the Odlin road extended."

While monuments capable of being identified must always control courses and distances, the measurements of the lines whose courses and distances are given should not be disregarded in determining the identity of the monuments claimed to be found with those referred to in the deed. Looking at the length of lines and quantities of land given in the deeds to Thomas R. Thompson and Erastus Gowen respectively, it is obvious that the wood-road claimed by defendant as a monument could not have been the one referred to in those deeds without such a mistake in the measurements as would be well nigh unaccountable. If any error was committed by the referees in their finding, it was not one which gives the defendant any just cause of complaint.

Exceptions overruled. Report of referees accepted. Judgment for plaintiff accordingly.

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

SUSAN CUNNINGHAM, in equity, *vs.* STEPHEN J. GUSHEE.

Same *vs.* LEWIS ROBBINS.

Knox. Opinion May 23, 1882.

Attachment. Partnership. Equity. Judgment.

An attachment by a creditor of the individual partner will not affect the lien acquired by an earlier attachment in favor of a creditor of the copartnership; and no different rule should prevail in equity in cases where the distribution of the partnership estate only is proceeding on equitable principles in insolvency.

Where a judgment upon which a levy has been made was excessive, the excess being occasioned by mistake and not by fraudulent design, it is examinable in equity when the complainant was not a party or privy to the judgment, and in such case the court may give equitable relief.

ON demurrer to bill in equity.

The questions presented by the bill, demurrer and joinder are stated in the opinion with the material facts.

The cases were presented together.

Orville D. Baker, for the plaintiff.

A private creditor of a partner is entitled in equity to a preference over a partnership creditor in respect to the private property. 1 Story Eq. § 675; *Murrill* v. *Neill*, 8 How. 414; 1 Am. Lead. Cas. (5th ed.) 588; *Phelps* v. *McNeely*, 66 Mo. 554, (27 Am. R. 378); *McCulloh* v. *Dashiell*, 1 Am. L. Cas. 473; *Morgan* v. *His Creditors*, 8 Martin, N. S. N. C. 599, (20 Am. Dec. 262); *Wilder* v. *Keeler*, 3 Paige Ch. 167, (23 Am. Dec. 781); *Egberts* v. *Wood*, 3 Paige Ch. 517 (24 Am. Dec. 236.)

And this equity will be enforced in favor of the separate creditor against the prior attachment unless that attachment has been perfected by a prior judgment and levy. *Jarvis* v. *Brooks*, 23 N. H. 136; *Crockett* v. *Crain*, 33 N. H. 550; *Bowker* v. *Smith*, 48 N. H. 111 (2 Am. R. 189); *Crooker* v. *Crooker*, 46 Maine, 265.

If the respondent's attachment was not dissolved by the insolvency his subsequent conduct in appearing and proving his claim in full in insolvency, having the same allowed in full and accepting his full dividend therein with the other creditors is a distinct waiver of all security he might have by attachment or otherwise.

Rice and Hall, for the defendants, cited: *Newman* v. *Bagley*, 16 Pick. 570; *Allen* v. *Wells*, 22 Pick. 450; *Stevens* v. *Perry*, 113 Mass. 380; *Camp* v. *Grant*, 21 Conn. 41; *Bardwell* v. *Perry*, 19 Vt. 292; *Emanuel* v. *Bird*, 19 Ala. 596; *Reed* v. *Shepardson*, 2 Vt. 120; *Clark* v. *Lyman*, 8 Vt. 290; *Ex parte Nason*, 70 Maine, 363; Story Eq. Pl. § 505; Story Eq. Jur. § § 64c, 64d, 558; *Bowker* v. *Smith*, 48 N. H. 111; *Cleghorn* v. *Bank of Columbus*, 9 Geo. 319; *Wisham* v. *Lippincott*, 1 Stock. Ch. R. 353; *Barnes' Appeal*, 7 W. and S. 269; *Baker* v. *Wimpee*, 19 Geo. 87.

BARROWS, J. These cases are presented upon the bills and respondents' demurrers, asserting that she has not stated a case that entitles her to the relief prayed for. The essential facts set forth in the first are that this complainant was a creditor of one Isaac H. Cunningham, and attached his real estate September 17, 1875, and levied thereon December 10, 1875. Prior to this, the respondent in March, 1875, brought suit against said Cunning-

ham as the surviving partner of the firm of Post and Cunningham, (which was dissolved by the death of Post, in February, 1875,) for a debt due from said firm and caused the real estate of said Cunningham as surviving partner to be attached but made no special attachment of said Cunningham's individual estate, which suit was entered at the September term, 1875, in the county of Knox, and judgment was rendered in it for the full amount of the debt claimed with interest at the March term, 1877, and the execution was levied, in season to save the judgment creditor's rights under the attachment, on part of the premises previously levied on by the complainant. The bill further charges and the demurrer admits, that when the respondent brought his suit Cunningham was individually insolvent, but that, at that time, the partnership had both real and personal estate to an amount exceeding what was necessary to pay the respondent's claim, which ought have been attached, that said partnership was duly represented insolvent by said Cunningham in September, 1875, and upon regular proceedings had, the respondent proved his claim against the partnership estate and in February, 1877, before he took his judgment for the full amount of his claim with interest and costs against the surviving partner, there was an order of distribution under which he became entitled to a dividend which he shortly afterwards received and which complainant claims should have been but was not credited to reduce the amount of said judgment. In November, 1878, respondent brought his action at law against complainant for the estate covered by respondent's levy and in March, 1879, complainant commenced this process praying that respondent may be enjoined against prosecuting his suit at law against her and required to release his claim to the estate levied on and for all other appropriate equitable relief.

In the second case the facts set out are the same with the exception that the respondent Robbins had an attachment of the individual real estate of Cunningham, as well as of the real estate held by him as surviving partner, and it is not in this case claimed that the respondent has received any dividend in insolvency which was not credited before judgment entered up. In support of their respective demurrers, respondents say that the complainant

has a remedy at law which is adequate for the protection of all the rights she has in the premises, that her bill is wanting in equity because the separate property of an individual partner is equally as liable to attachment and levy for the debts of the firm as for his own, and that if complainant was ever entitled to the aid of the court in equity she did not invoke it seasonably or in the proper manner.

There have been no proceedings in insolvency with respect to Cunningham's individual estate.

Doubtless the complainant can avail herself in defence of the suits at law of all the supposed defects in the attachments or levies of the respondents. If the attachments made by the respondents were defective so as not to create a lien on the individual estate of Isaac H. Cunningham, or if they were dissolved by the representation of the firm's insolvency and consequent proceedings in probate court, or if they were waived by proof of the respondent's demands against the firm, so as to be inoperative against the complainant's subsequent attachment, she has no occasion to invoke the aid of the court in equity, for her objections go to the legal validity of the title acquired by the respondents as against her own.

That the court ought not to interfere in equity to deprive the respondents of any benefit they may be legally entitled to by their diligence in securing their demands by attachment of the individual estate of one of the copartners seems to be clear. The doctrine declared in *Ex parte Nason*, 70 Maine, 363, is based upon the idea that the creditor of the partnership is entitled to the benefit of his double security, even when the joint and separate estates are both in the hands of the court, acting, as the court always acts in bankruptcy or insolvency proceedings, upon equitable rules and principles. *A fortiori* when only one of the funds is under the direction of the court and the court cannot marshal the assets in both, it will not interfere with the regular course of proceeding at law by the creditor to whom the credit of both estates was pledged, against the estate which is not in bankruptcy or insolvency.

It should be remembered that he who owes as a partner is himself just as much a debtor as though the debt was contracted

in his individual capacity. The debt is due personally from each member of the firm. Not unfrequently the partnership creditor relies largely upon the ability to pay and the credit of the individual partners and there are no partnership funds accessible. That he is the creditor of both the partners surely should not postpone his claim to that of a creditor to whom one of them alone is indebted.

Clearly the only mode and time for this complainant to claim the aid of the court in marshalling the assets of the partnership and individual estates here found, would have been by putting the individual estate of Isaac H. Cunningham into insolvency in season to dissolve the attachments made upon it. But this she did not apparently regard as a desirable course to pursue. As an attaching creditor she has no equities superior to those whom Isaac H. Cunningham was owing, as a member of the firm of Post and Cunningham. It has often been decided in suits at law that a subsequent attachment by a creditor of the individual partner will not affect the lien acquired by an earlier attachment in favor of a creditor of the copartnership. In all such cases, *qui prior est in tempore potior est in jure*. *Newman* v. *Bagley*, 16 Pick. 570; *Allen* v. *Wells*, 22 Pick. 450; *Stevens* v. *Perry*, 113 Mass. 380. We are satisfied that no different rule should prevail in equity in cases where the distribution of the partnership estate only is proceeding on equitable principles, in insolvency. There is a manifest want of equity in the complainant's claim that she should be allowed all the benefit to be derived from an attachment and sequestration of Isaac H. Cunningham's individual property, for the payment of her claim in full, without regard to diligence and priority as against one who was a creditor of said Cunningham as the surviving partner of an insolvent firm whose estate is distributed in insolvency. The alleged ground that the claims of the respondents might have been secured by an attachment of the partnership property, if tenable under any circumstances, vanishes with the statement of the proceedings for the settlement of the partnership estate in insolvency, which vacated all such attachments in conformity with R. S., c. 81, § § 49, 65, and c. 70, § 6. The principal relief sought by the bills must be denied for want of equity; but the demurrers cannot be sustained if

anything is set forth which entitles the complainant to equitable relief within the scope of her prayers. It appears that besides levying for the full amount of his claims the respondent, Gushee, has received a small dividend from the insolvent partnership estate. His levy, then, upon the property which would otherwise go to pay the complainant's demand, was, to the amount of that dividend, excessive. The bill does not allege that this was fraudulently done. If the judgment was fraudulently excessive, the complainant could make use of the fact to defeat the suits against her at law, and need not resort to equity. But the character of the allegations would seem to indicate that the excess was by reason not of fraudulent design, but of mistake by which the judgment would not be avoided either in law or equity at the instance of any one, whether party or privy, or a stranger, except as to the excess. And in a suit at law, a judgment when rendered by a court having jurisdiction and lawfully entered up, cannot be collaterally impeached, except for fraud or collusion, and is conclusive as to the relation of debtor and creditor between the parties, and as to the amount of indebtedness. *Sidensparker* v. *Sidensparker*, 52 Maine, 481.

But between parties situated as these are, the complainant not being a party or privy to the judgment, it is so far examinable in equity that we may ascertain whether it was rendered for the proper amount, and if not, may give equitable relief.

Upon the facts alleged in the bill in Gushee's case, and admitted by the demurrer, the judgment for the respondents should have been diminished by the amount of the dividend received from the partnership estate, and this sum he holds properly only as trustee for the complainant, who, if the facts are correctly stated, would be entitled to the amount of that dividend. For this cause only,

The demurrer in the first case overruled and a respondeas ouster awarded.

In the case against Robbins demurrer sustained.

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

RICHARD H. MARBLE *vs.* JEREMIAH GRANT.

Somerset. Opinion May 25, 1882.

Bankruptcy. Promissory notes. Void contracts. U. S. R. S., § 5131.

A part of the consideration for a promissory note, and an inducement to give the note, was an agreement on the part of the payee that he would not oppose the maker's application for a discharge in bankruptcy then pending. *Held*,

1. A contract thus procured is void at common law as against sound public policy.

2. It was in violation of the terms as well as the policy of the bankrupt act. U. S. R. S., § 5131.

3. It was not necessary for the maker to prove in an action against him upon such note, that before the note was thus procured the payee had proved his claim in bankruptcy.

ON REPORT.

Assumpsit on a promissory note for one hundred and seventy-five dollars, dated May 31, 1879, and payable in one year with interest.

At the trial the defendant offered to prove that at the time the note in suit was given and to induce the defendant to give the same, the plaintiff promised and agreed not to oppose defendant's application for a discharge in bankruptcy then pending, and that said promise was in part consideration for said note, but the court ruled *pro forma* that as there was no evidence that the plaintiff had ever proved his claim against the bankrupt, and thereby made himself a creditor of the defendant, who had a right to oppose his discharge, the evidence offered was immaterial and excluded it.

Folsom and Merrill for the plaintiff.

The evidence offered was inadmissible until the defendant had shown that the plaintiff was at the time a creditor who had a pecuniary interest in the discharge. Thus if it should happen (if he had a claim) that upon proving it, it appeared to be a debt of a fiduciary character, or came within the classes enumerated in the statutes, then he would have no pecuniary interest in the discharge. U. S. R. S., § 5117; Bump's Bank. 728, 272–4, 632, 716, 718; *Frost* v. *Tibbetts*, 30 Maine, 188;

Morse v. *Lowell*, 7 Met. 156; *Sackett* v. *Andros*, 5 Hill, 327; *Maples* v. *Burnside*, 1 Denio, 332; *In re Aspinwall*, 3 Penn. L. J. 212.

If it is not shown that there is a sufficient cause for a successful opposition then there is no fraud upon the act. *Chamberlain* v. *Griggs*, 3 Denio, 11; *Crates* v. *Blush*, 1 Cush. 572.

The mere stating of the claim by the bankrupt in his schedules is not even *prima facie* proof that the claim was due. One must prove his debt to be a creditor. *In re Burk*, 1 Deady, 429: *In re Sutherland*, 1 Deady, 573; 3 N. B. R. 300; 1 N. B. R. 133; Bump's Bank. 932, Form, 53.

Walton and Walton, for the defendant, cited: U. S. R. S., 5131; *Dexter* v. *Snow*, 12 Cush. 594; *Wiggin* v. *Bush*, 12 Johnson, 306; *Phelps* v. *Thomas*, 6 Gray, 328; *Blasdel* v. *Towle*, 120 Mass. 447; Bump's Bank. (9th ed.), 272–4; *In re Shepherd*, 1 B. R. 439; *In re Smith and Bickford*, 8 Blatch. 461; *In re Murdock*, 3 B. R. 146; S. C. 1 Lowell, 362; *In re Boutelle*, 2 B. R. 129.

LIBBEY, J. The note in suit was given in compromise and settlement of a note held by the plaintiff against the firm of Grant, Locke and Company, of which firm the defendant was a partner; and at the time it was given, said firm and each of the partners individually, were in bankruptcy, and the defendant received his discharge June 2, 1879.

The note for which the note in suit was given was embraced in the schedule of the debts of the firm as due the plaintiff; but there was no evidence that he had proved it in bankruptcy.

The defendant offered to prove "that at the time the note in suit was given, and to induce the defendant to give the same, the plaintiff promised and agreed not to oppose the defendant's application for a discharge in bankruptcy then pending, and that said promise was a part of the consideration of said note;" but the presiding judge ruled *pro forma*, that the facts if proved would constitute no defence to the action.

By the terms of the report, if this ruling is correct, judgment is to be rendered for the plaintiff; otherwise the action is to stand for trial.

We think this ruling is erroneous. A contract thus procured is void at common law, as well as by the bankrupt act.

It is void at common law as against sound public policy. *Wiggin* v. *Bush*, 12 Johns. 306; *Tuxbury* v. *Miller*, 19 Johns. 311; *Bell* v. *Leggett*, 7 N. Y. 176; *Dexter* v. *Snow*, 12 Cush. 594; *Phelps* v. *Thomas*, 6 Gray, 327; *Blaisdell* v. *Fowle*, 120 Mass. 447.

It is in violation of the terms as well as the policy of the bankrupt act. R. S., U. S. c. 8, § 5131 reads as follows: "Any contract, covenant, or security made or given by a bankrupt or other person with, or in trust for, any creditor, as a consideration for, or with intent to induce the creditor to forbear opposing the application for discharge of the bankrupt, shall be void." We think the defendant's offer of proof brings the case within the provisions of this section.

But it is claimed that, inasmuch as it does not appear that the plaintiff proved his note in bankruptcy, he could not object to the defendant's discharge, and, therefore, it cannot be said that the new note was given with intent to induce the plaintiff to forbear opposing his discharge. The plaintiff was a creditor in fact, and if he had not proved his debt in bankruptcy at the time, it does not appear that he might not have done so at any time, so as to be entitled to his share of the bankrupt's estate; but without doing so, he could have proved to the court his pecuniary interest in the defendant's application for a discharge, and would then have had the right to oppose it, as if the defendant obtained his discharge, the plaintiff's debt would be barred. Bump on Bankruptcy, 9th ed. 272, and cases cited.

If a creditor, by withholding proof of his debt in bankruptcy, should be permitted to make and enforce such a contract as this case discloses, the mischief and corruption, which the statute seeks to prevent, would be accomplished with impunity, and the provisions and policy of the statute evaded.

Action to stand for trial.

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

ATWOOD W. HARDING, in equity,

vs.

GEORGE JEWELL and another.

Waldo. Opinion May 26, 1882.

Deed. Equity.

When the grantor by inadvertance or mistake fails to place a seal upon his deed, equity will require him to perfect it so that it will comply with his intention at the time of giving it.

H and J exchanged farms, J giving H a mortgage back to secure the difference which he was to pay. Neither deed nor the mortgage was sealed. H repossessed himself of his old place, and insured the buildings, and, they being destroyed by fire, collected the insurance, and gave his wife a quitclaim deed of the premises. *Held*, In a bill in equity H against J to compel him to seal his deed that the decree would issue as prayed for, providing H sealed the deed which he gave J, and procured a quitclaim deed back from his wife, and accounted for the insurance money less the premium, and the rents and profits while he was in possession, and allowed all of such insurance, rents and profits upon the mortgage debt which he held against J, upon the principle, that he who asks equity must do equity.

BILL IN EQUITY to compel the respondents to perfect their deed by affixing a seal.

Heard on bill, answer and proof.

The material facts are stated in the opinion.

W. H. Fogler and R. W. Rogers, for the plaintiff, cited: Chitty Contr. 104, 105, 111, 1071, 1072; Story Eq. Jur. § § 165, 1502, note 2; *Adams* v. *Stevens*, 49 Maine, 362; 3 Wash. R. P. 333, 349, 350, 368; *Moore* v. *Griffin*, 22 Maine, 354; *Soutter* v. *Porter*, 27 Maine, 417; *Higgins* v. *Wasgatt*, 34 Maine, 308; *Abbott* v. *Abbott*, 53 Maine, 356; *Bates* v. *Foster*, 59 Maine, 157; *Johnson* v. *Leonards*, 68 Maine, 239.

Don A. H. Powers, for the defendants, cited: *Randall* v. *Bradley*, 65 Maine, 43; *Eveleth* v. *Wilson*, 15 Maine, 109; *Elder* v. *Elder*, 10 Maine, 80; *Miller* v. *Whittier*, 32 Maine, 203; *Rowel* v. *Jewett*, 69 Maine, 293; *McIntire* v. *Plaisted*, 68 Maine, 363; *Gould* v. *Murch*, 70 Maine, 288; *Thompson* v. *Gould*, 20 Pick. 134; *Wells* v. *Calnan*, 107 Mass. 514.

LIBBEY, J. By the bill, answer and proofs, it appears that the plaintiff, and the defendant, George Jewell, were respectively the owners of farms situated in Troy; and on the ninth day of December, 1873, made an agreement to exchange them; and said defendant executed to the plaintiff what the parties supposed was a deed of his farm, the other defendant, Arvilla J. Jewell, joining in relinquishment of her right to dower in the premises; and the plaintiff executed to the defendant a similar deed of his farm, taking back what the parties supposed to be a mortgage, to secure the payment of eight hundred and seventeen dollars and fifty cents, the sum to be paid by the defendant as the difference in the value of the farms. In fact, neither of the deeds or the mortgage was sealed. Each party soon afterwards entered into possession of the premises thus conveyed to him.

The plaintiff repossessed himself of the farm which he intended to convey to the defendant, in July 1876; and on the twenty-second day of March, 1877, by deed of quitclaim, conveyed the same to Sarah J. Harding.

After the plaintiff thus took possession in 1876, he insured the buildings on the farm, for seven hundred dollars, and before the commencement of this suit, they were consumed by fire, and the insurance received and appropriated by the plaintiff and Sarah J. Harding.

The plaintiff and Sarah J. Harding have held the possession of said premises since July, 1876, receiving the rents and profits.

The plaintiff brings this bill against the defendants to require them to seal their deed which they executed to him December 9, 1873.

The deeds and mortgage were not sealed through inadvertance or mistake, and equity requires each party to perfect his deed as it was his intention at the time. But the plaintiff while in possession of the farm which he intended to convey to the defendant, executed a quitclaim deed to Sarah J. Harding, which he claims should be construed as an assignment only of the defendant's mortgage to him. Sarah J. Harding is not a party to the suit, and therefore no construction can now be put upon that deed which will bind her. It is at least a cloud upon the title.

If the plaintiff asks equity, he must do equity, and before he can require the defendants to perfect their deed to him, he must put the defendant, George Jewell, in the same situation he would have been in if his deed to him had been sealed when executed. This will require him to duly seal his deed, cause Sarah J. Harding to convey to the defendant any interest or title which she acquired by the plaintiff's deed to her, except the assignment of the defendant's mortgage; and as the loss of the buildings before his conveyance to the defendant, and while he was in possession, must fall upon the plaintiff, (*Gould* v. *Murch*, 70 Maine, 288,) he must account for the insurance which he received, less the premium paid, and must also account for the rents and profits of the farm since he took possession in July, 1876. The insurance and rents and profits may be applied in payment of the mortgage, *pro tanto*, and if any balance remains it must be paid to the defendant, with interest.

Upon performance, or tender of performance by the plaintiff of the foregoing requirements on his part, the defendants must seal their deed to him.

If the parties cannot agree upon the amounts to be allowed for the insurance and rents and profits, the case must go to a master to state the accounts between the parties.

If the plaintiff does not elect, at the next term of court in the county, after the case is certified, to comply with the foregoing requirements on his part, the bill must be dismissed with costs for the defendants.

Decree accordingly.

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

THE CITY OF BANGOR *vs.* RISING VIRTUE LODGE, NO. 10, FREE AND ACCEPTED MASONS.

Penobscot. Opinion May 27, 1882.

Public charity. Masonic lodge. Taxes. R. S., c. 6, § 6.

The distinctive characteristics of a public charity are, that its funds are derived from gifts and devises, and not from fees, dues and assessments, and

that it is not confined to privileged individuals, but is open to the indefinite public.

A masonic lodge is not a charitable or benevolent institution, within R. S., c. 6, § 6, part second.

Its real and personal estate is subject to taxation, and must bear its just and proportionate share of the expenses required for the support of government.

ON REPORT.

Assumpsit to recover a tax assessed upon the real estate of the defendant corporation for the year 1880. The defendant claims that the property was exempt from taxation, on the ground that it is a benevolent and charitable institution, incorporated by this State, and the sole question submitted to the court is whether the property was exempt from taxation. The defendant was incorporated by c. 37, of the special laws of 1821. The property taxed is two brick stores and lot, owned by four masonic societies, one of which is defendant; the two upper stories they occupy as their place of meeting, the two lower stories by tenants paying rent to them, of which the defendant receives one-fourth. Whole valued by assessors, fifteen thousand dollars, and is mortgaged for four thousand five hundred dollars.

By the ancient masonic usages, a lodge of masons can be created and exist only by a charter from a Grand Lodge. Rising Virtue Lodge was chartered by the grand lodge of Massachusetts, September 16, 1802. A copy of the charter is made a part of the case.

Immediately upon the admission of Maine as one of the United States, the Grand Lodge of Maine was formed, and all the lodges in the State (including the defendant) passed at once under its authority as fully as if they had been originally chartered by the Grand Lodge of Maine. The pamphlet entitled "Constitutions and General Regulations of the Grand Lodge of Free and Accepted Masons of the State of Maine," is made a part of the case, also, the act of incorporation of the Grand Lodge of Maine, approved June 16, 1820. The defendant purchased its interest in the property in part, with two thousand dollars, a legacy from the late Rufus Dwinal, "for charitable purposes," as stated in *Everett* v. *Carr*, 59 Maine, 325. The by-laws of the lodge provide as follows:

"Article IV.—Committees.

"Section 1. At the annual communication there shall be chosen, by written ballot, a committee on charity, of which the master shall, *ex-officio*, be chairman; a committee on finance and committee of investigation, each to consist of three members, and may each be balloted for upon one ticket.

"Section 2. To the committee on charity shall be referred all applications for charity, and it shall be their duty to afford relief in all cases by them deemed proper; and they shall have authority to draw their order, through their chairman, upon the treasurer, for that purpose, for any sum not exceeding ten dollars in any case at any one time, such relief, in all cases, to be confined to members of the order, and the widows and orphans of deceased brother masons. Said committee shall report at the annual communication, specifically, in writing."

Upon so much of this statement as is legal evidence, the law court is to render such judgment as the law requires.

T. W. Vose, city solicitor, for the plaintiff, cited: R. S., c. 6, § 6; 119 Mass. 22; 3 Gray, 50; 11 Allen, 464; 72 Maine, 159; *Delaware County Institute of Science* v. *Delaware Co.* 8 Weekly Notes of Cases, 449; 4 Conn. 172.

Drummond and Drummond, for the defendant.

R. S., c. 6, § 6, provides that "the real and personal property of all benevolent, charitable and scientific institutions incorporated by this State," shall be exempted from taxation. The defendant claims that it is a benevolent or charitable institution.

I. It is incorporated as a society instituted for purposes of charity and benevolence, and is authorized to hold property only for "charitable and benevolent uses." As an incorporation, it can hold property only as authorized in its charter; that instrument authorizes it to hold property only for "charitable and benevolent uses." The same act expressly recognizes it as a charitable and benevolent society, for it is given the privileges "usually granted to other societies instituted for purposes of charity and beneficence." Accordingly, in *Everett* v. *Carr*, 59 Maine, 325, it was held that a bequest to this very lodge "for

charitable purposes" was valid, as the body was expressly authorized to take and hold property for such purposes.

II. The case shows that the defendant is a charitable and benevolent institution by its own organic laws. It is agreed, that according to ancient masonic usages, no lodge can be created or exist, without a charter from a grand lodge, the supreme governing body. The charter of the lodge is in the case. By it this lodge is authorized "to receive and collect funds for the relief of poor and distressed brethren, their widows and children; and in general, to transact all matters relating to masonry which may to them appear to be for the good of the craft, according to the ancient usages and customs of masons." By its civil charter and its masonic charter also, this body, therefore, is a charitable and benevolent institution, holding its property for charitable purposes.

III. The charter laws of the Grand Lodge, which is its supreme governing power, show this still more clearly. Act of June 16, 1820; Laws of 1820, p. 8; Constitution of Grand Lodge, § § 55, 56, 57, 77, 112. The right to relief in masonry, however, is not a legal right, enforceable by law, but a moral right, appealing to the conscience of the members.

To relieve the distressed is solemnly enjoined; but the manner of so doing is left to the party giving the relief. It is a matter of public history, that when the devastation of fire visited the cities of Portland, Chicago and St. John, and the forests of Wisconsin and Michigan, and the devastation of pestilence visited the South, the masonic lodges all over the country poured in relief with prompt and open hands.

The lodge holds its property in trust for charitable purposes, and even upon the winding up, or dissolution of a lodge, its members cannot divert the fund from its purposes. Constitution, Grand Lodge, § § 70, 71; *Duke* v. *Fuller*, 9 N. H. 536.

IV. The by-laws of the lodge in the case show the character of the society. A committee on charity is chosen annually, whose power and duty are to relieve the distress of needy brethren, their widows and orphans. The fact that the charity of the institution is not universal, but preference, at least, is given to

brethren, their widows and orphans, does not affect the case. The society is none the less a charitable institution. *Indianapolis* v. *The Grand Master*, 25 Ind. 518; *Maine Baptist Missionary Convention* v. *The City of Portland*, 65 Maine, 92; *Jackson* v. *Phillips*, 14 Allen, 539; *Old South Society* v. *Crocker*, 119 Mass. 11; *King* v. *Parker*, 9 Cush. 71; *Attorney General* v. *Old South Society*, 13 Allen, 474; *Fellows* v. *Miner*, 119 Mass. 541; *Sohier* v. *Burr*, 127 Mass. 221; *Boxford* v. *Harriman*, 125 Mass. 327; *McDonald* v. *Massachusetts General Hospital*, 120 Mass. 432.

We do not perceive how the court can hold that this corporation's property is not exempt from taxation, unless it expressly overrules, *Everett* v. *Carr*, 59 Maine, 325; *Duke* v. *Fuller*, 9 N. H. 536; *King* v. *Parker*, 9 Cush. 71; *Indianapolis* v. *Grand Master*, 25 Indiana, 518; *State* v. *Addison*, 2 S. Car. (N. S.) 499, and a host of other cases in which the same principle is involved.

APPLETON, C. J. The Rising Virtue Lodge, with other lodges, owning a block of stores assessed as of the value of fifteen thousand dollars, claim that this property, a small portion of which, in value, is used for masonic purposes, should be exempted from bearing its proportionate share of the burdens, which are imposed, for the support of government, on the general property of the community.

The just and honest rule in assessments for governmental purposes is equality of taxation. Whatever sacrifices it requires from the people should be made to bear as nearly as possible with the same pressure upon all. In this way only will there be the least sacrifice by all. If one bears less than his share of the public burdens, some other must bear more. If one block of stores remains untaxed, the remaining stores and other taxable property must be unduly and disproportionately taxed. The more numerous the exemptions, the more unequal and burdensome the taxation.

The defendant corporation denies that its property should be assessed to defray its ratable share of the expenses of the government, which protects it, in common with the other prop-

erty of the people and corporations of the State. The ground of exemption rests on R. S., c. 6, § 6, part 2, by which "the real and personal property of all literary institutions, and the real and personal property of all benevolent, charitable and scientific institutions incorporated by this State," are exempted from taxation.

Assuming that the legislature have the power to relieve favored corporations or individuals from paying their just taxes, (and it is as proper in the one case as in the other,) still taxation is the general rule; exemption from taxation the exception. Statutes violating the general rule are to be construed strictly. They must be construed with the utmost strictness. The statute creating the exemption must be clear, precise and definite, so as to satisfy the court beyond all doubt that the exemption claimed was within the intention of the legislature, as every exemption is repugnant to equal and impartial taxation. "All exemptions are to be construed strictly. Such special privileges are in conflict with the universal obligation of all to contribute a just proportion toward the public burdens." *Co. Com.* v. *Sisters of Charity*, 48 Maryland, 34. "The power to tax," observes DAVIS, J., in *Bailey* v. *Magwire*, 22 Wallace, 226, "rests upon necessity, and is inherent in every sovereignty, and there can be no presumption in favor of its relinquishment."

Exemption is a special favor conferred. The party claiming it must bring his case unmistakably within the spirit and intent of the act creating the exemption. Charity and charitable uses are expressions recognized and well understood in the law. The object of the legislature was to favor societies existing *exclusively* for charitable purposes, or as was said elsewhere by an eminent court, for purposes *purely* charitable, not a society existing for other and distinct purposes, and with other and different objects to be attained. It was the object to protect public charitable institutions.

The statute upon which the defendants rely, uses the word benevolent, but there is no question that this word, when used in connection with charitable, is to be regarded as synonymous with

it and as defining and limiting the nature of the charity intended. *Saltonstall* v *Sanders*, 11 Allen, 470.

What, then, is a charity? What is a charitable institution? "A good charitable use is *public*," remarks GRAY, J., in *Saltonstall* v. *Sanders*, 11 Allen, 456, "not in the sense that it must be executed openly and in public; but in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual immediately benefitted may be private, and the charity may be distributed in private and by a private hand. It is public in its general scope and purpose, and becomes definite and private only after the individual objects have been selected." In *Attorney General* v. *Proprietors of Meeting House*, 3 Gray, 50, "A public charity," observes SHAW, C. J., "in legal contemplation, is derived from *gift or bounty*." *Attorney General* v. *Hewer*, 2 Vern. 387. In the case of the *Attorney General* v. *Heelis*, 2 Sim. and Stu. 77, it is said by the Vice-Chancellor, that it is the source whence the funds are derived, and not the purpose to which they are dedicated, which constitutes the use, charitable; if derived from the gift of the crown, or the legislature, or a private gift for improving a town, they are charitable, within the equity of the stat. of 43 Eliz. c. 4; but when a fund is derived from rates and assessments, being in no respect derived from bounty or charity, it is not charitable. So a subscription by a benefit society, for mutual relief, is a private and not a public charity, and does not require the intervention of the attorney general, *Anon.* 3 Atk. 277. The essential features of a public charity, are, that it is not confined to *privileged individuals*, but is open to the indefinite public. It is this indefinite, unrestricted quality, that gives it its public character. *Donohugh's Appeal*, 86 Penn. 306.

Masonry being a secret institution, and its main purposes being carefully guarded from public scrutiny and knowledge in the secrecy of its lodges, we can only ascertain the objects of its existence from the information afforded us by its constitution and its general regulations, so far as they are made part of the case. The intimate purposes of the institution are not disclosed. They are secret. They are kept sacred. It is only from what is known that we can infer what are its leading objects.

The section relied on as exempting the institution from taxation, refers to those which are *purely* charitable. That masonic lodges are charitable to their own members is not to be questioned, but that is not the question. The inquiry is, whether it is a public charity or a private charity for the exclusive aid of its members.

The constitution, it seems by the preamble thereto, was ordained and established "in order to form perfect fraternal union, establish order, insure tranquility, provide for and promote the general welfare of the craft, and secure to the fraternity, the blessings of masonic privileges." From the "blessings of masonic privileges," all not members, and all of the female sex not married to masons or begotten by them in lawful wedlock, are excluded, while no woman can be a member, and no man, except by a unanimous vote. It will, too, be perceived that charity is not even mentioned as one of the purposes for which the constitution was ordained and established, but "the welfare of the craft" and "the blessings of masonic privileges" are specially designated.

It provides for the establishment and preservation of "a uniform mode of working and lectures, in accordance with the ancient landmarks and customs of masonry," and a Grand Lecturer, "whose duty it shall be to exemplify the work" and "impart instruction to any lodge requiring their services."

Its funds are derived from fees for initiation, assessments, fees for dispensation for holding new lodges, to be paid the Grand Treasurer, and generally from "fees, dues and assessments."

Of the nine committees for which provision is made in the management of the institution, there is one for charity, whose duty it is to appropriate the interest of the charity, "in whole or in part, for the relief of such poor and distressed brethren, their widows and orphans, as the grand lodge or the trustees of the charity fund may consider worthy of assistance, and if the whole be not so distributed, the residue, with all the other receipts of the treasurer, after deducting therefrom such sums as may be necessary for the ordinary expenses of the Grand Lodge," is to be added to this fund. This limitation of charity in the constitution is found in similar terms in the charter of the defendant lodge.

The jewels and the regalia, the elaborate schedule of official dignitaries with titles implying important functions and grave duties, inconsistent with and unnecessary for the distribution of charities, its splendid processions, its gorgeous rooms, its palatial temples, its "duly" guarded doors, its mysterious rites, its secret signs of recognition, all its rules, regulations and proceedings, so far as made known to the public, negative the idea that charity is the primary and exclusive object of the institution, and conclusively prove that "the welfare of the craft," and "the blessings of masonic privileges," are the objects of its existence. It is a society for mutual benefit and protection, and the ends to be attained are private and personal, not public. The very word "privileges," implies rights and immunities superior to those enjoyed by others.

It is apparent that the defendant corporation cannot be regarded as a purely public charitable institution, because it wants the essential elements of a public charity. It has other objects than charity. Whatever its ultimate purposes, they are other than charitable. Its funds are derived not from devises and gifts, as in case of a public charity, but from fees and the assessment of its members. The funds so obtained are to be distributed among the poor and needy members, from whom they were collected, and among their wives and children. It is an association for the mutual benefit of its members, and not a charitable institution within the meaning of the statute. *Bolton* v. *Bolton*, *ante*, p. 299.

In *Babb* v. *Reed*, 5 Rawle, 157, it was held that a lodge of Odd Fellows, being an association of mutual benevolence among its members, was not a charitable institution. But the Odd Fellows, so far as is known, are a secret institution with signs of recognition and carefully guarded secrets, raising their funds and distributing the same in a similar manner as the Masons. "The association," observes SARGENT, J., in delivering the opinion of the court, "from whose property is the money in court, was formed and conducted without incorporation. Its objects are stated to be the employment of its funds in purposes of mutual benevolence among its members and their families; but these

cannot be deemed charitable uses under the common law of Pennsylvania, or the statute 43 Eliz. The twenty-one cases enumerated in the statute, and others constructively within it, are of a *public* nature, tending to the benefit or relief in some shape or other, of the community at large, and not restricted to the mutual aid of a few." In *Thomson's Ex'rs* v. *Norris*, 20 N. J. Eq. 524, the case of *Babb* v. *Reed* was cited with approbation.

In *Delaware County Institute* v. *Delaware County*, 8 Weekly Notes of Cases, (Penn.) 449, it was held that an institute of science, whose object was the promotion of general and scientific knowledge among the community at large, but whose benefits were restricted to its members, except at the pleasure of its managers, was not a *purely* public charity, and was not exempt from taxation as such. "The plaintiff in error," observes the court, "so far from being a *purely* public charity, is not a public charity at all. It is a private corporation for the benefit of its members, as much as any other beneficial and literary society." It will be observed that other than members were allowed, or might be allowed, to participate in all the benefits of the association, not so with masonic lodges, whose "masonic privileges" and benevolence are limited and restricted to its members and families.

A charitable institution to be exempted from taxation must be a *purely* charitable one. *Humphries* v. *Little Sisters of the Poor*, 29 Ohio, 206. The gift or bequest must be for *strictly* charitable purposes, else the trust will not be enforced. *Thompson's Ex'rs* v. *Norris*. The funds of the defendant corporation may be and are, as the case shows, applied to other than charitable uses, "as for the good of the craft," in building a hall for the unknown purposes of its existence. To authorize exemption from taxation its purposes must be "strictly charitable," "purely charitable," not a commingling of other and more important purposes with charity as a mere secondary consideration.

But we are referred to certain decisions as opposed to the conclusions to which we have arrived. It may be proper to remark that the constitution and regulations of the Grand Lodge

were not before nor considered by the court, in the cases relied upon in defence.

In *King* v. *Parker*, 9 Cush. 71, it was held that a conveyance to certain persons and the survivors of them as joint tenants, but without word of limitation to their heirs or to the heirs of the survivor, in trust to and for the use of an unincorporated lodge of Freemasons, to the only proper use, benefit and behoof of the lodge forever—that the conveyance was in trust and that the estate did not descend to the heirs of the grantor. It suffices to remark that since that decision the question of public charities has been before the same court, and this decision has been not merely doubted, but, substantially, so far as relates to the question under discussion, overruled. In *Old South Society* v. *Parker*, 119 Mass. 24, WELLS, J., says property held in trust for a monthly meeting of Friends *seems* to have been regarded as a public charity in *Earle* v. *Wood*, 8 Cush. 430, and in *Dexter* v. *Gardner*, 7 Allen, 243; and for a lodge of Freemasons in *King* v. *Parker*, 9 Cush. 71, but neither of these cases was a proceeding which concerned the administration of charity as such. They were suits relating to trusts, in which the rights of private parties alone were represented. There was no *public* charity declared in either case, and no adjudication which necessarily involved or was based upon the existence of a charitable trust. A fund to be dispensed exclusively by way of mutual aid or benefit, among the members of an association, *is a private* and not a *public charity*, 3 Gray, 50; 11 Allen, 64. It may *well be questioned*, therefore, whether all the conditions requisite for a technical public charity, were present in the case of *King* v. *Parker*, cited above.

The case of *Duke* v. *Fuller*, 9 N. H. 536, was that of an unincorporated lodge of Masons, one of whose by-laws was that, "the furniture and funds of the lodge shall be considered as the joint and equal property of all the members, who shall, by a majority of votes, have management thereof for the good of the craft or for the relief of indigent and distressed worthy masons, their widows and orphans." The lodge was dissolved and the funds divided among the six attending members and the defendant,

who had been its treasurer, and the plaintiff brought his suit for his share. The court held the division void and gave judgment for the defendant. In their opinion they cite stat. 43 Eliz. relating to "gifts and devises" for charitable uses, as if the funds derived from assessments were derived by "gifts or devises," which they assuredly are not, any more than taxes collected for and appropriated to the support of paupers, are to be deemed within that statute, though that is a more general and extensive charity. Assuming this to be a *public* charity, the court intimate that in cases of gross mismanagement or dissolution, it might, sitting as court of equity, take the funds and commit their administration to other hands. But the right to thus interfere can rest only on the ground, that this is a *purely* public charity, which all the authorities show it is not.

In *The State* v. *Addison*, 2 S. Car. (N. S.) 499, the decision rests upon the long continued construction by the city council of Charleston, of an ordinance passed in 1793, exempting "all and every . . charitable society from payment of any city taxes now due or to become due." The property of certain real estate belonging to the lodge remained untaxed until the year 1868, when, for the first time, it was taxed. "Having already intimated," observes MOSES, C. J., "that we do not consider it as essential for any society claiming exemption under the ordinance of 1793, to show that the charities which it administers are *purely* for *public* purposes, we think the relators are to be held within it, *because* the city council, from the period when the societies first owned real estate in Charleston, to 1868, have given a construction to it which it was too late to disregard or change while it was in force. It is true, as it was not in the nature of a contract, they could have repealed it at their pleasure; but while operative, their action in regard to it for so long a time must be received as the interpretation of their own enactment." It will be perceived that it is not alleged that the lodges in question were within 43 Eliz. The decision rests on the absence of previous taxation, and on the construction of the language of the ordinance, made by the city council.

In *Mayor of Savannah* v. *Solomon's Lodge*, 53 Geo. 93, it was held that a Masonic institution was a charitable institution

and exempt from taxation, but the decision was based solely by WARNER, C. J., upon the statutes of the state. "It was," he remarks, "so recognized and styled by the general assembly of this state, as far back as 1796. See *Marble and Crawford's Digest*, 147." Upon this assumption, and without discussion, the opinion rests. Whether or not it was purely a public charity was neither considered nor discussed.

In *Everett* v. *Carr*, 59 Maine, 326, all that was decided, was, that "incorporated masonic lodges might receive in trust, property devised for charitable purposes." They could hold property as trustees, as towns, or individuals can, but that does not make the towns, lodges or individuals, public charitable institutions within the statute. They are corporations established for other purposes, and holding specified property for certain purposes. They hold as corporations their own property in their own right, for such purposes as the law permits; and trust property in trust, as other trustees. In the will of Dwinel there were legacies to Everett and others, "in trust, to be used solely and purely for charitable purposes." Neither devise altered the relations of the devisees, so as to make either the lodges or the individual trustees, thereby "charitable institutions," and therefore to be exempted from taxation. The only question then was, whether the lodge could take as trustee. That it does charitable acts is not to be questioned, but if charity was not the primary and exclusive object of its existence, and it was not a purely benevolent, charitable institution, the purpose and objects of its existence remaining unchanged, the receiving a devise as trustee would not make it a public, charitable institution — under the statute, when, without and before such devise it was not, any more than a bequest to a town for literary purposes would make such town a literary institution. The town can hold a devise for literary purposes, as trustee, precisely as a lodge can for benevolent purposes, without the one being a literary or the other a benevolent institution, within the purview of the statute. *Piper* v. *Moulton*, 72 Maine, 155.

In *Indianapolis* v. *Grand Master*, 25 Ind. 518, it was held that a lodge was a charitable institution — but its rules and regu-

lations were not before the court, nor considered by it. The decision rather assumed it as true that it was a charitable institution, and assuming it to be so, the court decided that it was.

After a careful consideration of the constitution and the general rules and regulations of the Grand Lodge of the state of Maine, and after an examination of the authorities bearing on the question, our conclusion is that a Masonic Lodge is not a charitable or benevolent institution, within R. S., c. 6, § 6, par. 2 and that its real and personal estate must bear its equal and just proportion of the burdens of sustaining government with the other property of the community.

Judgment for the plaintiff.

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

WILLIAM E. BARROWS *vs.* JOHN M. MCDERMOTT.

Piscataquis. Opinion May 27, 1882.

Fishing. Great ponds. Trespass.

The colonial ordinance of 1641 more particularly defined in 1647, and declaring among other things a common right of free fishing and fowling on great ponds of more than ten acres in extent, lying in common, has been so long and so uniformly accepted and acted upon in this State that it constitutes in all its parts a portion of the common law of the whole State without regard to the question whether it was ever extended by legislative authority to localities not embraced within the precincts of the colony of Massachusetts Bay.

Any person has the right to go to such a pond on foot, through uninclosed wood-lands belonging to another, and to take fish there; but the privilege must be exercised as it is conferred by the ordinance, and he must see to it that he trespasses on no man's corn or meadow, tillage or grass land.

ON REPORT.

Trespass *qu. cl.* submitted to the court upon agreed statement of facts which are substantially stated in the opinion.

A. G. Lebroke and W. E. Parsons, for the plaintiff.

The fact that the public had, for many years, to wit, thirty-five years, had access to the pond on said close, for the purpose of

fishing, conferred no right upon defendant to enter plaintiff's close for any purpose. The public cannot acquire an easement by prescription in land for the purpose of taking fish. A custom by the public, to take a profit from the land of another, is bad. *Waters* v. *Lilley*, 4 Pick. 145; *Littlefield* v. *Maxwell*, 31 Maine, 134.

The defendant would invoke the colonial ordinance of 1647. The *locus in quo* was in 1641 and 1647, if subject to any European power, subject to the grants and control of the French government, and not of the English. The territory of the town or township of Howard as will be seen by inspection of any and all maps, is situated north of the parallel of the forty-fifth degree north latitude. Abbott's History of Maine, 31, 106, 100, 101, 208; British Dominion in America, book 3d, part 2d, page 246; Address of Ex-Governor J. L. Chamberlain, at the Centennial Exposition, at Philadelphia, November 4, 1876, and in Convention of the Legislature of Maine, February 6, 1877, found in the published volume of the acts and resolves of the legislature of Maine, A. D. 1877, 269, 288; Hazard's Collection, vol. 1, 442; Goodrich's History of the United States, edition of 1849, page 47; Holmes' American Annals, vol. 1, p. 301; Hubbard's History of New England, p. 133; Summary of British Settlements in North America by William Douglass, vol. 1, 332, 389; Willis' History of Portland, 222; Williamson's History, vol. II, 10; 1 Hazard's Historical Collections, 105, 111; Plymouth Colonial Laws, (ed. 1836,) 3-10, cited in note appended to *Commonwealth* v. *Roxbury*, 9 Gray, 503; Laws of Massachusetts, published 1807, vol. 2, page 969.

The above references and books of history are proper to be considered by the court. 1 Green. Ev. § § 4, 5, 6, 497; *West Roxbury* v. *Stoddard*, 7 Allen, 158; *Commonwealth* v. *Roxbury*, 9 Gray, 451; *Storer* v. *Freeman*, 6 Mass. 438; *Winthrop* v. *Curtis*, 3 Maine, 115; *United States* v. *Teschmaker*, 22 Howard's U. S. Rep. 392.

But suppose the *locus in quo* had been embraced in territory belonging to Massachusetts, at the time of the adoption of the

ordinance of 1647, the result would not be different. First, because the better opinion is that the revocation and annulling of the charter of the colony of Massachusetts Bay by the decree in chancery in 1684 or 1685 swept away every vestige of the ordinances of 1641 and 1647, so that neither afterwards had any effect *ex proprio vigore*, even in Massachusetts. *Storer* v. *Freeman*, 6 Mass. 438; *Winslow* v. *Patten*, 34 M. 25; see Governor Chamberlain's address, *supra*; Goodrich's School History, edition of 1849, page 77, *et seq.*; *Storer* v. *Freeman*, 6 Mass. 438; *Mayhew* v. *Norton*, 17 Pick. 360; *Barker* v. *Bates*, 13 Pick. 258; *Commonwealth* v. *City of Roxbury*, 9 Gray, 465, note; Laws of Massachusetts, vol. 2, (1807) page 966.

Secondly, it makes no matter of difference who owned the soil because the ordinance of 1647 applied only to the Massachusetts Bay colony. A learned note appended to *Commonwealth* v. *Roxbury*, 9 Gray, 523, citing the following authorities, reads thus: "The ordinance of 1647 (in relation to flats,) has been extended by usage to Plymouth, to Nantucket, and Dukes county and to Maine, although none of them were under the jurisdiction of Massachusetts when it was made. Sulivan on Land Titles, 285; *Barker* v. *Bates*, 13 Pick. 258, 260; *Mayhew* v. *Norton*, 17 Pick. 357; *Storer* v. *Freeman*, 6 Mass. 435; 2 Dane's Ab. 701; *Codman* v. *Winslow*, 10 Mass. 146; *Lapish* v. *Bangor Bank*, 8 Greenl. 89; *Weston* v. *Sampson*, 8 Cush. 354; *Commonwealth* v. *Alger*, 7 Cush. 76; *Moulton* v. *Libbey*, 37 Maine, 485."

It is not admitted in the case that the ordinance of 1647 applied to, or in any way affected the territory of which the *locus in quo* was a part. By the above authorities cited in *Commonwealth* v. *Roxbury*, 9 Gray, 523, it is conclusively settled that neither the ordinance of 1641 nor 1647 applied to the State of Maine. *Barker* v. *Bates*, 13 Pick. 258.

A common law rule has grown up in this State, in relation to the flats between high and low water mark, where the tide ebbs and flows, which is a modification of the principle thereon declared in the ordinance of 1641-7. This even, came only by judicial adoption. *Lapish* v. *Bangor Bank*, 8 Maine, 85; *Winslow* v.

Patten, 34 Maine, 25; *Storer* v. *Freeman*, 6 Mass. 438; *Emerson* v. *Taylor*, 9 Maine, 43; *Moulton* v. *Libbey*, 37 Maine, 499. It is clear that the court in Maine have adopted a rule in relation to flats which is peculiar to our jurisdiction, showing that we are not bound by the literal expression of the ordinance, even as a common law rule.

The fact that our courts have adopted the ordinance, or any principle of it in relation to flats is no evidence that they have adopted, or will adopt the same in relation to fishing in ponds.

When a principle of common law, or body of common law, is adopted by one state or country from another state or country, it is always at the option of the former to adopt the same with such modifications as are deemed proper, under the circumstances of the country. Joel Prentiss Bishop, says in his first book of the law, § 51, (edition of 1868,): "The established doctrine of our courts is, that our ancestors conveyed hither the entire body of the English law as it was when they emigrated, only they did not need and so did not bring any laws which were inapplicable to their altered situation and circumstances." Of course they were the sole judges of what they should adopt or reject.

Among a multitude of authorities he cites: *Commonwealth* v. *Hunt*, 4 Met. 111, 122; *Pawlet* v. *Clark*, 9 Cranch, 292, 333; *Wheaton* v. *Peters*, 8 Peters, 591, 659; *Piatt* v. *Eads*, 1 Blackford, 81; *Lindsley* v. *Coats*, 1 Ohio, 243; *Lyle* v. *Richards*, 8 Sergeant and Rawle, 322; *Piersons* v. *The State*, 12 Ala. 149; *Stout* v. *Keyes*, 2 Douglass, Mich. 184; *Abell* v. *Douglass*, 4 Denio, 305; *Commonwealth* v. *Holmes*, 17 Mass. 336; *Commonwealth* v. *Churchill*, 2 Met. 118; *Simpson* v. *The State*, 5 Yerger, 356; *The State* v. *Rollins*, 8 N. H. 550; *The State* v. *Moore*, 6 Foster, N. H. 448, 455; *Norris* v. *Harris*, 15 Cal. 226.

Grindstone Pond does not lie in common, in the sense of the ordinance of 1647; but is wholly within plaintiff's close, which is in his actual possession, both by cultivation of the soil, and occupancy for maintaining fish. The seizin of the entire estate was, and is, in the plaintiff. *Waters* v. *Lilley*, 4 Pick. 145; *Commonwealth* v. *Tiffany*, 119 Mass. 303; *Commonwealth* v.

Weatherhead, 110 Mass. 175; *Cummings* v. *Barrett*, 10 Cush. 188; *West Roxbury* v. *Stoddard*, 7 Allen, 167; *Canal Commissioners* v. *The People*, 5 Wend. 423; *Ledyard* v. *Ten Eyck*, 36 Barb. 102; R. S., c. 40, § § 51, 52, 53, amended by c. 170 of pub. laws of 1874; the plaintiff, in this case had the exclusive right to protect the fish in Grindstone Pond, against all parties.

The word "pond" in § 53, c. 40, R. S., is general, without regard to size. "To take fish no one can, lawfully, go on another's land without his leave." Dane's Abridgement, ed. of 1823, vol. 2, c. 68, art. 7, § 4, item 3, page 706.

"But for taking fish, no man could lawfully go on the soil of another without his leave." *Peables* v. *Hannaford*, 18 Maine, 106; *Boatwright* v. *Bookman*, 1 Rice, (South Carolina) 447; *Stephenson* v. *Gooch*, 7 Greenl. 152; Cooley on Torts, 329, *et seq.*; *Cottrill* v. *Myrick*, 12 Maine, 222. A right to fish in any waters gives no power over the land. *Cortelyou* v. *Van Brundt*, 2 Johns. 274; Cooley on Torts, 329, 330, 331; *Bickel* v. *Polk*, 5 Harrington, (Del.) 325; *Cobb* v. *Davenport*, 32 N. J. 369; Sup. C. 33 N. J. 223.

By the common law the rule regarding fresh water streams in the matter of taking fish, applies to the small lakes or ponds of the country. Cooley on Torts. 330, and authorities cited. Now then, by the common law, the right to take fish in the fresh water streams of the country, belongs to the owners of the soil under them, extending to the middle of the stream, if the riparian proprietor owns only on one side of the stream, but extending the whole width of the stream, if such riparian proprietor owns on both sides. This right excludes the public from fishing on the proprietor's estate, though the legislature may regulate the passage of fish on such streams. *McFarlin* v. *Essex Company*, 10 Cush. 309; Cooley on Torts, 329, and note 2; *Waters* v. *Lilley*, 4 Pick. 145; *Commonwealth* v. *Chapin*, 5 Pick. 199; *Adams* v. *Pease*, 2 Conn. 481; *Yard* v. *Carman*, 2 Penn. 936; *Ingram* v. *Thready*, 3 Devereux, (North Carolina) 59; *Randolph* v *Braintree*, 4 Mass. 317; *Lunt* v *Holland*, 14 Mass.

149; *Cottrill* v. *Myrick*, 12 Maine, 222; *Hooker* v *Cummings*, 20 Johns. 90; *Trustees, &c.* v. *Strong*, 60 N. Y. 56; *Williams* v. *Buchanan*, 1 Iredell, 535; *Beckman* v *Kreamer*, 43 Ill. 447; *Cobb* v *Davenport*, 32 N. J. 369; and *Same* v. *Same*, 33 N. J. 223; *Browne* v. *Kennedy*, 5 H. & J. (Md.) 195.

J. F. Sprague and Henry Hudson, for the defendant, cited: *Moore* v. *Veazie*, 32 Maine, 356; *Brown* v. *Chadbourne*, 31 Maine, 22; *Attorney General* v. *Woods*, 108 Mass. 439; *West Roxbury* v. *Stoddard*, 7 Allen, 171; *Lapish* v. *Bangor Bank*, 8 Maine, 85; *Winslow* v. *Patten*, 34 Maine, 25; *Partridge* v. *Luce*, 36 Maine, 16; *Clancey* v. *Houdlette*, 39 Maine, 451; *Cummings* v. *Barrett*, 10 Cush. 188; *Fay* v. *Danvers A. Co.* 111 Mass. 27; *Paine* v. *Woods*, 108 Mass. 169; *Commonwealth* v. *Alger*, 7 Cush. 67; *Storer* v. *Freeman*, 6 Mass. 439; *Barker* v. *Bates*, 13 Pick. 258; *Weston* v. *Sampson*, 8 Cush. 353; *Com.* v. *Roxbury*, 9 Gray, 503; *Com.* v. *Vincent*, 108 Mass. 446; *Codman* v. *Winslow*, 10 Mass. 146; *Deering* v. *Long Wharf*, 25 Maine, 64; *Low* v. *Knowlton*, 26 Maine, 132; *Moulton* v. *Libbey*, 37 Maine, 485; *Preble* v. *Brown*, 47 Maine, 284.

BARROWS, J. The substance of the admitted facts upon which this case is presented for decision is as follows: In the summer of 1880, the plaintiff held as proprietor a tract of land in the township of Howard, containing a natural pond covering about twenty acres called Grindstone Pond, surrounded by wild and uncultivated land with the exception of a single piece of about two acres which had been cleared and cultivated, adjacent to the pond, but upon which no crops were raised or grass cut in 1880. To protect and increase the propagation of fish in this pond the plaintiff had forbidden all persons from entering on his land surrounding the pond or fishing in its waters, by posting on the cleared piece above mentioned and elsewhere around and on the shore of the pond conspicuous notices to that effect painted upon boards in legible letters.

But the defendant in defiance of the prohibition on divers days in the summer of 1880, went there, as all who wished had been

accustomed to do for thirty-five years before the notices were posted, and caught and carried away fish from the pond without permission from the plaintiff, passing for that purpose over and through the cleared piece of land adjoining the pond, no part of which was enclosed by a fence of any kind. Hence this action of trespass *quare clausum*, alleging in proper form the above facts with the exception of the posting of the plaintiff's prohibitory notices. The case is hereupon submitted to the court for judgment according to the legal rights of the parties, the damages, if the plaintiff is found entitled to prevail, being agreed to be one dollar.

The defendant bases his justification of the acts here complained of as trespasses, upon the Massachusetts Bay Colonial Ordinance of 1641 as amended in 1647, which is an early declaration of common rights and liberties, and some rules and principles respecting the tenure and proprietorship of certain kinds of real estate, adopted by the Massachusetts Bay colonists soon after the settlement there was effected. It declares among other things the right of free speech within due and orderly limits at public assemblies, the right of free fishing and fowling for all in and upon any great pond lying in common and containing more than ten acres in extent with the incidental right to "pass and re-pass on foot through any man's property for that end so they trespass not upon any man's corn or meadow" — the right of property to low water mark in the owner of lands adjoining the salt water where the sea doth not ebb above a hundred rods, and no more where it ebbs further, subject to the right of passage of boats or vessels — and the free right of removal from the colony "provided there be no legal impediment to the contrary." Anc. Chart. and Laws of Mass. Bay, chap. LVIII, p. 148.

The plaintiff's counsel strikes at the root of this defence in an elaborate effort, exhibiting not a little historical research, to show that those who framed this ordinance had no jurisdiction over the *locus*, and that it never was law for such portion of this State as falls within the limits of the ancient Acadia.

It may well be that the ordinance has no force by virtue of positive enactment by any legislative body having jurisdiction at

the time of such enactment over what is now the county of Piscataquis, and that its operation has never been extended there by any specific act of legislation since; and it is quite true that when under the charter of William and Mary, the great and general court of Assembly of the Province, in 1692, acting for the three united colonies of Massachusetts Bay, Plymouth, and Maine, re-enacted "all the local laws respectively ordered and made by the late governor and company of the Massachusetts Bay and the late government of New Plymouth" it was done on such terms that they continued in force only "in the respective places for which they were made and used" so that the ordinance under consideration was never in terms extended to the Plymouth colony or to Maine under any legislative sanction. See Anc. Charters, &c. pp. 213, 229.

But it has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both, throughout their entire extent, without regard to its source or its limited original force as a piece of legislation for the colony of Massachusetts Bay, that we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State until it shall have been changed by the proper law making power. When a statute or ordinance has thus become part of the common law of a State it must be regarded as adopted in its entirety and throughout the entire jurisdiction of the court declaring its adoption. *Barker* v. *Bates*, 13 Pick. 255; *Commonwealth* v. *Alger*, 7 Cush. 53, 76, 79.

It is not adopted solely at the discretion of the court declaring its adoption, but because the court find that it has been so largely accepted and acted on by the community as law that it would be fraught with mischief to set it aside.

It is not here and now a question whether this ordinance shall be adopted with such modifications as might be deemed proper under the circumstances of the country. It has been long since adopted in all its parts, acted upon by the whole community and its adoption declared by the courts; and now the argument of the plaintiff's counsel aims to have us declare either that it has not

the force of law in certain parts of the State, or that the court may change it if satisfied that it does not operate beneficially under present circumstances. We cannot so view it. That which has the force of common law in one county in this State has the same force in all.

To show that this ordinance has been long and constantly regarded as law in this State reference may be had to the following decisions: *Storer* v. *Freeman*, (Cumberland county,) 6 Mass. 435, 438; *Codman* v. *Winslow*, (Cumberland, 1813,) 10 Mass. 146; *Lapish* v. *Bangor Bank*, 8 Maine, 85, 93; *Emerson* v. *Taylor*, 9 Maine, 43; *Knox* v. *Pickering*, 7 Maine, 106, 109; *Parker* v. *Cutler Milldam Co.* 20 Maine, 353; *Deering* v. *Long Wharf*, 25 Maine, 51, 64; *Winslow* v. *Patten*, 34 Maine, 25; *Partridge* v. *Luce*, 36 Maine, 19; *Moulton* v. *Libbey*, 37 Maine, 472, (where the effect of the ordinance upon rights to fisheries is considered,) *Clancey* v. *Houdlette*, 39 Maine, 451, 456; *Hill* v. *Lord*, 48 Maine, 83.

It must be regarded as settled that the public have such rights to fish in the waters of Grindstone Pond, and such way of approach to it for that end as the ordinance gives them unless the right has been abridged by subsequent legislation. It may be true that our ideas of "great ponds" are not precisely similar to those which our ancestors brought from England—that there no longer exists the same necessity for free fishing and fowling to enable men to get the means of sustenance, which existed in 1641—that the right is now chiefly exercised by pleasure seekers and idle tramps who might be more profitably employed, and who cause more loss and destruction in timber and wood-lands than their pursuits yield advantage in the way of pleasure or profit—that their outgoings and incomings are attended by constant trespasses upon the farms which lie in their way, and in short that it would be for the general good to restrict the privileges they have heretofore enjoyed. But these are considerations to be addressed to the legislature rather than to the court, whose power is to be exercised in ascertaining and declaring the law, and in applying the old principles unchanged to the ever varying circumstances

of new cases presented and sometimes to the newly developed industries of the age (as the Massachusetts court applied this ordinance, in *West Roxbury* v. *Stoddard*, 7 Allen, 158,) but not in setting aside its plain doctrines because they are not in accord with our own views of what it should be, when the legislature, which is properly charged with the duty of promoting the public good and preventing mischief so far as law making will do it, has not seen fit to intervene.

Has there been any legislation which affects the rights of these parties? In the R. S., c. 40, § § 51-53 inclusive, as amended by c. 170, laws of 1874, we find provisions which would give to those who establish within their own premises the means and appliances for the cultivation of useful fishes an exclusive right to fish the waters thus used; and this wherever it is applicable would limit the common right so long as the proprietor of the pond took the steps necessary within the purview of the statute for the artificial breeding and cultivation or maintenance of such fishes.

But neither the allegations nor the proof bring this case within these provisions. All the plaintiff seems to have done "to protect and forward the propagation of fish," (and even this is not alleged in the writ, but only that the defendant hindered and delayed their propagation,) was to post his prohibitory notices to prevent, so far as he could thereby, indiscriminate poaching upon what he proposed to make a private preserve. But he does not seem to have done anything for the regular and systematic cultivation or maintenance of the fish, and without this the prohibition was without avail. He could not thus abridge the common right without doing anything which the statute impliedly requires to give him peculiar privileges.

The legislature has power over the whole subject so far as public and common rights are concerned, and may by statute impose penalties upon the taking of fish by any one except under certain restrictions, even in the waters contiguous to his own land. *Nickerson* v. *Brackett*, Hancock county, 10 Mass. 212; *Burnham* v. *Webster*, Cumberland Co. 5 Mass. 266, 269; and it cannot be doubted that they may also abridge the common right in favor of the proprietor when they are satisfied that the

interests of the public will be best served by an ampler recognition of the right of private property.

The legislature of Massachusetts have already changed the definition of a "great pond" as given in the colonial ordinance so that those only which contain more than twenty acres, instead of those exceeding ten, are subject to the public right of fishing conferred thereby. Mass. St. of 1869 c. 384, § 7; *Com.* v. *Tiffany*, 119 Mass. 300. But in the absence of any such enactment limiting the public right in this state, we must continue to regard natural ponds exceeding ten acres in extent, and which have not been devoted by the proprietors to the artificial cultivation or maintenance of useful fishes, as "great ponds," the fish in which may lawfully be taken by any one who can and does obtain access to the pond in the manner recognized as lawful in the colonial ordinance. In the outset the right seems to have been conferred only upon householders of the town where it was to be exercised, and under the proviso that "no man shall come upon another's propriety without their leave" which would, of course restrict the right, not only with respect to the persons who might lawfully exercise it, but to such ponds as could be reached without committing a technical trespass by going upon another man's land without license; but, by the further definition, the right of free fishing and fowling on "great ponds lying in common" was extended to all, with the right to "pass and repass on foot through any man's property for that end, so they trespass not upon any man's corn or meadow," and this we think gave the fisherman the right to approach the pond through unenclosed woodlands to whomsoever belonging, but not to cross another man's tillage or mowing land.

One common law limitation of these fishing rights, excluding the public from unnavigable streams where they flow through another's land, was well recognized in *Waters* v. *Lilley*, 4 Pick. 145; and various *dicta* in different cases cited indicate that the courts have no disposition to extend the privilege so as to justify or excuse any unwarranted interference with the rights of the owners of land lying on the margin of such waters.

The case shows that some two acres upon the shore and adjacent to the pond had been cleared and cultivated. From this it

may be fairly inferred that it was in a condition to produce grass, and the fact that none was actually cut there in 1880, does not rebut the inference. *Non constat* but the intrusions of defendant and others upon like errands, may have made it worthless. The location and fact of previous cultivation, in the absence of proof that it had reverted to a state of nature, fairly indicate that it ought to be classed with the land denominated in the colonial ordinance "meadow," and it was, by the very terms of the ordinance on which he relies, incumbent upon the defendant to see to it that he did not trespass on it. It appears on the contrary that he passed over and through this cleared and cultivated piece of land. There is nothing in the case which suggests the acquirement of any right so to do by prescription, and the idea of license is expressly negatived.

Judgment for plaintiff for $1.00 damages.

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

WILLIAM H. VIRGIE *vs.* SARAH A. STETSON.

Lincoln. Opinion May 27, 1882.

Evidence. Practice.

When documentary evidence is offered, each piece should be presented by itself to the presiding justice, exhibited if desired to the opposing counsel, identified by the court or stenographer with suitable marks, and, if objected to, its genuineness established by testimony.

A bundle of papers was offered in testimony, and an objection was raised to the reception of any bundles and sustained. *Held*, that the objection was properly sustained.

When offering files of papers or manuscript volumes in evidence, it is the duty of counsel to select the parts of such documents which they claim to be admissible, and point them out to the opposite counsel and the court, so that it may be known in the first place whether the opposite party will object, and if he does, that the court may pass upon the objection without waste of time.

Conversation between witnesses for one party not held in the presence of the opposing party is not admissible in evidence in behalf of the party offering the witness.

Where a witness testified to statements made by a party in his hearing, *Held*, It was not error to exclude testimony showing that such witness was not permitted to mention the name of the opposing party in the house of the party making the statement, or to show that such witness was not allowed in the store, the witness having testified that he was employed about the house and store, when neither fact would tend to contradict the witness' testimony on any material point.

Whether or not the presiding justice will call the attention of the jury to any particular piece of testimony, is a matter which rests in his discretion. The exercise of that discretion is not the subject of exceptions.

It is not a proper mode of requesting instructions to ask the presiding justice "to give proper instructions" upon any particular piece of testimony or fact appearing in the case.

On EXCEPTIONS and motion to set aside the verdict.

Assumpsit for money had and received amounting to thirteen hundred dollars. Also on account annexed for two thousand three hundred and sixty-seven dollars and twenty-nine cents, for three-eighths of the steamer Alice Virgie.

The writ was dated April 7, 1877, and the plea was the general issue.

After the jury had had the case under consideration some hours, late in the evening they were brought into court, when the judge presiding inquired if there was any prospect of an agreement. The inquiry having been answered in the negative, the judge addressed the jury as follows:

"The parties are very anxious that the case should be settled this term. It has been stated by counsel, and you know, therefore, that the case has been before tried. It is not likely that such a case can be better or more ably tried than this case has been at this term; and it is important for the parties and to your county that there should be an end of it. It is attended with considerable expense to your county, as well as to the parties. They are both anxious that it should be settled.

"You undoubtedly understood me to say in my charge that there are four items sued, and that it would be competent for you to return a verdict for all four, or any one of the four, or more of them.

"That is to say, if you should find that the defendant is liable for three-eighths of the steamer and not for the borrowed money,

it would be competent for you to find a verdict for the plaintiff for that portion of the steamer and not for the items of lent money; or if you find the defendant liable for the lent money or any part of it and not for the steamer, then you may return a verdict for those items; or if you find she is liable on the note and not liable for the other items, then you may return a verdict for the note. I presume you understood that you could find for the plaintiff for any one or all of these items, if the evidence satisfies you it would be just; or that you could find for the defendant if you should find none of the items proved. You undoubtedly understood all that."

Foreman. Yes, your honor.

Court. By request of counsel of both parties I urge upon your consideration, that one of the most unfortunate results, and one of the most unsatisfactory, is a disagreement. I will give you any further instructions you may desire.

Foreman. We would like to know what constitutes a legal agency?

Court. If you have any particular difficulty, you will please state as briefly as you can what it is, and I will endeavor to aid you.

Foreman. In your charge you used the expression, "A duly authorized agent." Some of the jury are in doubt what constitutes a duly authorized agent, whether a man in a store selling goods as a clerk is an agent, or whether he must have a writing to constitute him an agent.

Court. I understand your difficulty, from the statement of your foreman, to be as to what constitutes an agent.

After stating the elements of competency to appoint, the judge proceeded to say:

"The appointment, so far as this transaction was concerned, could be made by word of mouth as well as by writing. Either form would be equally obligatory and would confer an authority. In other words, if she was carrying on a store, and she wanted money to use in that business, she could have gone to Mr. Virgie and hired it herself, or she could appoint another person to go and hire it for her, just as you could employ a neighbor to do an

errand for you to another person, in your behalf.' She could appoint her husband as well as any other person.

"Now, the point in controversy here is whether she did appoint and authorize her husband to act for her in procuring this money."

After alluding to the conflict of testimony on this point, the judge directed the jury to weigh the evidence and determine where the truth lay, and then proceeded to say:

"Any fact, which it is necessary to establish in a court of justice, may be established by what is called direct evidence, or it may be inferred from the circumstances and situation of the parties. You will judge here whether the evidence offered is sufficient to satisfy you that she did in fact authorize her husband to act for her in this operation. You may infer it from their relations to each other and other circumstances, which you are satisfied are proved in the case, provided the circumstances are of such a character as to bring conviction to your minds that she did in fact hire the money herself, or authorize her husband to do it for her; or, as I have been requested by her counsel, Judge Gilbert, to instruct you with reference to the money, she must have authorized her husband before he could act for her, in respect to the purchase of the vessel, or she must have ratified his act afterwards, when done for her.

"It is a maxim of the law of agency, that subsequent ratification is equivalent to previous authority. In other words, if a man should undertake to act in your behalf, as your agent, to do any act for you, to buy for you a barrel of flour, a yoke of oxen, or an interest in a ship, without your authority, still if you knew what his act was, and you had become acquainted with all the circumstances attending it, and you assented to it, and ratified it, then his act would be as obligatory and binding upon you as if you had previously authorized him to do it. That is what is meant by subsequent ratification.

"I have already alluded to a request, which defendant's counsel, Judge Gilbert, made for an instruction to you. I will repeat it to you. He is not here, but would undoubtedly like to have it repeated. It is the third of his requests. That the defendant is not liable for the loans unless they were authorized by her before made or afterwards ratified by her.

"Perhaps in this connection I ought to add what is requested by the counsel for the plaintiff, namely: that if the defendant claimed to own three-eighths of the steamer after it was papered in her name, (I understand counsel to mean enrolled,) it would be competent evidence of a sale of that share to her, and to make it her property.

"This would be an illustration of the rule of agency that I have suggested, that if a person act for you, without your consent in purchasing a piece of property for you, if afterwards you ratify his acts, then you would be liable for any promise he made in your behalf to pay for it, precisely as if you had authorized him before.

"That is what is meant by subsequent ratification.

"For while it is true, as her counsel contends, and I instruct you, that she would not be liable, unless she first authorized her husband to act in her behalf or unless knowing what he had done, she subsequently ratified it, you may infer such authority and subsequent ratification from the circumstances proved in the case, if they are sufficient to satisfy you of the truth of the fact."

The requests for instructions alluded to as made by counsel on each side were made before the jury were sent out. The jury were then sent out again and subsequently rendered a verdict for plaintiff in the sum of two thousand eight hundred and forty dollars and seventy-five cents.

A. P. Gould, for the plaintiff.

W. Gilbert, for the defendant.

The papers excluded were part of the written history of the business of the store, while plaintiff alleges defendant was proprietor; they are of contemporaneous origin, growing out of the transactions in question. 1 Greenl. Ev. § 108. Viewed even as *res gestæ* the evidence is clearly admissible.

The report, being part of the exceptions, shows that it was contended for defendant, that the debt contracted by E. W. Stetson had been paid. The books excluded contained the accounts of the stock transferred from Stetson to plaintiff, and credits of the balance due him from Stetson, and of moneys

which plaintiff paid into the firm from time to time to make up the balance of his share of the capital. They embody evidence most important. During the period of the co-partnership, the books had been under the inspection of plaintiff without objection. They recorded the joint acts of the parties to the books, of whom he was one. *Dow* v. *Sawyer*, 29 Maine, 117; *Foster* v. *Fifield*, *Ib.* 136; *Pike* v. *Crehore*, 40 Maine, 503.

Stetson testifies that as joint builder he owned three-eighths of the Alice Virgie, and caused that interest to be enrolled to defendant. If therefore, Stetson, when Merry showed him plaintiff's letter, assented to plaintiff's order, and if he thereupon directed that his three-eighths be enrolled to his wife, that tends to negative plaintiff's allegation that defendant was a purchaser from him. That is what we expected to show by the witness. But the court cut us off *in limine* and would not allow us to approach the ultimate question. The explanation would complete the history of the transaction relating to the transfer. It is *res gestæ*, and the matter too familiar to require the citation of the many cases in our own books.

Defendant found herself with title to three-eighths of a vessel in herself. She held it in trust. The apparent legal title was in her. And it is obvious that underwriters and other outside parties to affairs involved in closing the concern would be satisfied with nothing short of the act of the apparent holder of the title. Under these circumstances she did that which the necessity of the plaintiff and the other owners required.

What good reason can be given, why this bearing of the case should not be given to the jury? or why these circumstances should be withheld from the jury? And if they should not be held back why should they not be distinctly presented to the consideration of the jury? And why should they not be instructed that what she did was the proper means to the end effected by that means?

Do those acts necessarily imply an admission of a purchase, or a ratification? If not, why should not the jury be instructed as to the legal bearing?

It is respectfully contended that the proceedings, after the jury were brought into court and declared their inability to agree,

were illegal in several particulars. R. S., c. 82, § 75; *Edmunds* v. *Wiggin*, 24 Maine, 505.

Counsel further elaborately argued the motion to set aside the verdict.

BARROWS, J. The plaintiff sues the defendant for certain sums of money which he says he lent her through the intervention of her husband acting as her agent to be used in the carrying on of the business in a certain store, and for the price of three-eighths of a small steamer taken by the husband in like manner for and in the name of the wife at the bills as built by the plaintiff. The defendant denies any interest in the transactions or authority given to the husband to act for her in the premises, says in effect that the plaintiff's dealings were all with her husband and not herself, and that the loans of money were repaid by being allowed to the plaintiff as his contribution to the funds of a copartnership which she claims subsequently existed between her husband and the plaintiff; and the plaintiff rejoins that the copartnership was with her, the husband representing her in that as in the other mutual dealings. The verdict being against her, the defendant brings the case here on exceptions and motion to set aside the verdict as against the evidence.

Some prominent facts proved beyond cavil favor the plaintiff's position. The defendant's husband was confessedly insolvent, and had been so for some time. Uncollected judgments were outstanding against him. The house they lived in had belonged to the wife for quite a number of years. Not long before, a store and stock in trade, of which the husband's father was the confessed proprietor, carrying on the business by the husband as his clerk and agent, had been conveyed, not to the husband, but to the wife, and she never parted with her title, only placing the deed and bill of sale in the hands of her husband, who continued to manage the trade, apparently, as he had done before the conveyances from his father to his wife. These facts were known to the plaintiff and even the defendant's husband, her principal witness, admits that he himself told him the most significant of them before applying to him for money. It does not seem probable that the plaintiff would prefer to give credit without

any security to the insolvent husband rather than to the wife who had property, or to have an insolvent copartner, whose business arrangements were liable at any time to be disturbed by his creditors. The defendant's husband testifies that an elaborate draft of articles of copartnership between the plaintiff and his wife, providing among other things for his own constant employment by the firm "as a salesman and generally to the care and superintendance of the store" was in his handwriting and was prepared by him after conference with the plaintiff and before the plaintiff took an interest in the business with any one. The defendant herself testified that she owned the three-eighths of the steamboat, and she seems in other ways to have recognized and ratified the negotiations of her husband in her behalf respecting it. If the jury believed the testimony given by the plaintiff and his wife, the defendant had knowledge from the first that her husband was dealing with the plaintiff in her name and on her account. The motion to set aside the verdict cannot be sustained for it is by no means reasonably certain that the jury erred. If, as is probable from the amount of the verdict, they found that the loans, (which were made previous to the forming of the copartnership) were paid by being accepted as the plaintiff's contribution to the copartnership funds, it is a result which would follow whether the husband or the wife was the partner and borrower, and we do not see how either party can complain.

Unless the defendant was injured by the exclusion of competent testimony offered in her behalf, or by the instructions given, or the refusal of those requested by her counsel, judgment should be rendered on the verdict.

We will consider first the exceptions to the exclusion of evidence offered. Now that parties and interested witnesses, and those connected in the bonds of matrimony are all permitted to testify to whatever is material upon the issue presented, there seems to be less reason than ever to enlarge the modifications, and seeming exceptions to the wholesome general rule, excluding hearsay testimony. It is a matter of curious interest to note how these modifications and exceptions have been extended, sometimes, apparently, for no better reason than the probability of the

correctness of the evidence thereby afforded in a particular case, sometimes from a seeming necessity for resorting to it upon the failure of more strictly legitimate sources. But the rule which excludes as hearsay the verbal or written declarations of third persons, not under oath nor subject to cross-examination and explanation from the declarants of the circumstances under which the declarations were made, ought to be carefully guarded, and not infringed unless it can be plainly seen that they belong to some exceptional class which can be counted upon to afford (without qualification or explanation) a reliable inference upon the precise issue which they may be supposed to affect. The probability of its being truthful in itself and affording a means of reaching the truth by correct inference may depend much upon the purpose for which it is produced. There would seem little occasion to resort to it merely for the purpose of corroborating the direct testimony of a witness who was so situated as to have it in his power to create and produce it at will, whether the inference to be drawn from it touching the subject of inquiry were correct or not. In such case, if the jury doubted the sworn statements of the witness, they would not be likely to credit him the more on account of any verbal or written acts of others which might be done under delusions that he had the power to create if he pleased. The whole would rest upon the credit given to the witness without strengthening it.

The first exception relates to the exclusion of certain files of papers under the following circumstances. Although the defendant's husband admitted in his testimony his own insolvency, and the constant liability of any attachable goods of his to seizure upon execution, and that his wife held the title to the house, store and stock of goods, and never had made any conveyance of them to him; that he had been merely the clerk and agent of his father in conducting the trade up to the time when his father made the bill of sale to his wife, and that he had informed the plaintiff of that conveyance, still he swore that his wife did not own the business, and had no interest in it from that date. He says she gave him the bill of sale which she received from his father, and that thenceforward he was the proprietor of the trade

in the store. Yet, when he had occasion to collect a bill for goods afterwards sold from the store, the suit was brought by him in her name.

Now the plaintiff had not offered testimony to show title in the wife, but only what representations as to title were made by husband and wife, upon the faith of which he claims he acted. The question who was the real owner of the goods in the store was only indirectly, if at all, connected with the questions which these parties were litigating, which were whether the plaintiff relied upon the defendant's credit in lending his money and in enrolling the three-eighths of the steamboat in her name as owner, and whether the defendant authorized or ratified her husband's transactions with the plaintiff in these matters as done in her behalf. When the title to the stock was confessedly in the defendant and this fact made known to the plaintiff (as defendant's husband testifies) proof that the husband made purchases and paid bills in his own name in conducting the business could hardly be expected to affect the decision of the questions between the plaintiff and the defendant. But conceding that such proof might have some bearing favorable to defendant, it remains to be settled whether the excluded evidence ought to have been received, and whether it can be said to appear from what is laid before us that defendant was injured by its exclusion.

The papers offered were described by the witness as "invoices of goods, notes, and drafts paid." Defendant's counsel said these were "invoices of goods delivered to this defendant" (probably meaning the witness), and "bills paid running to him," others which ran to his father, drafts and bills paid. There was no dispute as to the father's ownership of the stock, and bills to him were plainly irrelevant. A bundle of the papers was offered and an objection raised to the reception of any bundles, which was properly sustained. Each piece of documentary evidence offered should be presented by itself to the presiding judge, exhibited if desired to opposing counsel, identified by the court or the stenographer with suitable marks, and, if objected to, its genuineness established by testimony. Instead of doing this after excepting to the exclusion of the bundle, the defendant's

counsel made some ineffectual efforts to get a statement from the witness of the contents of one of the bills, presented the testimony of the witness to show that he bought goods for the trade in that store from Emery and Barker in February, March and April, 1874, a bill of which he had; and thereupon the counsel offered a paper, the genuineness of which or its relation to the matter in question was not established, or attempted to be established except by the counsel's own assertion. We see no error in excluding a paper thus presented; and moreover the matter was so indirectly connected with the issue the parties were litigating, and was as to the plaintiff so clearly *res inter alios*, that we think no new trial should be granted on this account.

Nor was the ledger presented in such a way that the defendant can well complain of its exclusion. Counsel cannot throw upon the court the duty of inspecting files of papers or manuscript volumes offered in bulk to see whether there is anything in them which is properly admissible, nor complain if, when thus offered, they are excluded. It is the duty of counsel to select the parts of such documents which they claim to be admissible, and point them out to the opposite counsel, and to the court, so that it may be known in the first place whether the opposite party will object and, if he does, that the court may pass upon the objection, without waste of time in ascertaining whether in a mass of irrelevant matter there may be something that might have a bearing upon the case. A different practice would tend more to confuse than enlighten the jury, and if counsel were at liberty to offer evidence of this description in gross and take their chance of having it admitted without objection, or sustaining exceptions if it turned out that there was something in it that might be deemed admissible, we should expect to see it always so presented as to afford the greatest scope for vehement assertion as to what appeared by it, assertion that it would be difficult for the opposing counsel or the jury either to verify or disprove in any reasonable time, and which accordingly, true or false, ought to have no influence in the determination of the case, but might or might not have such influence according to the prejudices of the jury touching the veracity of counsel.

The conversation between the defendant's husband and his brother-in-law, Merry, in respect to the enrolling of the three-eighths of the steamer, was rightly excluded. Either of them could testify to any fact within his knowledge respecting the enrollment which had a bearing on the question at issue; but neither was at liberty to state their conversations with each other in the absence of the plaintiff. Though it might be taken by the jury as corroborative of the testimony given by them respectively, it has no legitimate tendency that way, being too easily manufactured, and yet too difficult to contradict.

A lad by the name of Hatch, who lived in the defendant's family something more than a year, during the time covered by the copartnership, having given testimony as to statements made in his hearing by the defendant, about the ownership of the goods and store, was contradicted as to the making of the statements by the defendant, and she now insists on her exception to the refusal of the presiding judge to permit her to testify that the lad was not allowed to mention the name of Mr. or Mrs. Virgie in the house. The lad having said that he was employed both in the store and house, defendant's husband testified that he was not employed in the store, and exception is taken to the exclusion of the further question whether he was "ever allowed in the store." We think neither of the exceptions is tenable. It is not apparent how either of the facts, if they were facts, would tend to contradict the witnesses' testimony on any material point, or that the defendant or her husband would have added to their own credit by testifying to them.

The exceptions state that the defendant requested the court to instruct the jury that they were to consider certain testimony given in the case by the plaintiff, and certain facts which the defendant claimed appeared in testimony, and further, "that if defendant held three-eighths of the vessel in trust, still, the legal title was in her, and the power of attorney and bill of sale of the old iron were appropriate means to enable the parties in interest to close the affairs of the vessel," and, "to give proper instructions upon the effect of the plaintiff's testimony relating to the disposition of the old iron and the money received from

the underwriters," and that these requests were refused. Exceptions cannot be sustained for such refusal. It is a matter which rests in the discretion of the presiding judge whether he will call the attention of the jury to any particular piece of testimony. The exercise of that discretion is not the subject of exceptions. Requests, such as the counsel made, will doubtless be granted, if in the judgment of the justice presiding it will contribute to an intelligent and correct decision of the vital questions of fact by the jury; whether it would do so or not is a question for the judge who knows the whole course of the trial and argument, and his decision of it is final. So long as he gives instructions upon the questions of law which are essential to a correct understanding of the legal rights of the parties (so far as there is any contest between counsel in respect to them) it is for him to determine whether and in what form he will call the attention of the jury to particular pieces of testimony, a proceeding which is often a delicate one under the statute prohibiting the expression of an opinion upon any issue of fact arising in the case by the judge, who is under no legal obligation to perform any part of the duty of counsel, nor can he be required to reiterate or enforce their arguments by reminding the jury of them in his charge. The defendant's counsel probably contended stoutly that all that she did in respect to the vessel was to use the "appropriate means" to enable the parties in interest to settle up the affairs of the vessel; but there is nothing to indicate that any question of law arose touching that. It was the question of fact whether she was the party in interest about which the controversy arose there.

Nor is it a proper mode of requesting instructions, to ask the presiding judge "to give proper instructions" upon the effect of this or that piece of testimony, or fact appearing in the case. The presumption is that all necessary and proper instructions were given; and if counsel claims any particular legal result as to the effect of such testimony or fact, it is for him to present his request in writing in the proper form, to enable us to determine the correctness of his claim. It may well be that proper instructions would not have favorably affected the position of the party complaining.

An examination of the statement in the exceptions of what occurred when the jury came into court after having had the case under consideration for some hours, discloses nothing of which the defendant can complain.

The construction of the statute regulating proceedings in such cases, which was given in *Edmunds* v. *Wiggin*, 24 Maine, 505, we deem correct, and it has been adopted by the re-enactment of the provision there considered in the subsequent revisions of 1857 and 1871. That it was proper for the judge at such a time to impress upon the jury the importance of their coming to an agreement if possible, was distinctly held in *Emery* v. *Estes*, 31 Maine, 155. What was said of the desire of the parties that a verdict might be reached, was said at the request of counsel of both parties and was doubtless satisfactory to the defendant until the jury found against her. If the counsel who now complains of it would have objected, he should have remained in court and expressed his dissent, upon which the presiding judge would doubtless have modified the statement so as not to include him. He could not by absenting himself before the case was completed, abridge the rights and duties of other counsel or the court.

We perceive nothing in what was said that tended to produce a wrong verdict, or to bias the jury for or against either party, except as they would be led by following legal conclusions from facts to be found by themselves. Defendant's counsel had not withdrawn the request for instructions made before the jury retired the first time, and whether he had done so or not it was proper for the court to give such instructions as he might deem appropriate to meet the difficulties which might trouble the jury with or without the request of either party, so long as the legal doctrines enunciated were correct, and no question of fact was taken from the jury or an opinion thereon expressed by the court. While it is not settled that either party may at that stage of the case request instructions, with the effect that their refusal, if correct, would be ground of exception, we have no doubt that the judge may, in his discretion, adopt suggestions from either or both, so far as he deems them sound and appropriate to direct the attention of the jury rightly to the questions before them.

No juror of average intelligence when told that "if the defendant claimed to own three-eighths of the steamer after it was enrolled in her name, it would be competent evidence of a sale of that share to her, and to make it her property" would be likely to understand that it was a decision of the judge that she made such claim, or that if she did, it was conclusive evidence that she owned the property, especially when followed in the same connection with the specific instruction that "she would not be liable, unless she first authorized her husband to act in her behalf, or unless, knowing what he had done, she subsequently ratified it, and that they might infer such authority or subsequent ratification from the circumstances proved in the case *if they are sufficient to satisfy you of the truth of the fact.*"

We find nothing in the facts or law of the case which requires us to send it to a new trial.

Motion and exceptions overruled.

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

MARY C. TURNER *vs.* MARY A. WILLIAMS and another.

Somerset. Opinion May 29, 1882.

Promissory notes. Principal and surety.

A parol agreement by the principal to pay interest for a year at eight per cent. is not a good consideration for an agreement by the holder of a note with the principal to extend the time of payment one year after it became due, and such an agreement based on such a consideration does not discharge a surety on the note.

ON REPORT.

Assumpsit upon the following note:

"Rockland, March 1, 1875.

One year after date for value received we jointly and severally promised to pay Mary C. Turner, or her order, the sum of one thousand dollars, with interest at the rate of eight per cent. per annum.

(Signed,) Benjamin Williams,
Ephraim Dean, Jr.
Mary A. Williams."

Attest: M. W. Farwell."

Indorsed: "March 1, 1876. Received on the within, eighty dollars, one year's interest. March 1, 1877. Received on the within, eighty dollars, one year's interest. March 1, 1878. Received on the within, eighty dollars, one year's interest."

Writ dated August 16, 1879. Plea, general issue, and brief statement, by Mary A. Williams, one of the defendants. The action was brought against Mary A. Williams and Benjamin Williams only, the other maker, Ephraim Dean, Jr. not being in the State at the time it was brought, which fact is averred in the writ as the reason for the non-joinder. Before trial, a default was entered as against Benjamin Williams.

(Brief statement.)

"And for a brief statement of her further defense she says that she signed the note described in the writ as surety only for Benjamin Williams and Ephraim Dean, Jr. who also signed the same, and for whose benefit alone the money was borrowed of the plaintiff by them and said note was given. And that this was well known to the plaintiff and to said M. W. Farwell, her agent, who loaned the money to said Williams and Dean and received said note from them; that at the maturity of said note, viz: on the first day of March, 1876, said note was extended and day of payment thereof given by the plaintiff to said Williams and Dean, for a valuable consideration to her, promised, paid and secured by the said Williams and Dean, without the knowledge or consent of the defendant; that at the expiration of said period of one year, viz: on the first day of March, A. D. 1877, said note was again extended, and day of payment thereof given by the plaintiff to said Williams and Dean for the further period of one year, for a valuable consideration by them to her, promised, secured and paid without the knowledge or consent of the defendant; and at the expiration of said last mentioned year, to wit, on the first day of March, 1878, said note was again extended and further day of payment given by the plaintiff to said Williams and Dean, for the further period of one year from that date, for a valuable consideration to her, promised, secured and paid by the said Williams and Dean.

"And the defendant further says at the time of the said several extensions, it was well known to the plaintiff that the defendant

was surety only upon said note, and that it was given and signed by the defendant for the sole benefit of the said Williams and Dean; and that by each and every of said several extensions, the defendant was discharged from her liability thereon."

At the trial the following letters were put in evidence:

"Rockland, Maine, February 17, 1877.

Mrs. Turner, Madam, You hold our note, one thousand dollars, due March 1, 1877. We write by advice of M. W. Farwell, Esq. to ask if you want the money for same at maturity of note, or extend it twelve months, by paying the interest. Please answer on receipt of this and oblige, Yours respectfully,

Williams and Dean, per Mayo."

"P. S. Please name your lowest rate for interest."

"St. Albans, February 21.

Messrs. Williams and Dean, You can have the money for the same interest that you have been paying.

Yours respectfully, Mary C. Turner."

"Rockland, Maine, February 7, 1878.

Mrs. Mary C. Turner, St. Albans, Maine, Madam, You hold our note for one thousand dollars, due March 1, 1878. We write to see if you will extend the note for twelve months, and at what rate of interest. Please answer on receipt of this, and oblige, Yours respectfully, Williams and Dean, M."

"St. Albans, Maine, February 10, 1878.

Williams and Dean, Messrs. I will extend the note for twelve months at the same rate of interest. Please send interest (when due) and I will send a receipt for the same.

Yours, Mary C. Turner.

D. D. Stewart, for the plaintiff, cited: *Leavitt* v. *Savage*, 16 Maine, 72; *Appleton* v. *Parker*, 15 Gray, 173; *Berry* v. *Pullen*, 69 Maine, 103; *Mariner's Bank* v. *Abbott*, 28 Maine, 285; *Lime Rock Bank* v. *Mallett*, 34 Maine, 547; S. C. 42 Maine, 356; *Oxford Bank* v. *Lewis*, 8 Pick. 458; *Bank* v. *Bishop*, 6 Gray, 319; *Bank* v. *Rollins*, 13 Maine, 207; *Wilson* v. *Foot*, 11 Met. 285.

A. P. Gould, for the defendant, Mary A. Williams, contended, that the facts showed that Mrs. Williams was a surety and that the plaintiff had three times extended the note, for a year at each time, by an agreement with Williams and Dean, the principals, to pay her eight per cent. interest.

There was a good legal consideration for the extension.

In *Bank* v. *Woodward*, 5 N. H. 99, on p. 106, court say: "The consideration alleged to have been paid for the forbearance, was interest at twelve per cent." This was illegal. But it is well settled, that a promise founded upon an usurious consideration, is not void.

"He who takes or secures" (*i. e.* agrees to take) "more than six per cent. for day of payment, is made liable to certain forfeitures, which in a suit upon the contract may be deducted from the debt; and a promise to pay more than six per cent. is held to be invalid, as to all above six per cent. To this extent and no further, is a contract affected by usury." *Wheat* v. *Kendall*, 6 N. H. 504, 506-7; strongly enforces this.

If, therefore, the agreement to pay eight per cent. as a consideration for the extension, was not valid as to the two per cent. over the legal rate, it was a valid agreement to pay and receive, six per cent. by which both parties were bound; the contract being void only as to all over that rate.

And the agreement to pay eight per cent. for a year, was a good consideration for plaintiff's agreement to extend the note for a year; as was held in the cases from the N. H. Rep'ts; and explicitly in *Wheat* v. *Kendall*, 6 N. H. 504, where the instruction, that, a "promise to pay extra interest upon the note, was a good and sufficient consideration for the contract for delay of payment of said note," was held correct.

In *Bailey* v. *Adams*, 10 N. H. 162, 164, the court say, that, "the agreement to pay simple interest may be a sufficient consideration for such a contract to delay, if there is, in the contract for delay, a stipulation by which it is secured to the creditor for any specified time. As, for instance, if the creditor, the note being due, should agree with the principal to delay the payment six months, on the consideration that the principal promised to pay the interest for that period of time, this would be a contract upon a sufficient consideration.

"The promise to pay the interest under such circumstances, would bind the principal to the payment of it for the period agreed on, and thus secure the creditor a right beyond what he had before, even if the note contained a promise to pay interest; because, the debt being due, the principal, or surety, before the new agreement, might pay it at any time, and the original contract therefore did not secure the creditor interest for a single day to come."

That either of these extensions was sufficient to discharge the defendant, there will be no question.

"A surety has a right to have his liability remain precisely as he has himself fixed it, and any change in the contract or duty, for the performance of which he is holden, made without his consent, will discharge him." *Andrews* v. *Marrett*, 58, Maine, 539, and cases cited.

W. and D. agreed with plaintiff, or her agent, to pay eighty dollars for another year. Both parties were necessary to an "agreement." Such an agreement implied a promise to delay payment of the principal that year. No express words to that effect need be used.

Crosby v. *Wyatt*, 23 Maine, 156, does not conflict with the principles cited from New Hampshire cases. It only disagrees with New Hampshire on this question, whether payment of interest in advance raises an implied promise to extend.

LIBBEY, J. The defendant, Mary A. Williams, claims that she is surety in the note in suit, and she alone defends. The strongest case that can be claimed by her upon the evidence, is, that the plaintiff in consideration of a parol promise by Williams and Dean, the principals, to pay eight per cent. interest, agreed with them to extend the time of payment of the note one year after it became due.

The question arises whether this agreement of extension released the defendant from liability as surety on the note. We think it did not. The case of *Berry* v. *Pullen*, 69 Maine, 101, appears to be decisive of this case. In that case it is held that the agreement with the principal to extend the time of payment must be one that will suspend the right of action on the contract,

or which will authorize the principal to maintain an action against the creditor for its breach; that a promise which is void because not in writing is not a good consideration for an agreement of extension, and that a parol promise to pay interest at the rate of eight per cent. per annum, not being valid, although not prohibited by law, (R. S., c. 45, § 1,) is not a good consideration for such an agreement.

It is clear that the plaintiff could not maintain an action against Williams and Dean for the interest at eight per cent. per annum because their promise to pay it was not in writing. Williams and Dean, not being legally bound by their promise, the plaintiff would not be liable on her agreement, which had no consideration upon which it was based, except their void promise.

But it is claimed by the learned counsel for the defendant that the parol agreement to pay interest at the rate of eight per cent. per annum, although not in writing, was a valid agreement to pay interest for the year at six per cent. and that such an agreement was a good consideration for the plaintiff's agreement, and *Bank* v. *Woodward*, 5 N. H. 99; *Wheat* v. *Kendall*, 6 N. H. 504, and *Bailey* v. *Adams*, 10 N. H. 162, are cited as authorities sustaining this proposition.

We think the answer is that the plaintiff never made an agreement to extend the time of payment of the note one year in consideration of the promise of Williams and Dean to pay interest for the year at the rate of six per cent. There was no such contract between the parties. True, as long as the note remains unpaid, the plaintiff is entitled to interest at the rate of six per cent. but it is by virtue of the statue and not of the promise of Williams and Dean.

The doctrine of the New Hampshire cases cited for the defendant has not been adopted or approved by this court. *Berry* v. *Pullen*, *supra*.

Judgment for the plaintiff for the amount due on the note in suit.

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

SUSAN BAKER *vs.* BELDEN BESSEY, and another.

Kennebec. Opinion May 29, 1882.

Pleadings. Real action. Deed. "Mill and dam, with the appurtenances." Misnomer in civil actions.

A declaration in a writ of entry is not defective because it alleges the demandant's ownership in the demanded premises to be a fee, instead of a fee-simple; nor because the premises are described, without metes and bounds, as "the mill and mill-dam, with the appurtenances, and the land under and adjoining them and used therewith," a general description of the locality of the premises being added.

The same description, being the language of the statute, is sufficient in a deed from an officer who sold the premises under a lien obtained thereon by a judgment in a complaint for flowage.

There are two dams across a stream running from a pond, upon which stream a mill is situated, one at the mill, the other half a mile above the mill, and within a mile of the outlet of the pond. The lower dam flows to the upper. The upper is a reservoir dam used to preserve a head of water for the mill below. The same person owned the mill and both dams, but not all the land upon the stream between the dams, using them for many years in conjunction with each other. *Held*, that an officer's deed of the mill property describing it as "the mill and dam, with the appurtenances," carries, by express terms, the mill-dam below, and, by implication, an easement in the dam above. The conveyance gives the grantee a right to use the upper dam to maintain a head of water for the mill below.

Where the defendant was sued as Belden Bessey, while his true name is Jonothan Belden Bessey, the objection therefor should be by plea in abatement. Nor does an objection lie to a sale of defendant's property upon a judgment against him in which he was sued as Belden Bessey, he having appeared and contested the suit under that name.

ON REPORT.

Writ of entry to recover possession of certain real property situated in Albion and described in the declaration.

Writ dated April 26, 1880.

(Declaration.)

"In a plea of land, wherein the plaintiff demands against the defendants a lot of land situated in said Albion in said county, and bounded and described as follows: The mill and mill-dam, with the appurtenances, and the land under and adjoining them,

and used therewith, situated on and across the stream that constitutes the outlet of the Lovejoy pond, so called, in Albion, and formerly owned by said Belden Bessey and now occupied by the defendants; whereof the demandant was seized in fee within twenty years last past, and the defendants within said time unjustly and without judgment of law, disseized the demandant and still unjustly withhold said premises from her.

"And the demandant further avers that the defendants have been in possession of said premises since the first day of June, 1878, receiving the rents and profits thereof during all that time, which the demandant avers are reasonably worth one hundred and fifty dollars a year, amounting to two hundred and eighty-eight dollars in all, which she claims to recover in this action."

Plea, *nul disseizin*, and brief statement averring the title to be in the defendants and not in the plaintiff.

Other material facts are stated in the opinion.

By the terms of the report "the court to enter judgment upon so much of the evidence as is legally admissible, and if the plaintiff is entitled to recover, the damages for the rents and profits are to be one hundred and forty dollars with interest from the date of the writ."

Joseph Baker, for the plaintiff, cited: R. S., c. 92, § § 11, 15; *Lowell* v. *Shaw*, 15 Maine, 242; *Knapp* v. *Clark*, 30 Maine, 244; *Pierce* v. *Knapp*, 34 Maine, 402; *Leonard* v. *White*, 7 Mass. 6; *Blake* v. *Clark*, 6 Maine, 436; *Blains* v. *Chambers*, 1 S. and R. 169; *Pickering* v. *Stapler*, 5 S. and R. 107; Angell on Watercourses, § 153, *a*; *Maddox* v. *Goddard*, 15 Maine, 218; *Rackley* v. *Sprague*, 17 Maine, 281; *Stackpole* v. *Curtis*, 32 Maine 383; *Perrin* v. *Garfield*, 37 Vt. 312; Washburn on Easements, § 45, 34; *Crockett* v. *Millett*, 65 Maine, 191; *Whitney* v. *Gilman*, 33 Maine, 273; *Walcott Co.* v. *Upham*, 5 Pick. 292; *Shaw* v. *Wells*, 5 Cush. 537; *Bates* v. *W. Iron Co.* 8 Cush. 548.

Edmund F. Webb, for the defendants.

The writ is not in the form prescribed by law. R. S., c. 104, § 3. "He (the demandant) shall set forth the estate he claims in

the premises, whether in fee simple, fee tail, for life, or for years," &c.

The demandant's writ sets forth only a naked fee, which may be fee-simple, fee-tail, for life, for years, a determinable fee, a qualified fee or conditional fee, and is not such a writ as defendant is entitled to. *Veazie* v. *China*, 50 Maine, 526; *Low* v. *Dunham*, 61 Maine, 566; *Blake* v. *Portsmouth and Concord Railroad*, 39 N. H. 435, and cases there cited. *Wyman* v. *Brown*, 50 Maine, 143; 1 Wash. on Real Prop. c. 3, § § 31, 32; 2 Bl. Com. 106.

Demandant's lien attachment and levy are void.

The process undertakes to divest the defendant of the title to his property without his consent, and there must be a strict compliance with the law.

The word appurtenant does not carry the upper dam.

The word will not pass any corporeal real property, but only incorporeal easements or rights and privileges. Bouvier's Law Dictionary.

By grant of a grist mill, with the appurtenances, the soil of a way, immemorially used for the purpose of access to the mill from the highway does not pass. *Leonard* v. *White*, 7 Mass. 6. "Land cannot be appurtenant to land," *Ibid.* 9.

In *Bryan* v. *Weatherhead*, 3 Crokes, Rep. 17, it is held that "the grant of a house with the appurtenances will not pass an adjoining building not accounted parcel of the house, although held with it for thirty years, it must be an accepted parcel thereof "*ex vi termini*."

And in *Hearn* v. *Allen*, *Ibid.* 57, it is held that a devise of a house with the appurtenances will not pass land at a distance, though occupied with the house.

After the four deeds to the defendant, there was a unity of seizin of all the estates, both upper and lower dams, in the defendant, and all rights as easements, were extinguished.

The right of flowage is like the right of way which one may have through the close of another which is appurtenant to his

land, and grant of his land with the appurtenances will pass the right of way. But a man cannot have a right of way through his own land, independent of his right to the land; he has the right of way, but it is not an easement. *Barker* v. *Clark*, 4 N. H. 382; *Grant* v. *Chase*, 17 Mass. 447.

In this case the defendant owned the upper dam, the soil, the yard, the banks and the right to flow, but his right was not an easement; he had the title to the soil, and there was no easement to pass with the lower dam under the head of flowage as it would be if the upper dam had annexed to it the right to flow land of other people.

"Nothing is more clear than that under the word appurtenance according to its legal sense, an easement which has become extinct, or which does not exist in point of law by reason of ownership, does not pass." 2 Wash. Real Prop. 627; *Plant* v. *James*, 27 E. C. L. R. 191.

There is no easement of flowage in the upper dam, for the defendant owns it *ex vi termini*; he owns the soil which includes the use of flowing.

"By the grant of a mill, the land under the mill and adjacent thereto so far as necessary to its use, and commonly used with it, will pass by implication." *Forbush* v. *Lombard*, 13 Met. 114; *Blake* v. *Clark*, 6 Maine, 436.

But the land thus passing must be adjacent and not at a distance. *Blake* v. *Clark*, 6 Maine, 439, 440; *Tyler et al.* v. *Hammond*, 11 Pick. 193.

The attachment and levy in the name of Belden Bessey were void. The title deeds were in his real name, J. B. Bessey, or Jonathan B. Bessey.

R. S., c. 81, § 56, requires the officer returning the attachment to return "the names of the parties" to the registry of deeds. See *Dutton* v. *Simmons*, 65 Maine, 583, where the officer returned attachment of real estate of Henry "M" Hawkins instead of Henry "F" Hawkins and where this class of cases are collected and discussed by the court.

The defendant could not plead in abatement in this action, because he would necessarily tender more than one issue of fact.

Any plea in abatement which tenders an issue upon more than one matter of fact is bad. *State* v. *Heselton*, 67 Maine, 598; *Wyman* v. *Brown*, 50 Maine, 139; *Bailey* v. *Smith*, 12 Maine, 196; *Tibbetts* v. *Shaw*, 19 Maine, 204; *Maine Bank* v. *Hervey*, 21 Maine, 38.

In 1831, the legislature passed an act to abolish special pleading. C. 514. "In all civil actions the defendant shall plead the general issue." In 1836 special pleading was abolished in Massachusetts, and after that a tenant could show *non tenure* under the general issue of *nul disseizin*. *Wheelwright* v. *Freeman*, 12 Met. 154; *Richards* v. *Randall*, 4 Gray, 53.

PETERS, J. The demandant, under a complaint for flowage, recovered a judgment for damages against one of the present defendants; sued the same in assumpsit in order to obtain a lien-judgment against the defendants' mill-dam and mill, recovering in that suit; purchased the property in her name at a sale by the officer upon an execution issued on the latter judgment; and institutes this action to recover possession of the property thus purchased. The proceedings in thus obtaining title seem to have been in proper form and in accordance with the statutory requirements.

It is contended that the present writ is wrong in not alleging the demandant's ownership to be a fee-simple; it alleges a fee. That point fails, by force of a previous decision of the question in the case of *Jordan* v. *Record*, 70 Maine, 529.

The description of the demanded premises in all of the writs and papers, including the deed from the officer, is this: "The mill and dam, with the appurtenances, and the land under and adjoining them, and used therewith, situated on and across the stream that constitutes the outlet of the Lovejoy pond, and formerly owned by BeldenBessey and now occupied by the defendants." It is argued, by the defendants, that this is not a good description because not giving metes and bounds. We think that, in this particular proceeding, such a general description is well enough, though such might not be the case in officers' proceedings usually. It is the language of the statute. It may in this case be a safer description to abide by than any other, for both parties.

The defendants contend, further, that the description does not embrace the dam which caused the original injury by flowing, and that for that reason the proceedings are erroneous. It appears that there are two dams across the stream, one at the mill, and the other about half a mile above the mill, and within a mile from the pond; that the lower dam flows only up to the upper dam; that the upper dam holds back the principal head of water used at the mill, and caused the flowage which the demandants complained of; that the same person was the owner of the mill and both dams, and that for many years the dams have been used in conjunction with each other; and it may be inferred, we think, from the evidence, that either structure would be of very little value or consequence without the other.

The question, upon these facts, is, whether an easement in the upper dam is included in the describing words, "mill and dams, with the appurtenances," as used in the sheriff's conveyance and the other papers. We think it is contained therein, not in express terms, but by the strongest implication. It is an incident to the land granted.

The question is governed by the ancient maxim or rule of law, that when a person grants a thing, he is supposed also tactily to grant such means of his own as are necessary to thereby attain the thing granted; that, when the principal thing is granted, the incident passes with it. Broom Max. *362; Shep. Touch. 89. Incidents attached to land granted pass to the grantee, without any special terms in the conveyance, when necessary for its use and enjoyment. This principle is especially applicable to water privileges in grants of mills dependent for their use and value upon a water-power.

The general principle has various practical applications. A deed of a wharf may, by implication, include the use of adjoining flats; of a house, may convey the right of access thereto; of standing timber, grants the necessary facilities for cutting and removing it; of a mine, the opportunities to excavate for it; of a "farm" or "messuage" or "manor," known by any certain name, may include sundry distinct tenements and easements which are necessarily incident to the principal thing described as

granted. A "barn," when conveyed or reserved *eo nomine*, may include a shed connected with it, and other privileges. *Cunningham* v. *Webb*, 69 Maine, 92. Under a description of a "rope-walk" in a deed, such land of the grantor may pass as is habitually and necessarily used for its business. *Davis* v. *Handy*, 37 N. H. 65. An interesting and novel illustration of the principle is seen in the case of *Hougan* v. *Railroad*, 35 Iowa, 558, where it was held that a railroad company, having by grant a right of way for the use and occupation of its railway, had the legal right to dig a well upon such right of way and to use the water supplied by percolation for railroad purposes, although it materially diminished the supply of water in a spring upon the grantor's land. It has been frequently held that the principle applies to a grant of land with water running to buildings upon it, the grantor having a permanent ownership in the estate and in the waters. *Coolidge* v. *Hager*, 43 Vt. 9.

The maxim or principle is general in its character, and for that reason different courts have been led to different conclusions in many instances, and nice distinctions have arisen in cases. Differences might arise even in respect to some of the cases which we have cited for the purpose of argument and illustration. But in construing conveyances of mills and mill privileges, the course of decision has been uniformly liberal towards the grant. It was laid down by the old writers in general terms, that, "by the grant of mills, the waters, flood-gates, and the like, that are of necessary use to the mills, do pass." The same doctrine was at an early day accepted in this State. In *Blake* v. *Clark*, 6 Maine, 436, it was held that the word "mill" in a conveyance would carry the land under the mill, and might embrace the free use of the head of water existing at the time of the conveyance, as also a right of way and any other easement which has been used with the mill and which is necessary to its enjoyment. This principle has been acted upon in quite a number of subsequent cases. *Hathorn* v. *Stinson*, 10 Maine, 224; *Maddox* v. *Goddard*, 15 Maine, 218; *Rackley* v. *Sprague*, 17 Maine, 281; *Crosby* v. *Bradbury*, 20 Maine, 61; *Stackpole* v. *Curtis*, 32 Maine, 383. SHAW, C. J., defines the principle in *Richardson*

v. *Bigelow*, 15 Gray, 154, as far as applicable to the water-power embraced in such a description. "It is a well settled rule of law," says he, "that the grant of a mill carries with it, by necessary implication, the right to the use of the water-course coming to the mill and furnishing power for working it, and also to the canal or raceway which carries the water from the mill, to the full extent of the grantor's right and power so to grant them."

There are cases which hold that the rule would not apply where a mill-site is described by metes and bounds, without any allusion in the deed to any mill or water right or privilege, and there is nothing therein to indicate an intention to include any privileges connected with the main subject of the grant. *Brace* v. *Yale*, 4 Allen, 393; *Tabor* v. *Bradley*, 18 N. Y. 109; *Voorhees* v. *Burchard*, 55 N. Y. 98; *Simmons* v. *Cloonan*, 81 N. Y. 557.

The objection raised, that land does not pass as appurtenant to land, does not apply in this case. The land is not claimed in the upper dam, but only the use of the land, an easement in it. Nor does the objection, pressed upon our attention, lie, that there was no easement to pass by the grant for the reason that the grantor had more than an easement, having a full fee. The question is not whether an existing easement passed by the terms of the grant, but whether a new one was not thereby created; whether the proceedings do not carve one out of the defendants' estate; in other words, whether an easement in the dam above is not, in a legal sense, a part and parcel of the privilege below. A mere mill-structure was not the thing granted, but a mill; which implies a water power; and a privilege in the upper dam is an essential part of that power. The two are but one thing. The two combined are amenable for damages under the flowage act. *Goodwin* v. *Gibbs*, 70 Maine, 243.

The fact that a half mile's distance intervenes between the two dams does not defeat an application of the principle. They are connected by a natural stream. All easements are out of land other than the principal land granted. It is the use of the water-course that constitutes the privilege, which may necessarily

be for a longer or shorter distance, according to circumstances. It may require a control of the water far above or below the mill. *New Ipswich Factory* v. *Batchelder*, 3 N. H. 190. Distance is but one of the elements to be taken into the account. This is outweighed by relatively more important considerations. "It has often been held that a conveyance by metes and bounds, of a mill site," says FOLGER, J., in *Voorhees* v. *Burchard*, *supra*, "carries the right to take and convey and discharge water, from and across lands not within the boundaries given by the deed, for the reason that the power so to do is necessary to the full enjoyment of the property specifically conveyed." The case of *Perrin* v. *Garfield*, 37 Vt. 312, presents a statement of facts almost identical with those in the case at bar, where the court decided that such an easement passed. PECK, J., in discussing the question, says: "It is said this dam or easement is too far distant to pass by a conveyance of the mill. The proximity of the one to the other is of little comparative importance in determining the question whether an easement passes by a conveyance of the dominant tenement. It depends rather upon the nature, character and purpose of the easement, its relation to the subject matter of the grant, its accustomed use in connection with it, and its necessity to the value, and to the beneficial and convenient use of the premises granted."

It seems that one of the defendants has been in all the proceedings called Belden Bessey, while his true name is Jonathan Belden Bessey. The objection does not lie to this action, there being no plea in abatement. It does not avoid former proceedings, because J. B. Bessey was in all of them impleaded under the name of Belden Bessey, and appeared and contested the actions under that name. No question of notice arises. The case cited by the defendants (*Dutton* v. *Simmons*, 65 Maine, 583), presented a question of notice, where third parties were interested. Here only the immediate parties are concerned. *Ryder* v. *Mansell*, 66 Maine, 167. It would be well for the plaintiffs to amend the writ in this action by inserting defendant's true name, and aver that former proceedings were

prosecuted against him by the other name. *Root* v. *Fellowes*, 6 Cush. 29; *Colton* v. *Stanwood*, 67 Maine, 25.

Judgment for the plaintiffs.

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

WILLIAM M. STRATTON *vs.* MARY E. STRATTON.

Kennebec. Opinion May 29, 1882.

Divorce. Alimony. Stat. 1874, c, 184, § 3. R. S., c. 60. § 19.

Where the decree relating to alimony in a libel for divorce gives an annuity for life without reservation it cannot be modified at any time thereafter on motion or petition and a new trial can be ordered only in cases mentioned in the statute.

The power to alter the decree from time to time as circumstances may require, given by R. S., c. 60, § 19, relates only to the custody of the children.

ON EXCEPTIONS.

Petition, filed at the October term, 1880, for a decrease of alimony allowed by the court by way of an annuity of two hundred and fifty dollars during life to the respondent in a libel for divorce, filed by the petitioner against the respondent at the March term, 1860.

The respondent moved to dismiss the petition on the ground that the court had no right, jurisdiction or authority over the matter.

The court *pro forma* sustained the motion and dismissed the petition, and the petitioner alleged exceptions.

Joseph Baker, for the petitioner.

The question is, has the court the power to grant the prayer of the petition.

Divorces are equitable proceedings addressed to the discretion of the court. In equity the court and cause are always open, and a rehearing may be granted at any time when equity and justice require it. The statute of limitations in relation to

rehearings and reviews does not apply to or bind the discretion of the court. Adams Eq. 397; *Brandon* v. *Brandon*, 25 L. J. Ch. 896; *Daniel* v. *Mitchell*, 1 Story, 198; *Hodges* v. *N. E. Screw Co.* 5 R. I. 9; *Finch Co.* v. *Franklinite Co.* 1 McCar. 309; Story's Eq. Pl. § § 418, 419.

But we have not only this analogous authority in the court to grant a rehearing in divorce cases, but we have direct law to the the same effect. 2 Bish. M. and D. § § 430, 433, 751, 431.

Counsel citing the various statutes bearing upon the subject matter contended that the only reasonable construction authorized a rehearing on the question of alimony, in cases of divorce where an annuity is given. So much of the decree as gave an annuity for life is void. No decree for the support of a divorced wife can continue longer than the obligation of the husband to support his wife continues. That obligation ceases with his life, and if she should outlive him the decree ceases. Bish. on M. and D. § 428; *Lockridge* v. *Lockridge*, 3 Dana, (Ky.) 28; *Wallingford* v. *Wallingford*, 6 Harris and Johns. (Md.) 485.

But in this case the whole decree as to alimony is absolutely void. There was no power in the court to grant alimony to the wife on the libel of the husband for a divorce against his wife for her fault. R. S., c. 60, § 7; *Henderson* v. *Henderson*, 64 Maine, 419; 2 Bish. M. and D. § § 377, 435; *Dwelly* v. *Dwelly*, 46 Maine, 377.

C. P. Mattocks, for the respondent, cited: *Henderson* v. *Henderson*, 64 Maine, 419; *Prescott* v. *Prescott*, 59 Maine, 151; *Atkinson* v. *Dunlap*, 50 Maine, 111; *Burch* v. *Newbury*, 6 Selden, 394; *Harvey* v. *Lane*, 66 Maine, 536; *Bacon* v. *Bacon*, 43 Wis. 197; *Forseth* v. *Shaw*, 10 Mass. 253; *Coffin* v. *Cottle*, 4 Pick. 454; *Vanderhof* v. *Dean*, 1 Mich. 453; Morse on Arbitration, 71; *Hix* v. *Sumner*, 50 Maine, 290; *Mitchell* v. *Dockray*, 63 Maine, 82; *Pease* v. *Whitten*, 31 Maine, 117; *Shelton* v. *Alcox*, 11 Conn. 240; *Cox* v. *Jagger*, 2 Cow. (N. Y.) 638; *Shepherd* v. *Ryers*, 15 Johns. (N. Y.) 497; *Whitney* v. *Holmes*, 15 Mass. 153; *Valentine* v. *Valentine*, 2 Barb. 430; *Bigelow* v. *Newell*, 10 Pick. 354; *No. Yarmouth* v. *Cumberland*, 6 Maine, 21; *Parsons* v. *Hall*, 3 Maine, 60; *Bacon* v. *Crandon*, 15

Pick. 79; *Brown* v. *Clay*, 31 Maine, 518; *Dunn* v. *Murray*, 9 B. and C. 780; *Smith* v. *Johnson*, 15 East. 213; *Wheeler* v. *Van Honton*, 12 Johns. 311; *Warfield* v. *Holbrook*, 20 Pick. 534; *Bunell* v. *Pinto*, 2 Conn. 431; *Parsons* v. *Hall*, 3 Maine, 58; *Mayberry* v. *Morse*, 39 Maine, 105; *Pierce* v. *Strickland*, 26 Maine, 277; *Dunbar* v. *Bittle*, 27 Wis. 143.

SYMONDS, J. This is a petition for relief from the payment of an annuity of two hundred and fifty dollars, decreed to the wife as alimony in March, 1860, when a divorce was granted upon the husband's libel. The case is presented upon exception to the *pro forma* ruling, that the court now has no power, on motion or petition, to modify the decree concerning alimony.

In *Henderson* v. *Henderson*, 64 Maine, 419, it was held that the jurisdiction of the court, and its powers, relating to divorce, are derived solely from the statutes, and limited and controlled by them. The question, then, is one purely of the construction of the statutes on that subject.

By the laws of 1821, c. 71, § 5, it would seem that under certain circumstances, when the divorce was granted for the adultery of the husband, the court had authority to change the decree concerning alimony from time to time, upon the application of either party; this power being expressly conferred in regard to divorces from bed and board, and it being provided in case of such divorce from the bond of matrimony that "the court may allow her (the wife) reasonable alimony out of the husband's estate, so long as she shall remain unmarried, in the same manner as alimony may be allowed to a woman divorced from bed and board."

The first provision for a new trial in cases of divorce was in 1839, c. 377, giving the court discretionary authority to grant it in certain cases, upon application within three years from the first judgment. R. S., 1841, c. 89, § § 17, 19, 32, are revisions of these earlier statutes without substantial change in this respect.

But in 1854, c. 100, a law was enacted, which passed into the revisions of 1857, c. 60, § 6, and of 1871, c. 60, § 7, and defines the present powers of the court in regard to alimony. It gives

no authority to modify on motion a judgment for alimony once rendered.

On the other hand, the act of 1839, which first granted the right of new trial in divorce, continued without essential modification through the revisions of 1841, c. 89, § 32, and of 1857, c. 60, § 8, but in 1863, c. 211, § 3, was amended so as to provide that, in the cases stated, the new trial might be allowed within the three years, not only in respect to the divorce granted, but also in regard to the amount of alimony or the specific sum decreed instead of alimony; and this new provision, contained in the revision of 1871, c. 60, § 9, was again amended in 1874, c. 184, § 3, so as to read as follows: "Within three years after judgment on a libel for divorce, a new trial may be granted as to the divorce, when the parties have not cohabited nor either contracted a new marriage since the former trial; and when either of the parties have contracted a new marriage since the former trial, a new trial may be granted as to alimony, or specific sum decreed, on such terms as the court may impose and justice require, when it appears that justice has not been done through fraud, accident, mistake or misfortune."

It would be a manifest inconsistency to hold that a decree relating to alimony may be modified at any time on motion, when the statute by clear implication limits the right of new trial in regard to alimony to cases in which one of the parties have contracted a new marriage since the former trial. To grant the present motion is neither more nor less than to allow a new trial on the question of alimony, and in a case where the statute, unless a construction is adopted which plainly deprives it of force, excludes the right of a new trial.

It is not intended to say that the court may not in the first instance make the order relating to alimony conditional, or for a limited time, or in terms subject to future revision. But when the original decree gives an annuity for life, without reservation, we think a new trial can be ordered only in the cases mentioned in the statute.

That the power to alter the decree from time to time as circumstances require, given by R. S. c. 60, § 19, relates only

to the custody of the children is apparent from the history of the section. It is simply a revision of R. S., 1841, c. 89, § 27, which provides that "the court may from time to time revise and alter such decree, as to the custody, care and maintenance of the children, as the circumstances of all concerned may require or render expedient."

The exceptions raise no question in regard to the validity of the decree in this case. On the contrary, its validity, when made, is assumed in the present proceeding. Upon the facts disclosed, the court under the statutes now in force has no authority to modify it on motion, and the

Exceptions are overruled.

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

JACOB WAGNER *vs.* INHABITANTS OF CAMDEN.

Knox. Opinion May 29, 1882.

Ways. Defect. Damage. Notice. Stat. 1877, c. 206.

The notice to the municipal officers of a town required by stat. 1877. c. 206, must state not only the nature and location of the defect and the nature of the injuries received, but it must also set forth the injured person's claim for damages, or it will not be sufficient.

ON REPORT.

An action to recover damages sustained from a defect in a highway in the defendant town. Writ was dated October 11, 1880.

By the terms of the report if the following notice was insufficient, the plaintiff was to become nonsuit, otherwise case to stand for trial.

(Notice.)

"To the selectmen of the town of Camden: I hereby notify you that on the evening of October twelfth, instant, I received personal injuries on account of a defect and want of railing in the highway, in the town of Camden. The defect is located

upon the north side of the shore road leading from Camden to Lincolnville, about ten rods westerly from the dwelling house of Dr. Jonathan Huse. The defect consists of a bridge along the north side of said road, elevated about five feet above the ground on the northerly side of the same, and there is no sufficient railing upon the north side of said bridge. My injuries consist of bruises, and injuries to my arm, shoulder, side, back and other parts of my person, caused by my falling off the north side of said bridge.

Belmont, Oct. 18, 1879.

Jacob Wagner."

J. H. Montgomery, for the plaintiff.

"Notices in this class of cases, are not to be very strictly construed. . . . The main object of a notice is, that the town may have an early opportunity of investigating the cause of an injury and the condition of the person injured, before changes may occur essentially affecting such proof of the facts as may be desirable for the town to possess." *Blackington* v. *Rockland*, 66 Maine, 333; *Sawyer* v. *Naples*, 66 Maine, 454.

The notice was ample for all these necessary purposes.

A. P. Gould, for the defendants, cited: *Sawyer* v. *Naples*, 66 Maine, 453; *Hubbard* v. *Fayette*, 70 Maine, 121.

WALTON, J. The notice to the municipal officers of a town, required by the act of 1877, c. 206, must state not only the nature and location of the defect, and the nature of the injuries received, but it must also set forth the injured person's claim for damages, or it will not be sufficient. The notice in this case contains no claim for damages, nor any intimation that such a claim is made. It states that the plaintiff received personal injuries on account of a defect, and it describes the defect, but it contains no statement that the plaintiff claimed to recover damages of the town on account of his injuries. Such a notice is clearly defective and insufficient under the statute above cited. As stipulated in the report, the entry must be,

Plaintiff nonsuit.

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

JOSEPH E. CLOUGH and others *vs.* WILLIAM M. CLOUGH.

Knox. Opinion May 29, 1882.

Deed.

If one acknowledges and delivers a deed to which his name has been affixed by the grantee, the deed is valid. The acknowledgment and delivery are acts of recognition and adoption so distinct and emphatic, that the grantor will not be allowed to deny that the signature is his. The deed is not sustained on the ground of agency or ratification, but of adoption.

ON REPORT.

Writ of entry, dated September 3, 1880.

Plea, general issue.

At the trial the defendant offered in evidence the deed of John Clough to him. The plaintiffs objected to the deed upon the ground that it was not properly executed. For the purposes of this trial it was admitted that the name of the grantor in the deed was signed by the grantee, at the grantor's request and in his presence, and that the grantor personally acknowledged the deed, and that it was duly delivered to the defendant. The case was then submitted to the law court. If such a deed is valid in law, the case is to stand for trial; if not, default is to be entered.

A. P. Gould, for the plaintiffs, contended that when one person writes the name of another at his request, he does it as agent.

Thus if A writes B's name to a deed, to assert that because B is present, giving personal and verbal authority to A, A becomes B, that it is B's own act precisely as if no person was acting but himself, and no act of agency is done, is too transparent a sophism to be adopted by a court of law.

The grantee cannot take the acknowledgment of the grantor. *Beaman* v. *Whitney*, 20 Maine, 413; *Gibson* v. *Norway Savings Bank*, 69 Maine, 579.

How vastly more important that the signature of the grantor should be affixed by a disinterested person. A deed is good

without acknowledgment, that being required simply before recording. See Wash. Real Prop. (2 ed.) 601, (575.)

To allow the grantee to act as agent of the grantor in executing the deed, would be a violation of one of the cardinal rules of the law of agency.

C. E. Littlefield, for the defendant, cited: *Bird* v. *Decker*, 64 Maine, 552; *Lovejoy* v. *Richardson*, 68 Maine, 386; *Bartlett* v. *Drake*, 100 Mass. 174; *Holbrook* v. *Chamberlain*, 116 Mass. 155; *Wellington* v. *Jackson*, 121 Mass. 159; *Allum* v. *Perry*, 68 Maine, 234; *Wood* v. *Goodridge*, 6 Cush. 117; 3 Wash. Real Prop. 120.

WALTON, J. The only question is whether a deed can be made valid by subsequent acknowledgment and delivery, when the name of the grantor has been signed to it by the grantee. We think it can.

If one acknowledges and delivers a deed which has his name and a seal affixed to it, the deed is valid. No matter by whom the name and seal were affixed. No matter whether with or without the grantor's consent. The acknowledgment and delivery are acts of recognition and adoption, so distinct and emphatic, that they will preclude the grantor from afterward denying that the signing and sealing were also his acts. They are his by adoption. Without delivery the instrument has no validity. By force of our statutes the instrument is incomplete without acknowledgment. Till one or both of these acts are performed the instrument has no more validity than a blank deed. By taking the instrument in this incomplete condition and completing it, the grantor makes it his deed in all its particulars. He adopts the signature and the seal the same as he does the habendum and the covenants which were inserted by the printer of the blank. The deed is not sustained on the ground of ratification, but adoption. Ratification applies to agency. No question of agency arises in this class of cases. The validity of the deed cannot rest upon the ground of agency or ratification. If such were the case the authority or the ratification would have to be by instrument under seal; for authority or ratification must be of as high a character as the act to be performed or ratified. If the

act is the execution of a sealed instrument, it must be authorized or ratified by a sealed instrument. We therefore repeat that the validity of the instrument in this class of cases does not rest on agency or ratification, but on adoption. No matter by whom the signing and sealing were performed, nor whether with or without the grantor's consent. By completing the instrument, he adopts what had previously been done to it, and makes it his in all its particulars.

It is not often important to notice this distinction; but it is important in this case in order to avoid the apparent absurdity of holding that an agent can contract with himself, can be both grantor and grantee. An agent cannot contract with himself. He cannot as agent for the grantor execute a deed to himself. But he can prepare a deed running to himself, even to the signing and sealing, and if the grantor then adopts the deed by personally acknowledging and delivering it, it will be a legal and valid instrument. But its validity rests upon the ground of adoption, not agency or ratification. And when the word "ratified" or "ratification" is used in this class of cases, as it often is, it will be found on careful examination that it is used in the sense of "adopted" or "adoption," and not in the technical sense in which it is used in the law of agency. *Bartlett* v. *Drake*, 100 Mass. 174; Story on Agency, § § 49 and 252; *Lovejoy* v. *Richardson*, 68 Maine, 386, and cases there cited.

Action to stand for trial.

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

ALBERT R. STEVENS *vs.* INHABITANTS OF ANSON.

Cumberland. Opinion May 29, 1882.

Town bonds. Municipal aid to railroads. Special laws 1868, c. 622, § 1. R. S., c. 51, § 80.

Special laws, 1868, c. 622, § 1, which authorized the the town of Anson to raise not exceeding one hundred thousand dollars in aid of the construction of the Somerset railroad, and R. S., c. 51, § 80, which authorizes any town to raise not exceeding five per cent. of its valuation to aid in the construction of railroads, are distinct acts; each stands on its own basis, conferring authority to raise the sum therein named and consistent with each other,

and neither contains any language showing any intention on the part of the legislature to modify or limit either by the other.

By legal votes held at town meetings called for the purpose March 23, 1868, and October 1, 1870, the town of Anson voted to issue not exceeding ninety-five thousand dollars in bonds to aid in the construction of the Somerset railroad, and ninety-two thousand three hundred dollars were issued under those votes; and by legal votes at meetings called for the purpose, November 21, 1874, and June 10, 1875, the same town voted to issue twenty-seven thousand five hundred dollars in bonds to further aid in the construction of the same railroad and the bonds were issued to that amount; the valuation of the town in 1874, was $505,920 and in 1875, $501,476. *Held*, that these several votes were authorized by special laws, 1868, c. 622, § 1, and R. S., c. 51, § 80, and the bonds thus issued are valid and binding on the town.

ON REPORT.

Assumpsit on sundry coupons cut from town bonds, as follows: $396 from bonds issued under vote of March 23, 1868; $90 from bonds issued under votes of October, 1, 1870; and $434 issued under vote of November 21, 1874, and June 10, 1875, in all amounting to $920.

The following are the bonds from which the coupons were taken (one from each series).

"$100. State of Maine. No. 56.

Loan of town of Anson.

Somerset Railroad.

Be it known that the town of Anson will pay at the treasurer's office in Anson, to the holder of this bond, the sum of one hundred dollars in forty years from the date hereof, and will also pay at the same place the annual coupons hereto attached as the same shall severally become due. Value received. In testimony whereof we, the selectmen and treasurer of said town by virtue of authority conferred by the vote passed at a legal town meeting held therein March 23, A. D. 1868, and by an act of the legislature approved March 6, A. D. 1868, and in conformity thereto, do issue this bond with coupons attached, and have set our hands hereunto, and the treasurer has signed said coupons at said Anson this first day of July, A. D. 1869.

Albert Moore,
W. W. Pease, } Selectmen.
John M. Hilton.

J. A. Fletcher, Treasurer."

In the centre of the above is "$100."

"$100. State of Maine. No. 142.
Loan of town of Anson.
Somerset railroad.

Be it known that the town of Anson will pay at the treasurer's office in Anson, to the holder of this bond, the sum of one hundred dollars in forty years from the date hereof, and will also pay at the same place the annual coupons hereto attached as the same shall severally become due. Value received. In testimony whereof we, the selectmen and treasurer of said town, by virtue of authority conferred by the vote passed at a legal town meeting held therein October 1, A. D. 1870, and by an act of the legislature approved March 6, A. D. 1868, and in conformity thereto do issue this bond with coupons attached, and have set our hands hereunto, and the treasurer has signed said coupons at said Anson this first day of October, A. D. 1870.

Albert Moore,
Mark Emery, Jr. } Selectmen.
John Tinkham.

J. A. Fletcher, Treasurer."

In the centre of the above is "$100."

"$500. State of Maine. No. 11.
Loan of the town of Anson.
Eighteen hundred and seventy-four.

Be it known that for value received the town of Anson will pay at the treasurer's office in Anson to the holder of this bond, the sum of five hundred dollars forty years from the date hereof, and will also pay at the same place the semi-annual coupons hereto attached as the same shall severally become due. In testimony whereof we, the selectmen and treasurer of said town, by virtue of authority conferred by the votes passed at town meetings held therein November 21, 1874, and June 1875, for and in behalf of said town do issue this bond with coupons attached, and have set our hands hereunto, and the treasurer has signed said coupons at said Anson this tenth day of November, A. D. 1875.

Albert Moore,
H. T. Emery, } Selectmen.
Jesse Hilton.

T. F. Paine, Treasurer."

In the centre of the above is "$500."

The valuation of the town for the year 1868 was $520,990; 1869, $490,760; 1870 and 1871 about the same; 1874, $505,920; 1875, $501,476.

Other material facts stated in the opinion.

Webb and Haskell, for the plaintiff, cited: *Lane* v. *Embden*, 72 Maine, 354; *Augusta Bank* v. *Augusta*, 49 Maine, 507; *Deming* v. *Houlton*, 64 Maine, 254.

J. J. Parlin, for the defendants, contended that there was no authority for the town to issue the third series of bonds amounting to $27,500 and they were not therefore liable for the coupons taken from those bonds.

At the time of the first action by the town if they relied upon the public law, (stat. 1867, c. 119,) they could only issue about $26,000. If they relied upon special statute (private laws, 1868, c. 622, § 1) they could issue $100,000. They issued $92,300 under the authority, the recitals show, of the special act. They could then at the most only issue $7700 more, yet they did in fact issue bonds for $27,500 and as the recitals in this issue of bonds do not show the authority for the action we are not estopped from denying the authority. Jones on Railroad Securities, § 298; *County Court* v. *Howard*, 13 Bush. (Ky.) 101; *Atchison* v. *Butcher*, 3 Kans. 104; *Marsh* v. *Fulton Co.* 10 Wall. 676. Council further cited: *P. and O. R. R.* v. *Standish*, 65 Maine, 66; *Andrews* v. *Boylston*, 110 Mass. 214; Jones, Railroad Securities, § § 288, 289, 296; *Lewis* v. *Bourbon Co.* 12 Kans. 186.

DANFORTH, J. The coupons upon which this action rests, are cut from three distinct classes of bonds issued under three different votes of the town of Anson, and their validity depends upon the validity of the bonds from which they were taken. There is no question as to the authority of the town to issue the first two series and the votes under which they were issued appear to be in conformity with the law; and if it were otherwise the recitals in the bonds are such as to bring the case within that of *Lane* v. *Embden*, 72 Maine, 354, which must be decisive of it, so far as it depends upon the first and second issues.

The third issue raises a different question and upon these have been the arguments of counsel. These bonds are objected to both upon the want of authority in the town and the invalidity of the vote under which they were issued. In these bonds the only recital we find, is that they were issued "by virtue of authority conferred by the votes passed at town meetings held therein November 21, 1874 and June 1875." Whatever effect this recital may have it leaves the question of authority open to denial by the defendant, and imposes upon the plaintiff the burden of showing that the town was authorized by act of the legislature to issue these bonds. Assuming this duty, the special act of 1868, c. 622, is put into the case and R. S., c. 51, § 80 is cited. The former of these acts authorizes the defendant town to "raise by tax or loan such sums of money as it shall deem expedient not exceeding one hundred thousand dollars, . . and may appropriate the same to aid in the construction of the Somerset railroad." By the latter act "any city or town, by a two-thirds vote, at any legal meeting called for the purpose, may raise by tax or loan . . a sum of money not exceeding in all five per cent. on its regular valuation for the time being and appropriate it to aid in the construction of railroads in such manner as they deem proper." This act with some change in the phraseology was taken from the act of 1867, c. 119, which was in force when the special law of 1868, c. 622 was passed.

The first and second issues amounted to $92,300, but only $80,000 were raised. But whether the authority of the town was exhausted to the extent of the greater or less sum is immaterial now, for in either case neither law alone is sufficient to authorize the additional $27,500, while both of them are sufficient. The first two issues as appears by the bonds themselves derive their validity from the act of 1868. Hence the authority under that act is exhausted certainly not beyond the $92,300, leaving $7,700 still to be raised. Add to this five per cent. of the valuation of the town when the last bonds were issued and we have a larger sum than that covered by the bonds.

There is nothing in the vote or upon the face of the bonds to prevent such addition, for no allusion is made in either to the

statute under which they were issued. This was not necessary. The special act was made specifically applicable to the town, became a part of its organic law and of which the voters were bound to take the same cognizance in action upon matters to which it related, as of any other law relating to their organization. Of the public act every person is presumed to have knowledge. *Canton* v. *Smith*, 65 Maine, 203.

Thus if the two acts were in force as applicable to the town of Anson when the votes to issue the bonds in question were passed, we find sufficient authority for such votes.

It is however, claimed that by the special law of 1868, the public law was so far modified and limited in its effect that it was no longer applicable to the town of Anson. This view is attempted to be sustained on the ground that the special law authorizes a sum *not exceeding* one hundred thousand dollars, and therefore the five per cent. of the valuation cannot be added to it. But although the act of 1867 was in force when the special law was enacted it was not so in 1874 when the vote was passed. It had then been repealed and the R. S., c. 51, § 80, had been enacted. This provides that any town may for railroad purposes raise a sum of money not exceeding *in all* five per cent. of its valuation for the time being. There is therefore more reason to suppose that the public law had abrogated the private so far as it had not been executed than the reverse. But neither proposition can be entertained unless we concede that one legislature can bind another, which certainly cannot be admitted except in case of contracts. It is immaterial whether we consider the public or private law the prior one. The two are independent acts, each standing upon its own authority, making its own grant, to be executed precisely as if the other had no existence. It is true a subsequent legislature, with exceptions not material to this case, may modify or repeal the acts of a former. But no such modification or repeal will be presumed unless necessary, from the inconsistency of the laws, or from language used showing that such was the intention of the legislature. Here is no such inconsistency. Both may well stand together and each be executed without interfering with the other; and there is in the one no

allusion to the other, no language tending to show an intention on the part of the legislature that either should affect the other. The words "not exceed the sum" named in the one, and "not exceeding in all the five per cent." in the other, must be construed as having reference to the amount to be raised under the particular law in which they are used. Otherwise they can have no force whatever. If subsequent to the special act of 1868, another act had been passed authorizing the same town in the same language to raise a sum not exceeding one hundred thousand dollars, making no allusion to the former act, it would hardly be contended that the town would be limited to a single sum of one hundred thousand, and not authorized to raise that sum under each. Thus the two may stand together and so standing they give the town the necessary authority to raise all they have done.

It is further objected that it does not appear that the vote was passed by the necessary majority. It is true that under either act the sum to be raised and its appropriation must be determined by a two-thirds vote. At the meeting of November 21, 1874, the record shows a substantially unanimous vote in favor; only two dissenting votes in two hundred and two as the whole number. This vote authorized the sum to be raised, and appropriated "to aid in the construction of the Somerset railroad, by purchasing the first mortgage bonds of the said railroad company, to the amount aforesaid; upon condition that said railroad crosses the Kennebec river between Madison and Anson as at present located." The remaining conditions refer to the time of issuing, rate of interest, and at what price to be sold. Here is but one condition precedent, that of the place where the road shall cross the river, to the raising and appropriating the money. The vote of June, 1875, made some alterations in the former vote, one only in the condition precedent, the remainder in the other conditions and none in the vote to raise and appropriate, or in the manner of appropriation. The change in the location, as appears by the records, was made by the necessary two-thirds vote. Thus the amount to be raised, the appropriation and the manner of appropriation, with the conditions on which this was to be done, all and each had the required sanction of a two-thirds vote. This is all

that is required under the case cited of the *P. & O. R. R. Co.* v. *Standish*, 65 Maine, 66.

Whether the other alterations including that of interest, had a two-thirds vote in their favor does not certainly appear. An inference may be drawn that they did from the fact that all seem to have been passed as one vote and the statement of the fact as to the majority may easily have been put in, in the wrong place. But whether so or not is immaterial. The case finds that the road crossed the river at the required place. The rate of interest certainly does not require a two-thirds vote, nor as it would seem do the other conditions. But however this may be it was by a two-thirds vote made the especial duty of the selectmen to issue and dispose of the bonds at the time and in the manner authorized by the vote. They have done so with the recital that it was done by "virtue of the authority conferred by the votes" specified. If the selectmen were not made the judges as to the authority by which the votes were passed, they were as to the times when they should be issued and whether the conditions as to the time of issuing had been fulfilled.

The exchange of the town bonds for those of the railroad company can be no objection to their validity. The purchase of railroad bonds was not the object in view. This exchange was, or was supposed to be, an aid, and the taking of railroad bonds in payment, or as security, was no more objectionable than to have taken the stock for the same purpose.

There must be judgment for the plaintiff for the amount of the coupons, nine hundred and twenty dollars and interest, before the date of the writ as agreed in the report, five dollars and eighty-three cents, making nine hundred and twenty-five dollars and eighty-three cents, and interest from the date of the writ.

Judgment for the plaintiff for $925.83 and interest from date of the writ.

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

ALBERT PATTEN *vs.* DANIEL KIMBALL, JUNIOR, and others.

Somerset. Opinion May 29, 1882.

Poor debtor's bond. R. S., 1857, c. 113, § 45. Attorney at law. Waiver.

A bond taken under and by force of R. S., 1857, c. 113, though not technically a statute bond, would be subject to the limitation provided in § 45, and an action thereon must be brought within one year.

It is competent for an attorney of record, upon whom the citation for a poor debtor's disclosure may be served, to waive any illegality in the service.

ON REPORT on agreed statement.

Action on poor debtor's bond. Plea, general issue with brief statement setting up the statute of limitations and performance of one of the alternative conditions of the bond by disclosing and taking the poor debtor's oath.

The bond was in common form, but the sureties were not approved in writing by the creditor, nor by two or three justices of the peace and quorum of the county where the debtor was arrested or imprisoned.

March 5, 1870, the principal in the bond, made application to a magistrate who issued the citation, provided by the poor debtor law, to the creditor which was served upon the attorney of record of the creditor, who wrote and signed the following upon the back of the citation:

"I hereby acknowledge service by copy of the within paper, waiving any and all illegality of service.

March 12, 1870. Hiram Knowlton."

S. H. Willard, for the plaintiff.

The bond is not a statute bond because it was not approved by the creditor in writing, or by two justices of the peace and quorum. It must be, then, a common law bond, and an action may be maintained on it at any time within twenty years.

The pretended disclosure was not a performance because there was no sufficient service of the citation.

Bean and Beane, for the defendants, cited: *Lewis* v. *Brewer*, 51 Maine, 108; *Bank* v. *Ford*, 49 Maine, 99; *Ross* v. *Berry*, 49 Maine, 434; *Bell* v. *Furbush*, 56 Maine, 178; *Smith* v. *Brown*, 61 Maine, 70.

DANFORTH, J. Though the bond in this case is not technically a statute bond, it was taken under and by force of R. S., 1857, c. 113. There was no other authority by which it could have been taken. Therefore the limit provided in § 45, of that chapter, must be held applicable and the action not having been commenced within the year cannot be maintained.

It also appears that the first alternative condition of the bond was performed. The only objection made upon this branch of the case is a want of sufficient service of the citation. By the statute of 1860, c. 142, in force when the bond was given, and when the citation was served, a service upon the attorney of record was sufficient. As the bond makes no provision as to service, this statute must govern. *Smith* v. *Brown*, 61 Maine, 70. If it was sufficient to serve it upon the attorney of record, it was competent for him to waive any illegality in the service. *Lord* v. *Skinner*, 9 Allen, 376. The case finds that Mr. Knowlton was the attorney of record and the proof of his waiver is conclusive. It is in writing and his signature is not denied.

Judgment for defendants.

73 498
94 368

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

THE NATIONAL EXCHANGE BANK OF BOSTON

vs.

SILAS W. MCLOON, and HENRY SPALDING and J. FRED MERRILL, trustees; DYER AND GURNEY, claimants.

Knox. Opinion May 29, 1882.

Assignment of part of a chose in action. Equity. Trustee process.

The assignment of a part only of an entire demand or chose in action, is valid in equity, so as to be upheld in a court of equity, against the consent of the person owing the demand assigned, in all cases where just and equitable results may be accomplished thereby.

The court has jurisdiction to enforce an equitable assignment of a part of a demand or chose in action, as against a creditor who, after such assignment, attaches upon trustee process the whole of the demand or fund, the assignee having become, under the statutory provision therefor, a party to the trustee suit. All parties interested are in this case before the court.

Silas W. McLoon made, substantially, the following assignment: "Whereas William McLoon was the owner of the ship Louisa Hatch, captured by the confederate steamer Alabama, and died, in April, 1871, leaving me one of seven heirs to his estate: Now, therefore, I, for a valuable consideration, do hereby assign, transfer and convey to Dyer and Gurney, all my claim and demand, of every name and nature, for damages, compensation and remuneration for the destruction of said ship, due from or to be paid by the United States, or the administrators of my father's estate, or any and all other persons, and all sums of money due or to be paid therefor; meaning hereby to assign and convey to said Dyer and Gurney all the right, claim and demand to which I am or may be entitled as heir at law of said William McLoon, and arising from and growing out of the destruction and loss of said ship." The ship destroyed belonged, in fact, to the father and a brother of the assignor. After the loss the brother died, leaving the father his sole heir; then the father died, leaving the assignor one of his heirs; next came the assignment; then the administrators of the father, who were also administrators of the deceased son, collected from the United States an award for the value of the ship, her freight and fittings. It turns out that the administrators are indebted to the assignor, not for a share of the award specifically and separately, but for his share of all his father's personal estate in their hands.

Held, that this instrument creates a valid equitable assignment of the assignor's interest in all the fund which comes to his father's estate from the total losses sustained by the father and deceased son by the destruction of the ship.

Held, also, that all the expenses of obtaining the award and its collection are a charge upon the fund, to be deducted therefrom; but that the assignor's share of all other charges and expenses, and all sums of money advanced to him by the administrators, are a charge upon his interest in the other assets of the estate in preference to imposing them upon the interest assigned.

ON REPORT.

Assumpsit for money paid and expended. The writ was dated May 10, 1876, and served on the alleged trustees on the same day.

The question presented to the court related to the disposition of the funds in the hands of the trustees. The facts shown by the disclosure are sufficiently stated in the opinion.

The assignees of a portion of the funds in the hands of the trustees appeared and claimed the funds. They were admitted as parties to the suit and filed allegations setting up the following assignment:

"Whereas, William McLoon of Rockland, in the State of Maine, was the owner of the ship Louisa Hatch, which was captured by the Confederate Steamer, Alabama, during the late war between the United States and the Southern Confederacy, so called.

"And whereas, said William McLoon died in April, 1871, leaving Silas W. McLoon, his son, and one of seven heirs to his estate.

"Now, therefore, I, said Silas W. McLoon of Rockland, in the county of Knox and State of Maine, in consideration, five thousand and five hundred dollars to me paid by Edwin Dyer and James Gurney of Boston, in the commonwealth, co-partners under the name of Dyer and Gurney, the receipt of which is hereby acknowledged, do hereby assign, transfer, and convey to said Dyer and Gurney, and their heirs and assigns, all my claim and demand of every name and nature, for damages, compensation and remuneration, for the destruction of said ship Louisa Hatch, due from, or to be paid by the United States, or the administrators of my father's estate, or any and all other persons, and all sums of money due, or to be paid therefor; meaning hereby to assign and convey to said Dyer and Gurney, all the right, claim and demand to which I am, or may be entitled to, as heir at law of said William McLoon, and arising from, and growing out of the destruction and loss of said ship.

"And I hereby authorize said Dyer and Gurney, and their heirs and assigns, to use my name in such manner as they may find necessary to prosecute, collect and receive said claim, and to compound and receipt for the same.

"The same to be held and enjoyed by said Dyer and Gurney and their executors, heirs, administrators and assigns, to the same extent I could have done, had this instrument not been made.

"Witness my hand and seal this seventh day of May, A. D. 1875."

Signed, sealed, witnessed and acknowledged before a justice of the peace.

The following were the terms of the report:

"This case is taken from the jury and reported to the law court, and that court is to determine the validity of the claim made by the claimants, and also whether the trustees are chargeable. If the claim of the claimants is sustained, the case is to stand on the docket at *nisi prius* to enable the trustees to determine the amount for which they are chargeable. All evidence is subject to any legal objection as if properly made when offered."

A. P. Gould, for the plaintiff.

The assignment, Silas W. McLoon to Dyer and Gurney was void in law for many reasons.

It conveys "all my claim for damages and compensation for the destruction of the ship Louisa Hatch, to be paid by the United States government, or the administrators of my father's estate." He had no such claim. He had no interest in the ship; and at the time of the assignment he had no claim against the administrators, except for his distributive share of his father's estate.

A declaration of the meaning or intention of a grantee, does not enlarge the grant, only to explain it, and if the terms are not sufficient without the explanatory clause, nothing passes. Hence the expressed intention "to assign all the right, claim and demand to which he is entitled as heir of William McLoon arising out of the destruction of the ship," conveyed nothing.

The most favorable view which can be taken for the assignees, is, that the defendant undertook to assign one-seventh part of the money which the administrators might receive on the Alabama claim for his father's eighth part of the ship.

It amounts to this, one of seven heirs undertakes to assign his interest in a chose in action which belonged to his father's estate, an estate of over four hundred thousand dollars, with many choses in action due to it, some of which were unsettled at the time of the assignment.

It would be vain to look for authority to sustain such an assignment.

Even an assignment of an aliquot part of his distributive share of his father's estate, would have been void in law without the assent of the administrators and a promise on their part; and for

a much stronger reason an assignment of what he supposed would be his share of a single chose in action, then due to his father's estate, would be void. *Getchell* v. *Maney*, 69 Maine, 442; *Gibson* v. *Cooke*, 20 Pick. 15; *Robbins* v. *Bacon*, 3 Maine, 346; *Manderville* v. *Welch*, 5 Wheat. 277; 2 Kent's Com. (7th ed.) 688, note *e*; *Tierman* v. *Jackson*, 5 Peters, 480; Drake, Att. § 611, and cases cited.

The case of *Gibson* v. *Cooke*, *supra*, goes on all fours with the case at bar; and, approved as it is by our court, is decisive.

In that case, the trustee under the will of the plaintiff's mother stood in precisely the same relation to the assignor as the trustees in this case stood to the defendant at the time of the attempted assignment. The reason for rejecting the assignment in that case applies much more strongly to this one, because if the assignment is valid, the administrators would be compelled, not only to open an account and settle with the several persons, but also with individual claims due to the estate, which would much increase the hardship on them.

If an heir at law can assign to one person his interest in one particular claim due to his ancestor's estate, he can assign his interest in each and every claim due to the estate to as many different persons. This would compel the administrators to keep complicated accounts and answer to the suits of many different persons.

The assignment was void because not executed according to the laws of the United States. R. S., U. S. § 3477; *Trist* v. *Child*, 21 Wall. 441; *United States* v. *Gillis*, 95 U. S. (5 Otto,) 407; *Becker* v. *Sweetzer*, 15 Minn. 427; *Creighton* v. *Black*, 2 Mon. Ter. 354.

The question here is as to the effect of the assignment upon the legal liability of the administrators, not how the assignor would be affected. And the following cases are not in point: *Wood* v. *Wallace*, 24 Ind. 226; *Patten* v. *Wilson*, 34 Pa. St. 299; *Lowery* v. *Steward*, 25 N. Y. 239; *Parker* v. *Syracuse*, 31 N. Y. 376; *Algar* v. *Scott*, 54 N. Y. 14; *Simpson* v. *Bibber*, 59 Maine, 196.

It is claimed that the assignment is good in equity. There is no distinction between actions at law and suits in equity, in the

protection which courts afford to assignments. Courts of law in this State "in all cases uphold and protect the equitable interests of the assignee." *Pollard* v. *Ins. Co.* 42 Maine, 221.

Would a court of equity compel these administrators to open an account to as many persons as each heir chose to assign some portion of his share? *A fortiori*, would the court require them to subdivide every claim due to the estate? None of the authorities justify the assertion that a court of equity would compel the administrators to do all this. *Ex equo et bono*, it could not be required.

In no event can the assignment cover the claim for any part of the vessel which his father did not own. Seven-eighths of the net amount of the Alabama claim comes into the hands of these administrators as cash from the estate of the son and not in payment of a claim of this estate against the government.

Orville D. Baker, (*Joseph Baker* with him,) for the claimants, cited: *Brooks* v. *Cook*, 8 Mass. 246; *Waite* v. *Osborne*, 11 Maine, 185; *Kimball* v. *Woodman*, 19 Maine, 200; Dicey on Parties, rule 45, p. (221,) (319); 2 Chitty Pl. 16th Am. ed. 119, obs. See *Farwell* v. *Jacobs*, *Admr.* 4 Mass. 634; *Prescott* v. *Morse*, 64 Maine, 422; 2 Wm's Ex'rs, 6th ed. 1803; *Hutchinson* v. *Sturges*, Willes, 261, 3; *Wood* v. *Wallace*, 24 Ind. 226; *Patten* v. *Wilson*, 34 Pa. St. 299; *Lowery* v. *Steward*, 25 N. Y. 239; *Parker* v. *Syracuse*, 31 N. Y. 376; *Alger* v. *Scott*, 54 N. Y. 14; *Caldwell* v. *Hartupee*, 70 Pa. St. 74; *Simpson* v. *Bibber, and Tr.* 59 Maine, 196; 2 Story Eq. Jur. § 1044; *Row* v. *Dawson*, 1 Ves. 431; *Yeates* v. *Groves*, 1 Ves. Jr. 281; *Ex-parte Alderson*, 1 Madd. 39: *Ex-parte South*, 3 Swanst. 392; *Lett* v. *Morris*, 4 Sim. 607; *Moody* v. *Kyle*, 34 Miss. 506; *Supt. Pub. Schools* v. *Heath*, 15 N. J. Eq. 22; *Pomeroy* v. *Life Ins. Co.* 40 Ill. 398; *Caldwell* v. *Hartupee*, 70 Pa. St. 74; *Pollard* v. *Ins. Co.* 42 Maine, 225; *Jordan* v. *Parker*, 56 Maine, 557-8; *Buffington* v *Gerrish*, 15 Mass. 156.

PETERS, J. It appears, from the facts in this case, that William McLoon and his son, Charles William McLoon, were the owners of a ship destroyed by the confederate cruiser Alabama, the former owning an eighth and the latter seven-

eighths thereof; that soon after the loss of the ship the son died intestate, the father being his sole heir; that soon after the son's decease the father died intestate; that his administrators, who were also administrators upon the estate of the son, petitioned the court of commissioners upon the Alabama claims, to recover the value of the vessel, her freight and fittings, setting forth all the claims for the father and son in a single petition, and recovering accordingly; that during the pendency of the petition, Silas W. McLoon, another son of William, and as such entitled to one-seventh of his estate, assigned his share of the funds, to be received by his father's administrators for the loss of the ship, to certain of his creditors; that, after the administrators received the funds, other creditors of Silas sued him and trusteed the administrators; that it turns out that the administrators are indebted to Silas, not for his share of those funds alone and separate from the other funds of the estate, but for a seventh of the entire funds of the estate in their possession, which exceed the amount recovered for such loss; and that there is a conflict of claim for the assigned fund between the attaching creditors and assignees.

The questions are these: *First:* Is the assignment of a part only of an entire demand or chose in action, valid in equity, so as to be upheld in a court of equity, against the consent of the person owing the demand assigned? *Second:* If so, is the fund in a situation, under the proceedings now before us, to authorize us to decide upon its equitable distribution? *Third:* To what extent is the fund to be subjected to an equitable distribution, if at all, upon the facts adduced?

The first is an important question not before decided in this State. It is universally admitted, at the present day, that *the whole* of a chose in action may be assigned, and the assignment be binding upon the debtor. That is but an equitable assigment, unknown to the ancient common law, but such as the later common law takes notice of and protects, allowing the assignee to use the legal remedies in the name of the assignor. But courts of law, not, as such, exercising equitable jurisdiction, do not protect or recognize an assignment of a part only of an entire demand. At

law, a partial assignment may be good between the parties, and, if the assignor collects the money, he would in such case hold it as the trustee of the assignee. But the assignee has no legal remedy against the debtor who does not become a party to the arrangement. The reason for the legal doctrine is obvious. The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent, it can be divided and sub-divided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear. In support of this doctrine, as one of law, the following cases have been commonly cited and relied upon: *Mandeville* v. *Welch*, 5 Wheat. 277; *Tierman* v. *Jackson*, 5 Pet. 580; *Gibson* v. *Cooke*, 20 Pick. 15; *Robbins* v. *Bacon*, 3 Maine, 346.

In a court of equity, however, the objections to a partial assignment of a demand which are formidable in a court of law, disappear. In equity, the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him, or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned.

The debtor is not the only party whose interests should be considered. There is as much natural equity, in many cases, in protecting an assignment of a part of a claim as an assignment of the whole of it. Equitable assignments are the outgrowth of the requirements and refinements of the present business era. In many ways, directly and indirectly, do circumstances create assignments of parts of funds, in dealings through servants,

tenants, consignees, bankers and other agencies. Disastrous results will often be experienced by deserving and innocent persons, if this boon be not granted by courts of equity. The case at bar illustrates it. The parties in this case supposed the assignment covered all the funds the assignor had, while it turns out that the administrators had a slightly larger amount to be distributed. This is a race, too, between creditors. The statute allows the funds to be intercepted by creditors in different suits, and the administrators might be required to make as many payments as there are suits. Should it be, that a debtor cannot assign to a creditor what the same creditor may attach? We must bear in mind that both the common law and equity have been constantly progressive in the consideration of commercial questions. And the spirit of progress has also actuated legislatures in the same direction. Most of the states in the union have passed laws allowing an assignee of a chose in action to prosecute the claim in his own name; and the privilege is now most liberally accorded to an assignee by an English enactment, notwithstanding Lord COKE's belief, that "*any* right of assignment would be of great oppression of the people, and the subversion of the due and equal execution of justice." See act of 1873, (36 and 37 Vict.) c. 66, sec. 25, sub-sec. 6. We think, upon reason and principle, partial assignments should be sustained in a court of chancery, in all cases where it can be done without detriment to the debtor or stakeholder, whenever equitable and just results may be accomplished by it.

The doctrine is vindicated, directly and indirectly, by a great deal of authority. It was recognized at an early day in the English chancery cases. *Row* v. *Dawson*, 1 Ves. Sen. 431; *Yeates* v. *Groves*, 1 Ves. Jr. 481; *Ex parte South*, 3 Swanst. 392; *Fitzgerald* v. *Stewart*, 2 Sim. 333; S. C. 2 Russ. and My. 457; *Lett* v. *Morris*, 4 Sim. 607; *Watson* v. *The Duke of Wellington*, 1 Russ. and Mylne, 602.

In *Burn* v. *Carvalho*, 4 Mylne and Cr. 690, Lord COTTENHAM lays down this statement of the principle: "In equity, an order given by a debtor to his creditor upon a third person having funds of the debtor, to pay the creditor out of such funds, is a

binding equitable assignment of so much of the funds." And previous cases are reviewed in the opinion in that case, in the following manner: "In *Row* v. *Dawson*, Lord HARDWICKE says, 'It is a credit on the fund, and must amount to an assignment of so much of the debt; and, though the law does not admit an assignment of a *chose in action*, this court does, and any words will do, no particular words being necessary thereto; and in *Yeates* v. *Groves*, Lord THURLOW says: 'This is nothing but a direction by a man to pay part of his money to another for a valuable consideration. If he could transfer, he has done it; and it being his own money, he could transfer.' In *Ex parte South*, Lord ELDON says: 'It has been decided in bankruptcy that if a creditor gives an order on his debtor to pay a sum in discharge of his debt, and that order is shown to the debtor, it binds him. On the other hand, this doctrine has been brought into doubt by some decisions in the courts of law, which require that the party receiving the order should, in some way, enter into a contract. That has been the course of their decisions, but is certainly not the doctrine of this court.' In *Fitzgerald* v. *Stewart*, and *Lett* v. *Morris*, the same rule was acted upon; and, in *Watson* v. *The Duke of Wellington*, Sir J. LEACH thus defines an equitable assignment: 'In order to constitute an equitable assignment, there must be an engagement to pay out of a particular fund.' . . . Here there is an existing fund in an agent's hand, and there is a distinct contract to discharge the liability out of that fund."

Lord TRURO in *Rodick* v. *Gandell*, 1 De Gex. Mac. and Gor. 763; S. C. 12 Beav. 325, reviewed the cases extensively, and expresses a similar opinion as to the principle to be deduced from them. The same rule has been repeatedly acted upon in the later English chancery decisions. *Addison* v. *Cox*, L. R. 8. Ch. 76, reviews and approves the doctrine of the earlier cases. That was a case where an officer assigned a part of a sum due to him from the sale of his commission, and the sale was held to be valid. *Brice* v. *Bannister*, L. R. 3 Q. B. Div. 569 is a pertinent case. The facts were these: A agreed to build a vessel for B, the price of which was to be paid by installments.

Before the vessel was finished, the builder, being in debt to C, by an instrument in writing directed B to pay to C one hundred pounds out of monies due or to become due from B to the builder. B had notice but refused to be bound by it. The written transfer was held to be an equitable assignment of that part of the money then due to the assignor, and it was decided that the assignee could sustain an action therefor against B, under a provision of the act creating the Supreme Court of Judicature which allows an assignee to have in his own name either legal or equitable remedies. Other cases are decided upon the same principle. *Ranken* v. *Alfaro*, L. R. 5 Ch. D. 786; *Ex parte Hall*, L. R. 10 Ch. D. 615; *Hopkinson* v. *Forster*, L. R. 19 Eq. 74; *Thompson* v. *Simpson*, L. R. 5 Ch. 659; *Brown* v. *Bateman*, L. R. 2 C. P. 272; *Field* v. *Megaw*, L. R. 4 C. P. 660.

In some cases in Massachusetts the doctrine appears not to have been yielded to, but the discussions have arisen in cases at law and not in equity. *Palmer* v. *Merrill*, 6 Cush. 282; *Tripp* v. *Brownell*, 12 Cush. 376; *Bullard* v. *Randall*, 1 Gray, 605; *Dana* v. *Third Nat. Bank*, 13 Allen, 445.

In New York the doctrine is well established by a series of cases covering a long period of time. *Morton* v. *Naylor*, 1 Hill, 583, and cases cited in note. *Bradley* v. *Root*, 5 Paige, 632; *Phillips* v. *Stagg*, 2 Edw. Ch. 108; *Marshall* v. *Meech*, 51 N. Y. 140; *Alger* v. *Scott*, 54 N. Y. 14; *Brown* v. *Mayor of New York*, 18 Supreme Court R. 22; *Jones* v. *Mayor*, 47, N. Y. Superior Court R. 242. In *Field* v. *The Mayor of New York*, 2 Seld. 179, the precise question was presented and fully discussed and decided in accordance with preceding cases in that state. In *Risley* v. *Phœnix Bank*, 83 N. Y. 318, the rule was again applied and the doctrine affirmed, where the question was disposed of in these words: "The claim that there can be no valid assignment of a part of an entire debt or obligation is opposed to the well settled rule in this state. This point was ruled the same way by the court of King's Bench, in *Tibbetts* v. *George*, 5 Ad. and Ell. 107. The tendency of modern decisions is in the direction of more fully protecting the equitable right of assignees of

choses in action, and the objection that to allow an assignment of a part of an entire demand might subject the creditor to several actions to enforce a single obligation has much less force under a system which requires all parties in interest to be joined as parties to the action." See S. C. 18 Supreme Court R. 484.

The same result is reached by the Pennsylvania court. In their latest case touching the question, *Appeals of the City of Philadelphia*, 86 Penn. St. 179, it was held that the principle, for reasons of public policy, should not apply to claims against a municipality, the court remarking, that "there is no doubt, that as between individuals the rule prevails in equity." In *Daniels* v. *Meinhard*, 53 Georgia, 359, it was held that a holder of a fire insurance policy, after a loss, might assign in writing an interest in the same to a creditor to the extent of the creditor's debt, which would prevent an attachment of it as the property of the assignor by trustee process. In *Stanberry* v. *Smythe*, 13 Ohio St. (N. S.) 495, the court refused to recognize the principle in an action at law, expressly admitting that it would obtain in equity, "where the rights of all the parties could be determined in one and the same controversy." In *Etheridge* v. *Vernoy*, 74, 809, N. C. which was "a civil action in the nature of a bill in equity," the rule was applied. Similar decisions have been made in other courts. *Dowell* v. *Cardwell*, 4 Saw. 217; *Lapping* v. *Duffy*, 47 Ind. 51; *Whitney* v. *Cowan*, 55 Miss. 626. The above are marked cases illustrating the rule. New Hampshire cases cast some light upon the question. *Conway* v. *Cutting*, 51 N. H. 407; *Christie* v. *Sawyer*, 44 N. H. 298. The doctrine is adopted in New Jersey, acted upon in Vermont, and evidently approved by the supreme court of the United States, as a rule in chancery. *Public Schools* v. *Heath*, 15 N. J. Eq. 22; *Claffiin* v. *Kimball*. 52 Vt. 7; *Christmas* v. *Russell*, 14 Wall. 69; *Trist* v. *Child*, 21 Wall. 441.

There is a concurrence of opinion also among text writers, so far as the question is noticed by them. 2 Story Eq. Jur. § 1044; 2 Spence's Eq. Jur. *859; Byles on Bills, (6th Am. ed.) 171; 1 Pars. on Notes and Bills, 334. The American editors of Leading Cases in Equity, (1st ed. vol. 2, pt. 2, p. 234,) say:

"But whatever may be the intrinsic propriety or convenience of the doctrine, it seems too well established by authority to be shaken, that the partial assignment of a debt is binding in equity and will invalidate subsequent payments to the assignor, to the extent thus assigned." In subsequent editions, however, the doctrine is not so conclusively stated. The Roman law contained the same principle. It allowed a single debt to be assigned in parts, but required all the assignees to join in one suit and receive the whole debt at one time. WARE, J., in the case of *Hull of a New Ship*. 2 Ware, R. 203.

The counsel for the attaching creditors relies upon the cases of *Mandeville* v. *Welch*, and *Tierman* v. *Jackson*, *supra*, as asserting that there can be no equitable assignment of a part of a demand which even a court of equity will protect. We understand the opinions in those cases to declare no more than that a court of law cannot protect such equitable assignments. Those were actions at law. In the former, STORY, J., says: "The second question is whether, under all the circumstances of the case, Prior was an assignee in equity *entitled to maintain the present action.*" In the latter case the same judge said the question was whether the assignee could maintain that action, adding these words, "whatever might be the case in a suit in equity, brought to enforce his equitable claims under his assignment." We think the counsel falls into the same error in attributing the same meaning to the words of the opinion in *Getchell* v. *Maney*, 69 Maine, 442. The most that was intended to be said there was, that, without the assent of the debtor, a creditor cannot assign part of a debt or chose in action, so as to give an equitable interest or lien, *which a court of law can recognize and protect*. The learned judge who delivered the opinion of the court in that case did not undertake to say, nor had he any occasion to say, what would be the rule in such a case in a court of equity. As before seen, a court of law protects the assignment of an entire demand, although that is an equitable and not a legal assignment. Further than that the law does not deal with equitable assignments. It matters not whether the partial assignment be by parol or by a formal instrument or by an order or draft upon a

particular fund. Neither law or equity observes any difference in the kinds or modes of assignment. Neither is a legal, while either may be an equitable, assignment. Where a draft or order constitutes an assignment, it must be upon a particular fund. It is not enough that it is drawn upon a debtor by a creditor in general terms.

The next question is, can we, in this proceeding, determine the equitable rights of the parties? We think we can and that we should do so. The statutory provisions relating to trustee process and procedure necessitate our taking jurisdiction of the matter, so far as to decide whether the assignment be valid or not. It would be an useless circuity to require a bill in equity to be instituted merely to settle that controversy. All persons interested are parties to this litigation, which is carried on in most respects as if it were a bill of interpleader. We cannot, by this proceeding, enforce payment to the assignees, but can prevent payment to the attaching creditors. In quite a number of the cases already cited by us, the same question arose and was settled upon similar proceedings.

Lastly: how shall the assets be distributed? It is contended that the instrument by Silas conveys only one-seventh of his father's direct ownership in the Alabama claim. We think the intention was to transfer the assignor's interest in all the fund coming to his father's estate from all descriptions of loss caused by the destruction of the vessel, and from whatever sources obtained, and that the words of the instrument are sufficient to accomplish the purpose intended. The actual intention is clear enough. Equity adheres to the intention.

It appears that Silas owes the estate for advances. Equity requires that his interest in the unassigned assets shall be first exhausted to pay such advances. The attaching creditors can stand in no more favorable situation than their debtor did at the date of their attachments. By assigning one part of the assets he agrees that charges common to all the assets shall be paid by the part not assigned. Equity directs that the assets in which the assignees have no interest, shall bear the incumbrance in preference to imposing any share upon the interest conveyed.

Holden v. *Pike*, 24 Maine, 427; *Shepherd* v. *Adams*, 32 Maine, 63.

The fees of the administrators come under this head; they are not a lien on any particular portion of the estate. Any special expenses attending the recovery of the Alabama claim, entirely incident thereto, should be deducted from that fund. Had anything been allowed to the administrators as commissions upon the estate of Charles W. McLoon, that should have been deducted. That charge, however, is included in a four per cent. commission charged against the father's estate. It may be equitable to consider that charge as arising in the settlement of the son's estate.

We think no other points taken in behalf of the attaching creditors need an especial examination.

An application of these rules to the facts of the case, gives the following result. The Alabama award was ninety-two thousand and fifty-four dollars and eleven cents. After deducting the expenses of prosecuting the claim (four thousand three hundred and forty-two dollars and eighty cents), and also a commission upon the portion of the award coming through the son's estate (three thousand two hundred and twenty-one dollars and eighty-nine cents), and then deducting the widow's share (twenty-eight thousand one hundred and sixty-three dollars and fourteen cents), leaves a remainder (fifty-six thousand three hundred and twenty-six dollars and twenty-eight cents), one-seventh of which (eight thousand and forty-six dollars and sixty-one cents), is the amount of the award really and effectually assigned. The amount which the assignor owes the estate (one thousand five hundred and forty-eight dollars and two cents) is to be paid out of his interest or ownership in any other assets of the estate, so far as such interest goes. Any balance necessary to meet the amount, must be taken and made up from the sum assigned (eight thousand and forty-six dollars and sixty-one cents). The remainder left from the latter sum, so far as required to pay the notes (five thousand five hundred dollars) and interest thereon, must be paid to Dyer and Gurney, the assignees. Any excess left after such payments, if there be such, may be held upon the trustee writs in the order of

attachment, as the assignment is only for security. *Macomber* v. *Doane*, 2 Allen, 541; *Simpson* v. *Bibber*, 59 Maine, 196. If any interest is to be accounted for, that may be added to the sum assigned. And the case, by the terms of the report, is remitted to the court at *nisi prius*, to regulate the rights of the parties upon the rules prescribed in this opinion.

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

CLIMENA M. PIKE *vs.* SARAH NEAL, and another.

Kennebec. Opinion May 31, 1882.

Recognizance.

No recovery can be had upon a recognizance taken in a suit or proceeding when the court to which it is returnable has no jurisdiction of the subject matter.

ON exceptions from superior court.

Debt on recognizance.

The opinion states the case and the material facts.

Arthur Libbey, for the plaintiff.

This recognizance was the voluntary contract of record of the defendants. Voluntary, because they appealed.

The municipal court of Augusta had jurisdiction of the forcible entry and detainer suit. The defendant appealed to the Supreme Judicial Court, and gave the recognizance to pay all intervening costs and rent of the premises. By entering his appeal the court obtained jurisdiction of the parties if they had none of the subject matter.

The defendants thereby obtained the use of the premises of the plaintiff, which of itself is a good consideration for the contract. And the plaintiff electing to accept the contract and treat it as valid, neither the principal nor surety can evade liability on the ground of the irregularity of the appeal. *Allen* v. *Kellan*, (S. C. Penn.) 10 The Reporter, 751.

This is somewhat analogous to the removal of cases from the state to the United States courts where a bond to pay the costs must be given. If the United States court hold that it had not jurisdiction that would not render the bond void.

Here the appeal was taken against the will of the plaintiff and he has been thereby damaged to the extent of at least the intervening rents, and the defendant has received the benefit of the same and should be estopped from setting up the irregularity of her own appeal to avoid paying the plaintiff's damages under the recognizance.

Orville D. Baker, for the defendants, cited: *Owen* v. *Daniels*, 21 Maine, 180; *Dennison* v. *Mason*, 36 Maine, 431; *French* v. *Snell*, 37 Maine, 100; *Jordan* v. *McKenney*, 45 Maine, 306; *Harrington* v. *Brown*, 7 Pick. 232; *Libby* v. *Maine*, 11 Maine, 344; *Dodge* v. *Kellock*, 13 Maine, 136; *Green* v. *Haskell*, 24 Maine, 180; *State Treasurer* v. *Wells*, 27 Vt. 277; *Same* v. *Danforth Crayton*, 140; *Com.* v. *Bolton*, 1 S. and R. 328; *State* v. *Fowler*, 28 N. H. 184; *Coleman* v. *State*, 10 Md. 168.

APPLETON, C. J. This is an action of debt on a recognizance taken on appeal in a process of forcible entry and detainer and tried by the justice of the superior court without the intervention of a jury.

It appears that on May 20, 1878, a process of forcible entry and detainer was commenced by the plaintiff against Nelson S. Neal, in the municipal court of Augusta, on which judgment was entered June third, for the plaintiff, and an appeal therefrom was claimed by the defendant to the next August term of the Supreme Judicial Court and this recognizance was taken by the municipal judge and the appeal allowed as claimed.

The recognizance was duly filed at the August term, and the appeal entered, which at the following October term was dismissed for the reason that the Supreme Judicial Court had not jurisdiction, it having been conferred on the superior court for Kennebec county, by c. 10, of the acts of 1878.

To the ruling dismissing the action exceptions were filed, which were subsequently overruled.

The recognizance was to a court not having jurisdiction. It is an incident to an appeal. When there is no appeal, there can be no recognizance to prosecute the appeal. It is not a voluntary contract. It is compulsory upon an appellant. When the recognizance fails to be in accordance with the statute authorizing it, it is held void. *Owen* v. *Daniel*, 21 Maine, 180; *Dennison* v. *Mason*, 36 Maine, 431; *Jordan* v. *McKenney*, 45 Maine, 306. Much more, must it be held void when no such appeal was allowed as was taken, and consequently the magistrate has no authority to take it. *Harrington* v. *Brown*, 7 Pick. 301. No recovery can be had upon a recognizance taken in a suit or proceeding, of the subject matter of which, the court to which it is returnable, has no jurisdiction. *State Treasurer* v. *Wells*, 27 Vt. 277. The recognizance in suit is void, and no action can be maintained upon it. *State* v. *Fowler*, 28 N. H. 184.

Exceptions overruled.

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

CHARLES N. TOWNES, petitioner for mandamus,

vs.

EUGENE C. NICHOLS, and another.

Hancock. Opinion May 31, 1882.

Mandamus. Corporation. Stock.

The weight of authority inclines against the right to employ mandamus to compel certificates of stock to be issued by a corporation, upon the ground that the petitioner for mandamus can receive full indemnity by purchasing other shares in the market and recovering the price thereof against the corporation in an action of law.

Mandamus does not lie, unless the petitioner's right to the possession of the shares is clear. If the right claimed is a doubtful one, involving the necessity of litigation to settle it, the remedy by mandamus must be denied.

The petitioner claimed to have shares issued to him by virtue of this certificate given by the officers of the corporation: "North Castine Mining Company. This certifies that Charles N. Townes is entitled to two hundred shares in the company deliverable according to the special agreement between the holder and the company. According to said agreement this certificate

is not transferable." *Held*, that a controversy existing between the parties as to their legal rights, the petition for mandamus must be denied.

ON REPORT.

Mandamus to compel the officers of the North Castine Mining Company to issue to the petitioner a certificate of stock for two hundred shares of the capital stock of the company.

The opinion states the material facts.

H. A. Tripp, for the plaintiff.

The court has power to issue the writ prayed for. R. S., c. 77, § 4; *Smyth* v. *Titcomb*, 31 Maine, 272; Angel & Ames, Corp. § § 707, 709, 710; *Strong, Pet'r*, 20 Pick. 484; *Baker* v. *Johnson*, 41 Maine, 15.

C. J. Abbott, for the defendants, cited: 6 Dane's Abr. c. 186, art. 2, § § 13, 16; 6 Bacon's Abr. Title, Mandamus F; *Hartshorn* v. *Ellsworth*, 60 Maine, 276.

PETERS, J. This is a petition for a writ of mandamus, to compel the directors of a mining company to require its ministerial officers to issue to the petitioner a certificate of shares in the capital stock of the company. The case is submitted to us upon the petition and the testimony reported in support of it. There are no formal pleadings, but the respondents stand in the attitude of demurring to the petition and the evidence adduced.

The petitioner's claim is founded upon a receipt or certificate of the treasurer of the company, the material part of which is in these words: "North Castine Mining Company.—This certifies that Charles N. Townes is entitled to two hundred shares in the company, deliverable *according to the special agreement between the holder and the company*. According to said agreement this certificate is not transferable, and any assignment will not be recognized by the company as valid."

The respondents contend that mandamus does not lie against the directors, but that it should go against the company, if at all, or against its ministerial officers, or against both. We need not pass upon this point, however, in making our present decision.

It is next contended by the respondents, that a remedy by mandamus does not lie against a private corporation or any of

its officers to compel the issuance of certificates of stock; that it is a public remedy, to be used only in proceedings against public corporations or their officers. It is undoubtedly true that the weight of authority inclines against the right to employ this remedy to compel a transfer of stock upon the books of a corporation or to compel certificates of stock to be issued by a corporation, if the petitioner can be indemnified for the refusal by the recovery of damages in an action at law. And a majority of the adjudged cases hold that the petitioner in such a case as the present would receive full indemnity by purchasing other shares in the market and recovering the price thereof against the corporation in an action of law. The idea of the cases is that mandamus is an extraordinary remedy not called for upon merely ordinary occasions. *Baker* v. *Johnson*, 41 Maine, 15; *Murray* v. *Stevens*, 110 Mass. 95; *Stackpole* v. *Seymour*, 127 Mass. 104; *Bank* v. *Kortright*, 22 Wend. 348; *Ex parte Fireman's Ins. Co.* 6 Hill (N. Y.) 243; Wood on Mandamus, 17; High on Extraord. Rem. § 313; Field on Cor. § 504; A. & Ames on Cor. § § 710, 711; Morawetz on Cor. § 337, and note citing the principal cases upon the question. We need not, however, commit ourselves to an expression of opinion upon this question upon this occasion, inasmuch as another point arises the determination of which we regard as decisive of the case before us.

All the authorities declare that the remedy by mandamus cannot be resorted to in a case like this, unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, mandamus must be withheld. Mandamus is the right arm of the law. Its principal office is, not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary law-suits or equitable proceedings. It is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise. Its very nature implies that the law, although plain and clear, fails to be enforced and needs its assistance.

An application of this rule defeats the petitioner's claim under the present proceeding. We do not know what the rights of the

parties are. The purpose of the petition seems to be to give the petitioner absolute possession and control of the shares. Still, there is no assertion that he is deprived of dividends or of an eligibility to any of the offices or trusts of the company. He is entitled to shares, "deliverable according to the special agreement" between him and the company. We know not what that agreement may be. The present certificate is declared to be unassignable. The respondents, it seems, claim that "the shares have been pooled" by the company. We are not informed by the case what that process is, nor of the rights of the parties in respect to it. There is evidently a controversy between the petitioner and the company or its officers, and we have not the means of knowing whether the petitioner's claim is a just and legal one or not. It should appear to be an unquestionable claim.

Petition denied.

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

STATE OF MAINE *vs.* WESTERN UNION TELEGRAPH COMPANY.

Cumberland. Opinion May 31, 1882.

Constitutional law. Stat. 1880, c. 246. Taxation of telegraph companies.

Stat. 1880, c. 246, entitled "an act for the taxation of telegraph companies," is constitutional, and a tax imposed under its provisions is valid.

This statute was intended to and does impose a tax upon the use of the property, or business of the corporation, and not upon the property itself.

ON REPORT.

An action to recover the tax of twenty-five hundred dollars assessed by the Governor and Council upon the defendant corporation, for the year 1880, by virtue of stat. 1880, c. 246, which was enacted March 19, 1880, and reads as follows:

"An act for the taxation of telegraph companies. Be it enacted by the senate and house of representatives in legislature assembled, as follows:

"Section 1. That every telegraph corporation, company or person doing business within the limits of this State shall annually

pay into the State treasury a tax of two and one-half per centum on the value of any telegraph line owned by said corporation, company or person within the limits of this State, including all poles, wires, insulators, office furniture, batteries and instruments, and any circumstances or conditions which affect the value of the property.

"Section 2. Every such corporation, company or person shall annually, on or before the fifteenth day of April, return to the secretary of state, under the oath of its superintendent, the amount and value of all the property enumerated in section one, owned by it within the limits aforesaid, together with the names and residences of all shareholders living in this State, and the number of shares owned by each on the first day of April annually, and the Governor and Council shall determine said values and assess said tax thereon on or before the first day of May annually. The secretary of state shall thereupon certify said assessment to the state treasurer, who shall forthwith notify the several parties assessed thereof. Said tax shall be paid into the treasury on or before the first day of September annually, and shall be in lieu of all State or municipal taxation on any of the property or shares of said corporations, companies or persons.

"Section 3. If any corporation, company or person aforesaid fails to make the return herein provided, the Governor and Council shall proceed to make said assessment on such valuation as they think just, with such evidence as they are able to obtain, and such assessment shall be final. And if any such corporation, company or person fails to pay the tax required by this act, the state treasurer may forthwith commence an action of contract in the name of the State, for the recovery of the same with interest.

"Section 4. When such tax is paid, it shall be the duty of the state treasurer to credit to each town such proportion of the tax of each company as the number of shares in said company owned in said town bears to the whole number of said company's shares owned in the State, the remainder to be retained for the use of the State.

"Section 5. All acts and parts of acts inconsistent herewith, are hereby repealed, and this act shall take effect when approved."

Henry B. Cleaves, attorney general, for the State, cited: *Paul* v. *Virginia*, 8 Wall. 168; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wall. 567; *Lafayette Ins. Co.* v. *French*, 18 How. 404; *The Cin. Mut. Health Association Co.* v. *Rosenthal*, 55 Ill. 85; *Western Union Telegraph Co.* v. *Mayer*, 28 Ohio, 521; Hillard on Taxation, 30, § 258; *Durach's Appeal*, 62 Penn. 491; Cooley's Const. Lim. 3d ed. 496; *Comm'rs of Ottawa Co.* v. *Nelson*, 19 Kansas, 234; *Dyar* v. *Farmington Village Corpo.* 70 Maine, 515; 62 Maine, 62; *Commonwealth* v. *People's Savinys Bank*, 5 Allen, 428; *Commonwealth* v. *Hamilton Manufacturing Co.* 12 Allen, 298; *Cheshire* v. *County Commissioners*, 118 Mass. 386; *Francis, Treas.* v. *A. T. & S. F. R. Co.* 13 Kansas, 220; *Society of Savings* v. *Coit*, 6 Wall. 607; State Freight and Tax Cases, 15 Wall. 232; *Att'y Gen'l* v. *Bay State Mining Co.* 99 Mass. 148; *Commonwealth* v. *Lowell Gas Light Co.* 12 Allen, 75; *State Railroad Tax Cases*, 2 Otto, 575; *Sharpless* v. *Mayor of Phila.* 21 Penn. 168; *Tappan* v. *Merchants*, 16 Wall. 490; *Baker* v. *Cincinnati*, 11 Ohio. St. 534; *Ducat* v. *Chicago*, 48 Ill. 172; *DeCamp* v. *Eveland*, 19 Barb. 81; *Providence Bank* v. *Billings et al.* 4 Peters, 170; *Catlin* v. *Hull* 21 Vt. 152; *People* v. *B. & A. Railroad*, 70 N. Y. 569; *Albany R. R.* v. *Brownell*, 24 N. Y. 345; *Home Ins. Co.* v. *City of Augusta*, 50 Geo. 543; *Kitson* v. *Mayor*, 26 Mich. 325; *Reading Railroad* v. *Pennsylvania*, 15 Wall. 232; *State* v. *Carrigan*, 37 N. J. L. 264; *McMillen* v. *Anderson*, 16 Albany Law Journal, 335; *Gilpatrick* v. *Saco*, 57 Maine, 277; *Chicago, Burlington and Quincy Railroad Co.* v. *Paddock*, 75 Ill. 616; *Rhodes* v. *Cushman*, Auditor, 45 Ind. 85: *Genessee Valley Nat'l Bank* v. *Supervisors, etc.* 53 Barb. 223; *Western R. R. Co.* v. *Nolan*, 48 N. Y. 513; *Clinton School District's Appeal*, 6 P. F. Smith, 315; *Stewart* v. *Maple*, 70 Penn. St. 221.

Orville Dewey Baker, (*Joseph Baker* with him,) for the defendant.

The provisions of the constitution which relate to taxation are these:

"Art. IV, part III. Section 1. The legislature . . shall have full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this constitution, nor to that of the United States.

"Art. I. Section 22. No tax or duty shall be imposed without the consent of the people, or of their representatives in the legislature.

"Art. IX. Section 7. While the public expenses shall be assessed on polls and estates, a general valuation shall be taken at least once in ten years.

"Section 8. All taxes upon real and personal estate, assessed by authority of this State, shall be apportioned and assessed equally according to the just value thereof.

"Section 9. The legislature shall never, in any manner, suspend or surrender the power of taxation."

This law proposes to tax all the property of the corporation, situated in Maine; not the value of the company's stock, but the value of its property. It embraces all the open and tangible property of the company in the State and nothing more. It does not tax the franchise of the corporation because it is not specified, and if to be taxed, should and would be named, as in the railroad tax act, stat. 1880, c. 249. Nor does it tax its capital stock, nor its business or earning capacity, nor its income, net or gross.

The value of the stock is no measure of the taxable value of the property, nor is the value of the property any measure of the value of the stock or franchise. *Ins. of Chicopee* v. *Co. Com'rs*, 16 Gray, 38; *Com'th* v. *Hamilton M'f'g Co.* 12 Allen, 298, 302; *Same* v. *Cary Improvement Co.* 98 Mass. at p. 22.

Therefore a tax laid on the franchise, or capital stock, or business or income is not a tax laid on property, and *e converso* a tax laid on property is not a tax on the franchise, capital stock, business or income.

This tax cannot be sustained upon any principles of constitutional law. It cannot be sustained as an excise tax or license. It has just been decided in a leading case in New Hampshire that an excise cannot be constitutionally imposed and this under a constitution which, though it differs from ours in some particulars

resembles it in more. *State* v. *U. S. and Can. Express Co.* 23 Alb. Law J. 303; *Com.* v. *Hamilton M'f'g Co.* 12 Allen, 301.

This tax does not lay or purport to lay an excise or license, but simply a property tax. The subjects of taxation are thus defined by the Supreme Court of the United States in the case of the *State Tax on Foreign held Bonds*, 15 Wall. 319.

"These subjects are persons, property and business. Whatever form taxation may assume, whether as duties, imposts, excises or licenses, it must relate to one of these subjects."

"Corporations may be taxed, like natural persons, upon their property and business." See also, *Glascow* v. *Rowse*, 43 Mo. 479; Cooley on Taxation, 393.

A tax on the "use" of the property would be on its business; on the "capacity" would be on its franchise or capital; on the "productiveness" would be on its income; but a tax on the "value of the property" would be the tax at bar and no other.

The three former taxes would be excises; the last is a tax on property, pure and simple. See *Oliver* v. *Wash. Mills*, 11 Allen, 274; *Provident Institution* v. *Mass.* 6 Wall. 631; *Society for Savings* v. *Coite*, 6 Wall. 594; *State Tax* v. *R. R. Gross Receipts*, 15 Wall. 284; *Com.* v. *Provident Institution*, 12 Allen, 312; *Same* v. *Lowell Gas Light Co.* 12 Allen, 75; *The Del. R. R. Tax*, 18 Wall. 206; *Com.* v. *People's Five Cent Savings Bank*, 5 Allen, 428.

As a property tax it cannot be sustained. A property tax to be valid must be proportional and uniform. This is so. 1. Independent of all constitutions and by the nature and definition of taxation itself. Opinions of Justices, 58 Maine, 591; Cooley on Taxation, 1, 16, 17; *Sutton's Heirs* v. *Louisville*, 5 Dana, 28, 31; *Knowlton* v. *Supervisors*, 9 Wis. 410; *Woodbridge* v. *Detroit*, 8 Mich. 274, 301; *Grim* v. *School District*, 57 Penn. St. 433; Cooley's Const. Lim. 616, 617, 622, 625; 2 Kent's Com. 331; Smith's Wealth of Nations, B. 4. c. 2.

By the common opinion of jurists and political writers, by repeated declarations in bills of rights, and by the universal maxims of free government, no man can be held by a property

tax to contribute more than his "share" to the common burden. Within that is taxation; beyond it, is confiscation.

2. The same principle is found in the express provisions of our constitution. Const. Art. IX, sec. 8; *Jones* v. *Winthrop Savings Bank*, 66 Maine, 245; *Knowlton* v. *Supervisors*, 9 Wis. 410.

If anything could make more certain the distinct and unequivocal language of the constitution, or emphasize its assertion that taxation must be uniform between classes as well as between individuals of a class, it would be the record proceedings of the constitutional commission which framed the taxation clause now in force.

The construction, put upon the constitution by its framers, is its best test. The commission had distinctly before them the two plans of taxation; the one giving, the other refusing the power to tax by classes. They deliberately rejected the former and adopted the latter.

A tax to be "equal" must also be proportional. By our constitution taxes must be "apportioned" equally, and apportionment itself means that "the sum demanded of any one person, or laid upon any one parcel of property, must have fixed relation to the whole tax, as well as to that demanded of every other person, or laid upon every other piece of property." Cooley on Taxation; *Bank* v. *Ohio*, 3 Ohio St. 15; *Knowlton* v. *Supervisor*, 9 Wis. 410; *Attorney General* v. *Winnebago Lake Co.* 11 Wis. 35; *Lumsden* v. *Cross*, 10 Wis. 225; *Gilman* v. *Sheboygan*, 2 Black, 510.

The tax before us is not proportional or uniform. It is not proportional because it is not based on either of the proportions which control. It bears no fixed relation either to the whole taxable property of the State, or to the whole amount needed and raised for the use of the State.

Viewed as a State tax, it is not uniform or proportional either in mode or rate. It taxes the telegraph property at a fixed rate year after year, and all other property at a rate which varies or may vary with each year. It taxes the telegraph property at twenty-five mills and all other State property at five mills. A more monstrous inequality could be hardly found.

Viewed as a municipal tax, it is void. Because the State has no right, under our mode of government to assess a purely municipal tax. Because it establishes a radically different system or rule of municipal taxation for telegraph property from that which the towns fix for other property. In the case at bar the fixed percentage of the taxing act is materially greater than the average tax rate declared from all the towns in the State, and including State, county and municipal taxation. One is twenty-five mills and the other is eighteen and seventy-two hundredths mills.

Whether this tax be viewed as an excise or as a property tax, it is void, because levied for a purpose beyond the taxing power of the legislature. The purpose of a tax is shown by the mode of its distribution, by the objects to which, or the persons to whom it is to go.

By § 4 of this act each town is to receive such a proportion of the tax as the number of shares owned in said town bears, not to the whole number of shares, but to the whole number owned in this State, "the remainder" to be retained for the use of the State. But obviously, there never can be any remainder, for whether there is one share or the whole of a given corporation owned in the State, it must all go to the towns, and none to the State.

In this case there were forty-one shares only held in the State, and owned by four shareholders. Under sect. 4, Thomaston would get one forty-first of the whole tax, Calais, ten forty-firsts, and Portland, thirty forty-firsts. The remaining towns get nothing, the State gets nothing.

It is a State tax levied for the benefit of three towns; a State tax for local purposes, as much so as if laid to build a reservoir, or pave a street in Portland. *Lexington* v. *McQuillan's Heirs*, 9 Dana, 513; *Howell* v. *Bristol*, 8 Bush. 493, 497; *Wells* v. *Weston*, 22 Mo. 384; *Gilman* v. *Sheboygan*, 2 Black, 510; *State* v. *Haben*, 22 Wis. 629; *Madison Co.* v. *People*, 58 Ill. 350; *Bright* v. *McCullough*, 27 Ind. 223; *Knowlton* v. *County*, 9 Wis. 410; *Hale* v. *Kenosha*, 29 Wis. 599; *Slatteu* v. *People*, Sup. Court Ill. 1875; 7 Chicago Legal News, 292; *Hammett* v.

City of Phila. 8 Law Reg. (N. S.) 411; *Dyar* v. *Farmington Vill. Corp.* 70 Maine, 515.

The consequences would be:

1. That Portland would have to raise eighteen hundred and twenty-nine dollars, that Calais would have to raise six hundred and ten dollars, and that Thomaston would have to raise sixty-one dollars less money every year for taxable purposes, and the tax of every individual in these three towns would be ratably diminished.

2. That every other town which contains taxable telegraph property, while it must raise the same sum by taxation, has so much less property to raise it from and each citizen's tax is ratably increased.

DANFORTH, J. This is an action to recover the amount of a tax assessed upon the defendant corporation by virtue of c. 246, of the acts of 1880. The defence is that the act is void as in violation of the constitution.

That the legislature has the power to tax a foreign corporation to any extent it pleases as a condition upon which such corporation may be permitted to exercise its franchise in this state, may be considered as well settled law. *Dryden* v. *G. T. Railway of Canada*, 60 Maine, 512; *Paul* v. *Virginia*, 8 Wallace, 168; *Liverpool Ins. Co.* v. *Massachusetts*, 10 Wallace, 566; *Ducat* v. *Chicago*, *Ib.* 410. Under these and similar authorities it would seem that the tax in question might be sustained as against this defendant, though a somewhat graver question might possibly arise as to the proper remedy under a refusal to pay.

It is, however, evident that this tax was not imposed upon any such ground. The act includes all like corporations, both foreign and domestic, as well as companies and persons doing the same kind of business. We therefore propose to discuss the law as applicable to these several classes, as the legislature clearly intended it.

There is no pretence of any charter limit to the liability of this company, to any taxation which may be imposed upon any corporation, company or person. The objections rest upon the prohi-

bition found in the constitution and in the inherent nature of taxes imposed for the support of government.

In this discussion we must start with the fundamental principle, now well settled, that all acts passed by the proper authority in conformity with established forms, are presumed to be in accordance with the constitution and none will be declared otherwise so long as any reasonable doubt of its violation of the fundamental law remains. Sedgwick on Statutory and Constitutional Law, 2d ed. 409, and cases cited.

Another principle equally well settled is thus stated by BIGELOW, C. J., in *Commonwealth* v. *Hamilton M'f'g Co.* 12 Allen, at p. 301, "Where the language of the legislature is fairly susceptible of two interpretations, that one is to be adopted which will sustain an act as within the limits of legislative authority under the constitution rather than one which will defeat it on the ground that it is an excess or abuse of power."

In the absence of any prohibition of taxation in the constitution of this state there is no limit to the power of the legislature in this respect except such as the necessities of the government may impose or such as may arise from the inherent nature of taxes. It cannot be claimed that taxes can be imposed for other than public purposes and ordinarily they must be uniform.

The only limitation to this power found in the constitution of this state material to this case, is that contained in article IX, § 8 and is as follows: "All taxes upon real and personal estate, assessed by authority of this state, shall be apportioned and assessed equally, according to the just value thereof." The meaning of this direction is not difficult to ascertain and if any argument were needed to show that if the act in question imposes a tax upon property as such, it comes within this limitation, certainly the elaborate and able argument of defendant's counsel upon that point is a demonstration of that proposition. If, however, by the proper construction of the act, it imposes a tax or excise upon a specific use of the property it is perhaps equally clear that it is not within the limitation and is in conformity with the constitution as settled by uniform practice since the organization of the government of the state. The uniformity required

in a tax upon use or business is satisfied by its being assessed upon all business of a like kind.

Thus the real question at issue is the proper interpretation of the act, or more properly, will it fairly bear the construction necessary to make the tax one upon the business?

Such is the variety and extent of meaning attached to the word tax or taxes that no argument either way can be drawn from its use. It has been at different times applied to nearly if not quite every burden imposed upon persons, property or business for the support of government and in acts for raising a revenue for public purposes it seems to be used as meaning the same thing as impost, duty, or excise.

The method by which the burden is imposed though not conclusive, has a significant bearing upon the meaning and purpose of the act. It is not levied as property taxes usually are. There is no given sum to be assessed in which the percentage is fixed by valuation but the percentage is fixed by law leaving the amount to be ascertained by the valuation.

But what is of more importance is the kind of property selected for valuation. It is not all the property which the company may have, but only such as is used in the telegraph business. It is the telegraph line, with a detailed statement of such articles as constitute that line, or are necessary to its operation. No real estate is specified, no other property, however convenient it might be, or however much the company might own or may acquire, can be included in the valuation. This tax then is virtually imposed upon that which stands for the capital stock or rather upon the use of the property and upon the use of that which in some degree represents the extent of its business. It is that which is invested in the business and exclusively used for carrying it on, and may fairly be used as a test of the extent of the business for the purpose of fixing the amount to be paid for that business.

Further, while it is the property used which is valued, it is only while it is in use for this business. The moment the use for the specified purpose ceases, that moment the tax ceases. It is assessed upon telegraph corporations, companies and persons

doing that business. The business is a necessary incident to the tax; without it the tax falls and ceases to be. The corporation is assessed not because it is a corporation, but because it carries on that particular business, and the amount of that assessment is not a given sum, but ascertained by a valuation put upon that which it uses in that business. In a word the corporation is assessed because it is engaged in that particular business and the amount of the assessment is ascertained by the value of the property exclusively used for that business. This may not be the most accurate way of fixing the amount of business done, but it is substantially the method often adopted for that purpose; the object of the act is the material thing and not the particular means by which it is to be attained.

But the means used do not stop here. It is not the property alone which is valued. "Any circumstances or conditions which affect the value of the property" are to be taken into consideration. We cannot assent to the proposition of counsel that this provision is without meaning. It is rather of very significant meaning if not conclusive as to the intention of the statute. It is a part of the act and cannot be ignored. These circumstances and conditions are not of the property, though incidental to it.

They may or may not add to its inherent value but they are of the highest importance as an element in the value of the use to which it is put as fixing the amount to be paid for that use. A portion of the property is fixed and cannot easily be moved from place to place. Its value must therefore very much depend upon its situation. A telegraph line as such, whatever the cost of erection, would be of very little value extending through a country without inhabitants or business. So its connection or want of connection with other lines, the competition or want of it from rival lines are circumstances very materially affecting its value, and the fact that these things are to be considered, show plainly that this is not a tax upon the property, but upon its use and capacity to earn money.

Thus it would seem that if the act in question is susceptible of an interpretation as laying a tax upon property, a fair construction of its terms leads us still more forcibly to the conclusion

that such was not the intention of the legislature, but that its purpose was to levy a tax upon the use or business of the company and that in reality such is the tax imposed.

In conformity with these views, we think will be found all or nearly all the cases to which our attention has been called.

In *Portland Bank* v. *Apthorp*, 12 Mass. 252, a tax of one per cent. per year upon the capital stock of all the banks, was called in question as beyond the constitutional power of the legislature. The constitution under which the act was passed was similar in effect so far as material to this case as ours. The same objection as here was made that it was a tax upon property and lacked the necessary uniformity. But the court not denying that the capital stock was property, as it could not, sustained the tax as one upon the franchise and not upon the property of the bank.

In *Commonwealth* v. *Hamilton M'f'g Co.* 12 Allen, 298, a tax was assessed upon the excess of the market value of all the capital stock of the company over the value of the real estate and machinery taxable in the town where situated. Here as in the case at bar the amount of the tax was fixed by the value of a certain portion of the property of the company. Again the court not denying that the amount of the tax depended upon the value of certain property, held that the tax could not be sustained as a property tax for the want of uniformity and that it is not "proportional" but that there was nothing "in the nature of the assessment, or in the manner in which it is imposed, or in the method prescribed for ascertaining the amount which each corporation is to pay, which renders the act under which it is imposed invalid and unconstitutional as authorizing an excise or duty on the franchise or privilege of corporations," and as such the act was sustained. The same case was heard and affirmed in United States Court, 6 Wallace, 632.

In *Commonwealth* v. *Five Cents Savings Bank*, 5 Allen, 428, the tax in question was levied by the legislature upon the average amount of deposits for a specified time. That the deposits are a part of the property of the bank cannot be disputed, though

it is that class of property which tends to show the amount of business done. While this tax could not be sustained as a tax upon property, though the amount was ascertained by the value of property, it was sustained as a duty upon the franchise. To the same effect are *Commonwealth* v. *Provident Ins. for Savings*, 12 Allen, 312; S. C. 6 Wallace, 611; *Society for Savings* v. *Coite*, *Id.* 594. In these cases the question involved in the case at bar has been so fully discussed as to leave nothing to be added.

Similar taxes have been imposed upon savings banks and other corporations in our own State, and in most instances have been paid without objection, not because it is a tax upon property, but rather upon the business or franchise. This question was somewhat discussed in *Jones* v. *Winthrop Savings Bank*, 66 Maine, 242. In that case the tax was ascertained by the average deposits. It was there held that the tax could not be sustained as one upon property, but was upon the franchise, and that therefore when the bank ceased to do business as such, the tax ceased though the deposits remained. Also that the deposit did not pay the tax, "though it may materially affect the amount to be paid." So in the case at bar, the corporation is assessed without regard to the amount of property it owns, but the amount depends upon the value of certain property, with the "circumstances or conditions which affect that value."

In 1874, the legislature of this State passed an act, c. 258, of the acts of that year, assessing a tax upon railroad corporations. The amount of the tax was to be ascertained by an estimate of the cash value of all the shares constituting the capital stock of such corporation, which was enacted to be the true value of its corporate franchise "for the purposes of this act." From this was to be deducted the value of certain property subject to local taxation and the proportional part of the line beyond the limits of the State. Upon the balance thus obtained, the corporation was to pay a tax of one and one-half per cent. "upon its corporate franchise." In this act it is directly stated that the tax is upon the franchise. But the name is not material. It is the nature of the tax imposed which settles the question as to its validity. If

the tax is upon the property as such, it is illegal by whatever name we may christen it. If upon the franchise it is clearly within legislative power, though the name be omitted and though the value of the franchise may be ascertained by an estimate of certain property. Now it is clear that the shares of a corporation are property, and just as clear that their value is not a certain test of the value of the franchise, except as they are arbitrarily made so "for the purposes of this act." In this act and in the one in question, the tax is assessed upon the same principle, and the amount is ascertained by the same method, the valuation of certain specific property. It would seem that if the one is within the legislative power the other must be also. If there is any difference the advantage must be in favor of that now in question, for that does require a valuation of "circumstance or conditions" which are not property, but must relate to the business of the company, while the railroad act requires the valuation of property only. The constitutionality of this act assessing railroad corporations was before the court in *State* v. *M. C. R. Co.* 66 Maine, 488. It was there sustained. It is true the same objection was not made that it was a tax upon property that is now raised. But if the objection is valid, it may well excite surprise, that it was overlooked both by the court and the eminent counsel engaged in the defence.

Under the conclusion to which we are brought, that the tax is one upon the business of the defendant corporation, and not upon its property, many of the objections raised do not apply, which otherwise would require serious attention. Our constitution imposes no restriction upon the legislature in imposing taxes upon business. In this respect it differs from that of New Hampshire and some other states, where it is required that all taxes shall be "proportional and reasonable," and for that reason, some of the cases cited do not apply. It is undoubtedly true that all taxes whatever the form they take, must be for a public purpose. It requires no provision in the constitution to prevent their being levied for any other.

It is objected in this case that the distribution of this tax as provided in the act, shows that it is not for a legitimate purpose.

What distribution was contemplated is somewhat difficult, perhaps impossible to ascertain from the act itself. If it is all to go to the towns, it would still be a public purpose. But that is a matter which is not now involved. The tax is imposed by the State. It is to be paid to the state treasurer as other public funds. It then becomes a public fund to be used for a public purpose. If diverted from that, the remedy is not by a refusal to pay. If the last section of the act should prove to be in violation of the constitution, or void for uncertainty, it does not affect the remainder. This is not a case where one district is required to pay a tax for the support of another. It is like other excise taxes raised in any part of the State to be appropriated by the State wherever its needs or its sense of justice may require.

The exemption of the corporate property from further taxation, is a matter of which this defendant can hardly complain. But if so, it is a clause which in the same or similar form is inserted in all or nearly all the acts of this character, and is so inserted as a matter of justice to the party, and for the very purpose of equalizing the taxes assessed. We are not aware of any provision of the constitution which is violated by it.

Judgment for the State, $2500 and interest since September 1, 1880.

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

FANNY GRIFFITH *vs.* WILLIAM DOUGLASS.

Oxford. Opinion May 31, 1882.

Chattel mortgage. After-acquired property.

A mortgage of furniture then in a dwelling house, and of that afterwards to be purchased, conveys a valid title to that only of which the mortgagor was then the owner.

The mortgage being void as to after-acquired property a mere delivery of the same by the mortgagor to the mortgagee, the former retaining the possession and control, does not transfer a valid title as against attaching creditors.

In such a case the mortgagee cannot hold the subsequently purchased property

as against attaching creditors, because the mortgage when recorded did not embrace it. He cannot hold it as a pledge because he did not retain the possession.

ON REPORT.

Trespass against an officer.

The case and material facts are stated in the opinion.

David Hammons and Enoch Foster, Jr. for the plaintiff.

R. A. Frye, and Black and Holt, for the defendant.

APPLETON, C. J. This is an action of trespass against the sheriff for the taking and carrying away by his deputy of certain goods and chattles to which the plaintiff claims title. The defendant justifies their seizure under writs in favor of Orange C. Littlefield and others against Joseph F. Barden, whose property he alleges them to be.

Joseph F. Barden and wife then residing in Lewiston but intending soon to remove to Bethel and being indebted to the plaintiff, on the twentieth of May, 1873, executed a mortgage to secure such indebtedness of "the following described property, viz: all the furniture and furnishings *now* owned by us or to be owned by us to be used and kept at the Chandler house, so called, at Bethel, in the county of Oxford, intending hereby to convey all furniture and furnishings of every description, consistings of beds, bedding, tables, chairs, carpets, stoves, &c., &c., now owned or to be owned by us, . . . provided also that it shall and may be lawful for said Joseph and Georgiana Barden (the wife) to continue in the possession of said property without denial or interruption by said Griffith until condition broken."

The mortgage was recorded in Bethel, where the parties then resided, on the twenty-seventh of September, 1878, and in Lewiston on the twenty-eighth of September, 1878. The attachments, which constitute the trespass complained of, were made on the thirtieth of the same September.

The suit is for goods purchased by the mortgagors after the date of the mortgage. The plaintiff is an aunt of Mrs. Barden, whose husband kept the Chandler house, and boarded there. As articles were purchased for the house Mr. Barden would

deliver the same to the plaintiff under the mortgage as security. The delivery being thus made, he remained in the use and control of the same. The question presented for determination is whether the plaintiff has a good title as to the goods purchased subsequently to the mortgage as against attaching creditors.

By R. S., c. 91, § 1, "no mortgage of personal property, to secure payment of more than thirty dollars, shall be valid against any other person than the parties thereto, unless possession of such property is delivered to and retained by the mortgagee or the mortgage is recorded by the clerk of the town or plantation, organized for any purpose, in which the mortgagor resides."

The object to be attained by requiring the recording of mortgages of personal property is the same as that in providing for the registration of mortgages of real estate. The same general principles are alike applicable in each case. The design is to give notice to the public of all existing incumbrances upon real or personal estate by mortgage. Hence it is obvious that the property mortgaged, whether real or personal, the person mortgaging, to whom the mortgage is made and the debt or claim to be secured should be fully disclosed and made apparent of record. It would necessarily follow that the mortgage could only embrace what was *in esse*, what could then be taken possession of and the possession retained, — what then could be described as existing and what in case of litigation could be identified as the same as that described and that what was not *in esse* and not owned by the mortgagor could not be mortgaged, because there was nothing the mortgagor could deliver or the mortgagee receive and to which the mortgage could attach. If the mortgage is held to cover what was mortgaged and what was *not* mortgaged because not *in esse* and not then owned by the mortgagor, then the notice to the public, which was the primary object of the statute, conveys no trustworthy or reliable information. The mortgage may cover whatever is capable of being mortgaged, not at its date, but whatever the mortgagor might at any subsequent time acquire.

The rights of parties are to be determined by the statute. To be protected the mortgagee must take delivery and retain

possession of the mortgaged property or have the mortgage recorded, otherwise his claim will not be "valid against any other person than the parties thereto." It is not enough that there be delivery but there must be retention of the property mortgaged. But there can neither be delivery nor retention of such property unless the mortgagor has the same to deliver. Delivery by the mortgagor and retention by the mortgagee of the property mortgaged are the statutory equivalents of recordation. Whatever delivery and retention of possession will enable the mortgagee to hold will be equally held by the recorded mortgage. But what cannot be delivered and retained cannot be recorded as what is to be mortgaged. The rights of the parties are statutory. The statute thus making the one the equivalent of the other, the record is valid only to protect goods which at the giving of the mortgage could be delivered and retained. Consequently the mortgage cannot be held to secure after purchased goods, whatever may be its language.

Such is the uniform and unvarying decisions of courts of common law. In *Head* v. *Goodwin*, 37 Maine, 181, it was decided that a grant of goods which did not *then* belong to the grantor was void. In *Chapin* v *Cram*, 40 Maine, 561, the mortgage provides "that all drugs, medicines, wares, merchandise and fixtures of every description which may be hereafter purchased to replace any of those then in the store, shall be held for the payment of the sums hereafter named, in the same manner as those now in the store, as also all additions to said stock." "It is quite clear" observes TENNEY, J., in delivering the opinion of the court, "that the additions to said stock obtained by the mortgagor, after the execution of the mortgage to the defendant, without any further act would confer no rights therein. *Lunn* v. *Thornton*, 1 Man. Gran. and Scott, 383; *Jones* v. *Richardson*, 10 Met. 481; *Head* v. *Goodwin*, 37 Maine, 181. To purchase such additions to the stock, the mortgage constituted no agency in the mortgagor." That that is the rule at common law is conceded in *Morrill* v. *Noyes*, 56 Maine, 458, and in *Emerson* v. *E. & N. A. Railway*, 67 Maine, 391, while as between the parties to the mortgage, the right of the mortgagee to after purchased goods would be upheld. *Allen* v. *Goodnow*, 71 Maine, 420.

The general current of authority is in accord with views above expressed. It was held in *Jones* v. *Richardson*, 10 Met. 481, that a grant of goods which are not in existence or which do not belong to the grantor at the time of executing the deed, is void, unless the grantor ratify the act by some *new* act done by him with that view, after he has acquired property therein. In *Barnard* *Eaton*, 2 Cush. 295, by the terms of the mortgage, the mortgagor was allowed to sell the goods mortgaged, others of equal value being substituted therefor, it was held that the mortgage could not apply to goods intended to replace those which were sold. "A mortgage," remarks SHAW, C. J., "is an executed contract; a present transfer of title, although conditional and defeasible, it can only therefore bind and affect property existing and capable of being identified *at the time* it is made and whatever may be the agreement of parties, it cannot affect property afterwards to be acquired by the mortgagor." In *Codman* v. *Freeman*, 3 Cush. 306, it was decided that a stipulation in a mortgage of personal property, that after acquired property should be subject to such mortgage, does not bind property subsequently purchased. These views were re-affirmed in *Chesley* v. *Josselyn*, 7 Gray, 489; and *Moody* v. *Wright*, 13 Met. 17; and in *Chace* v. *Denny*, 130 Mass. 566. In *Williams* v. *Briggs*, 11 R. I. 476, it was held in an elaborate opinion by DURFEE, C. J., that at common law a mortgage of subsequently acquired property would transfer no title to the same. In *Ranlett* v. *Blodgett*, 17 N. H. 305, referring to the subject under consideration, PARKER, C. J., says: "If this doctrine were admitted, a mortgage of personal property would be like a kaleidoscope, in that the forms represented would change at every turn; but, unlike that instrument, in that the materials would not remain the same." In *Gardner* v. *McEwen*, 19 N. Y. 123, it was decided that a mortgage of all the goods of a specified description then in a store, or that thereafter might be brought there, though void as to the latter, might be good as to the rest. In *Hamilton* v. *Rogers*, 8 Md. 301, it was held that a mortgage of goods in a store, "together with all the renewals and substitutions for the same in any part or parts thereof," did not convey subsequently

acquired goods so as to entitle the mortgagee to an action at law against the party seizing them. So in Kentucky it was held that a mortgage of future acquired chattels is valid only when the property mortgaged may be regarded as a part of or accretion to the property in the actual or legal possession of the mortgagor at the time of making the mortgage. *Wilson* v. *Seibert*, 8 Am. Law Reg. (N. S.) 608. The same rule is recognized in New Jersey. *Looker* v. *Pickwell*, 38 N. J. Law, 253. It was so held in *Parker* v. *Jacobs*, 14 S. C. 112.

While at common law the mortgage covers the existent property of the mortgagor and does not transfer any right to after acquired property, it is otherwise in equity. Though that court recognizes the rule of the common law, yet it holds such conveyance operative as an executory agreement, binding on the property when acquired. The mortgagor holds the property as trustee and equity enforces the trust. In some cases the decision rests upon the grounds of an equitable lien. In *Mitchell* v. *Winslow*, 2 Story, 630, it is said by STORY, J., "that whenever parties, by their contract, intend to create a positive lien or charge either upon real or personal property, whether then owned by the assignor or contractor or not, or if personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquire a title thereto, against the latter and all persons asserting a claim thereto under him, either voluntarily or with notice or in bankruptcy." But without particularly considering the different reasons given in equity in support of its exercise of jurisdiction, it is sufficient to remark that in all cases it recognizes the rule at common law as in full force.

But, though, this disposition of after-acquired property is *per se* inoperative, "such disposition," remarks TINDAL, C. J., in *Lunn* v. *Thornton*, 1 Man. Gran. and Scott, 383, "may be considered as a declaration precedent, which derives its effect from some *new* act of the party after the property is acquired." But the *new* act must be an act done by the grantor for the avowed object and with the view of carrying the former grant or disposition into effect. "Lord BACON'S language is," continues the Chief Justice, "there must be some *new* act or conveyance, to give life

and vigor to the declaration precedent, which evidently imports more than the simple acquisition of the property at a subsequent time, which, if sufficient, would render the rule itself altogether inoperative; but points at some *new* act to be done by the grantor in furtherance of the original disposition." In that case there being no new act done by the grantor indicating his intention that the goods should pass under the former bill of sale, the case was held to fall under the general rule.

In the case at bar, the subsequently purchased goods were in the Chandler House commingled with those there at the date of the mortgage; the plaintiff having the mortgage was residing as a boarder in the house. The mortgagor delivered the newly purchased goods to the plaintiff as security under the mortgage, but retained the possession and control of the same "without denial or interruption" on her part by the express terms of the mortgage.

The inquiry then arises whether here is any *new* act, within the decisions in *Lunn* v. *Thornton*, and *Jones* v. *Richardson*, which perfects the title of the mortgagee in the after-acquired goods. The mortgage, though recorded, was only available as between the parties to it. The possession of the mortgagee was instantaneous. It instantly reverted to the mortgagor. Now, as has been seen, the plaintiff acquired no title under the mortgage. There is no compliance with the other statutory alternative, possession and retention of the mortgaged property by the mortgagee. The new act was merely momentary, which, there being no retention of possession, conveyed no title under the statute. It was no act which conveys title.

In *Jones* v. *Richardson*, the defendant claimed to hold under a mortgage intended to hold after-acquired goods. "He did not prove," observes DEWEY, J., "nor offer to prove, any act done by the mortgagor, after the mortgage deed was executed, by which he ratified the same as to subsequently acquired property. All he offered to prove was that he had taken possession of the goods before the attachment. But this evidently was irrelevant, as it was held to be by the arbitrator. But if he had proved that the mortgagor had delivered possession to him of the goods in

question, to hold the same under the mortgage, that would not have availed him against the plaintiff, although it might be good against the mortgagor." The court then refers to the statute of Massachusetts, which is similar to that in this State, and then proceeds as follows: "Now it is clear, we think, that the record of the mortgage deed is no sufficient notice of a legal incumbrance as to subsequently acquired property; because by law, no such property could be sold or conveyed thereby; and it would furnish no notice that any property would be afterwards purchased, or, if purchased, that any act would be done to ratify the grant in that respect. As to such property, therefore, the mortgage could not be valid, except as between the parties thereto, unless such goods were delivered by the mortgagor to the mortgagee, with the intention to ratify the mortgage and the mortgagee, *retained open possession of the same* until the time of the attachment." This case determines the case at bar. There was a formal delivery, but no retention of possession of the subsequently purchased goods, in that case nor in this. In *Brown* v. *Thompson*, 59 Maine, 373, a mortgage was given to secure after-acquired goods as well as those then in the store. The goods were removed to another store. An indorsement was then made to the effect that the mortgage should cover the stock removed. The mortgage with the indorsement was recorded. Here was a *new* act, the indorsement on the mortgage, which becoming part of the mortgage and recorded, conveyed a good title to the goods in the store when the indorsement was made. In *Rowley* v. *Rice*, 11 Met. 333, there was a mortgage of after-acquired goods, which before the attachment were delivered to and retained by the mortgagee, with authority to sell the same. "The facts show," remarks SHAW, C. J., "all the elements of a new, distinct and substantive agreement to hypothecate the after-acquired goods, sufficient of itself to give title." The plaintiff held title as pledgee and not as mortgagee; the court adding that when an act is voidable, it may be ratified, but if actually void and the act of ratification be of itself sufficient to convey title, it will enure as an original act. In *Moody* v. *Wright*, 13 Met. 17, the same question again came before the court for consideration, and with the same result. "A stipulation that future acquired property shall be holden as

security for some present engagement," observes DEWEY, J., "is an executory agreement of such a character, that the creditor with whom it is made may, under it, take the property *into his possession*, when it comes into existence, and is the subject of transfer by his debtor, and *hold* it for his security; and whenever he does so take into his possession before an attachment has been made of the same, or any alienation thereof, such creditor, under his executory agreement may hold the same; but until such an act done by him, he has no title to the same; and, that such act being done, and the possession thus acquired, the executory agreement of the debtor authorizing it, it will then become holden by virtue of a valid lien or pledge." The authorities are uniform in requiring not merely delivery but retention of the property delivered as indispensable to the perfection of the mortgagee's title, whether the mortgage purports to convey after-acquired property, or should be unrecorded. *Wright* v. *Tetlow*, 99 Mass. 397.

The possession of the plaintiff was but instantaneous. It was resumed by the mortgagor. But a concurrent possession by the mortgagor and mortgagee is insufficient. There must be a substantial change of the possession. The cases of *Flagg* v. *Pierce*, 58 N. H. 348, and *Sumner* v. *Dalton*, 58 N. H. 296, are precisely in point. "Constructive possession," observes BOARDMAN, J., in *Crandall* v. *Brown*, 25 Hun. 461, "cannot be taken under a chattel mortgage. The right to possession is by virtue of the contract, and not as in an execution by virtue of the law. Possession must be taken, in fact . . a chattel mortgage is not an execution. Possession cannot be taken by words and inspection." In *National Bank* v. *Sprague*, 20 N. J. Eq. 27, ZABRISKIE, C. J., in referring to the statute of New Jersey and a mere nominal possession, says, "such possession does not satisfy the object nor comply with the words of the act; they required an *actual* and *continued* change of possession; these words would seem to be inserted expressly to provide against such a sham as this."

Judgment for defendant.

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

BARROWS, J., concurred in the result.

HARVEY SCRIBNER and another, in equity,

vs.

CATHARINE S. ADAMS, executrix of the will of JOSEPH ADAMS, and EPHRIAM HATCH, administrator on the estate of GEORGE F. ADAMS.

Kennebec. Opinion May 31, 1882.

Equity. Principal and surety. Evidence. Executors and administrators. Practice.

The complainants were co-sureties with J. A. on a bond given by his son G. as principal for the faithful performance of his duties as cashier of a bank. G. proved to be a defaulter, assigned an insurance policy which he had taken out upon his own life to his father to indemnify him for his liabilities upon this bond aud certain other paper (the amount of the insurance being more than sufficient to cover them all) and shortly after died insolvent, three minor legitimate children surviving him.

J. A. accepted the assignment, notified the insurance company thereof, and received their consent thereto, paid a premium which fell due thereon, informed his co-sureties that he had received it and requested them to pay his third of the sum due, on the bond, promising to reimburse them when he realized on the life policy. They however paid nothing until called upon by the bank after J. A. had died also, insolvent. Upon the call of the bank they paid the amount of the cashier's deficit, one-half each.

With the consent of J. A's executrix, G's administrator took the policy giving her an indemnity and collected and still holds the amount thereof, though the complainants have demanded so much thereof as was necessary to reimburse them for the amount which they paid, of both the respondents who are respectively the executrix of J. A. and the administrator of G.

Held, that if the minor children of G. had been joined as defendants so that the rights of all parties might be settled in one suit, complainants would be entitled upon this showing to a decree in equity that the assigned policy was held by J. A. and the proceeds thereof by his executrix through her agent, and by the administrator of G. subject to a trust in favor of the complainants for their indemnity as co-sureties with J. A. on the bond. *Held further*,

1. That the co-sureties were entitled to the benefit of the indemnity under such circumstances although it was intended by the assignor and assignee for the benefit of J. A. alone.

2. That the consent given by J. A's executrix that her co-respondent might collect the money on the policy, and the fact that he did collect and now holds it having indemnified her cannot relieve the executrix from her responsibility to the complainants for the trust fund.

3. That the testimony of one of the complainants as to matters occurring in the life time of J. A. is not competent in this process against his executrix.

4. That the declaration of J. A. made after the assignment to him are not competent evidence for the respondents.

5. That before a decree can be had for complainants the minor children of the assignor must be made parties to the suit and have an opportunity to be heard through their guardian.

It is not good practice to print the formal parts of documents respecting which no question is made for presentation to the court.

ON REPORT.

Bill in equity, heard on bill, answer and proof.

The opinion states the case and material facts.

Joseph Baker, for the plaintiffs, cited: Angell and Ames, Corp. § 234; White and Tudor's Lead. Cas. in Eq. Part 1, p. 171; *Gould* v. *Fuller*, 18 Maine, 364; 1 Whart. Ev. § § 261, 262, 265; *Ins. Co.* v. *Mosely*, 8 Wall. 397; *Small* v. *Gilman*, 48 Maine, 506; *Battles* v. *Batchelder*, 39 Maine, 19; *Wilson* v. *Sherlock*, 36 Maine, 295; *Pulsifer* v. *Crowell*, 63 Maine, 22; 2 Whart. Ev. § § 1164, 1165.

S. C. Whitmore and Henry S. Webster, for the respondents.

Complainants have a plain, adequate and complete remedy at law against the insurance company for any interest they may have in this policy, or against Ephraim Hatch, personally, for their interest in the money which he collected on said policy. *Russ* v. *Wilson*, 22 Maine, 207; *Crooker* v. *Rogers*, 58 Maine, 339; Addison, Contr. 984; Stat. 1874, c. 235.

A life policy when the annual premium is less than one hundred and fifty dollars, is not assignable. R. S., c. 75, § 10; c. 49, § 65. There are third parties interested, the children.

This policy was not assigned to secure the principal debt, but to secure only what Joseph Adams may have been obliged to pay. Brandt on Suretyship and Guaranty, § § 284, 285.

George F. Adams' estate being insolvent, this claim should have been presented to the commissioners appointed by the probate court. R. S., c. 66, § 3. The declarations of Joseph Adams are not admissible unless they are against his pecuniary interest. 1 Whart. Ev. § § 226, 228.

The bill cannot be sustained on the ground of fraud. The charge of collusion between the defendants is not sustained. The answers of defendants deny the charge, and are to be taken as evidence, and require the testimony of two witnesses or its equivalent to overcome them. *Appleton* v. *Horton*, 25 Maine, 23; *Gould* v. *Williamson*, 21 Maine, 273; *Buck* v. *Swazey*, 35 Maine, 41; *Gilmore* v. *Patterson*, 36 Maine, 544; *Alford* v. *McNarrin*, 44 Maine, 90; *Piscataqua F. and M. Ins. Co.* v. *Hill*, 60 Maine, 178.

The bill cannot be sustained on the ground of trust. Equity will not lie where the plaintiffs have a complete and adequate remedy at law. *Spofford* v. *B. and B. R. R. Co.* 66 Maine, 51; *Jones* v. *Newhall*, 115 Mass. 244. Assumpsit is the proper remedy of a surety against his co-surety for contribution. *Davis* v. *Emerson*, 17 Maine, 64; *Goodall* v. *Wentworth*, 20 Maine, 322; *Rollins* v. *Taber*, 25 Maine, 144; *Bachelder* v. *Fisk*, 17 Mass. 464.

When compensation in damages is the only relief that can be given, a court of equity will not assume jurisdiction. Compensation is decreed by a court of equity only as incidental to other relief. Story Eq. Jur. § 794-99; *Milkman* v. *Ordway*, 106 Mass. 232; *Kempshall* v. *Stone*, 5 Johns. Ch. 193; *Law* v. *Thorndike*, 20 Pick. 317; *Blood* v. *White*, 3 Cush. 416; *Hall* v. *Marston*, 17 Mass. 575; *Lewis* v. *Sawyer*, 44 Maine, 332; *Calais* v. *Whidden*, 64 Maine, 249.

Hatch, if liable at all, is liable personally, and not in his representative capacity. An executor or administrator cannot create a debt against the estate which he represents. *Sumner* v. *Williams*, 8 Mass. 162; *Davis* v. *French*, 20 Maine, 21; *Walker* v. *Patterson*, 36 Maine, 273; *Plimpton* v. *Richards*, 59 Maine, 115.

If the court should be of the opinion that the bill can be sustained, the case of the defendant Catharine S. Adams should be distinguished from that of the other defendant. No decree against her is asked for, and none can be made. It is not pretended that she holds anything in trust for the plaintiffs, or can in any way control or direct the funds which they claim. 1 Daniell's Chan. Prac. 342; Story's Eq. Plead. § 231.

But if the bill be sustainable, and for any technical cause it was necessary to make Mrs. Adams a party, no decree against her for costs should be made. *Stone* v. *Locke*, 48 Maine, 425.

BARROWS, J. The bill alleges, and it is either admitted in the answers, or the proof shows, that the complainants were co-sureties with Joseph Adams the testator of one of the respondants upon a bond given by George F. Adams the intestate of the other respondent, as principal, to the Gardiner National Bank, conditioned for the faithful performance of said principal's duties as cashier of said bank, with the usual accompanying covenants; that said George F. Adams proved to be a defaulter, and the two complainants being called upon by the bank, October 6, 1879, after the death of their co-surety Joseph Adams, and of the principal George F. Adams, (the latter of whom died April 1, 1879, and the former April 24, 1879,) paid the whole of the deficit in the cashier's accounts amounting to thirteen hundred and ninety-nine dollars and seventy-two cents, each paying one-half of said sum, and the estates of the principal and co-surety contributing nothing to the discharge of the bond thus procured by the complainants; that the estates of both the principal and co-surety are in process of administration in probate court as insolvent estates; that George F. Adams left no property real or personal of any considerable amount; that said George F. in 1867 took out an insurance policy on his own life payable to his personal representatives for the sum of three thousand dollars, which was valid at the time of his decease, bearing on it an assignment in due form to Joseph Adams, the complainants' co-surety, subscribed by said George F. Adams, communicated to the insurance company and the company's consent thereto obtained; that the said assignment purported to be in consideration of said Joseph Adams's liability for said George F. on two promissory notes of three hundred and fifty dollars each and two bonds one of which was the bond above mentioned, to the Gardiner Bank, (on which the complainants also were sureties,) and the other a bond given by said George F. as administrator of the estate of one Wilson, and that it purported also to be given to indemnify said Joseph for any sums he might be obliged to pay on account of said liabilities or other-

wise for said George F.; that said Joseph Adams paid nothing on account of the two three hundred and fifty dollar notes and his estate was finally discharged from the Wilson administration bond on payment of thirty-six dollars; that the respondent Hatch (notwithstanding this assignment which it is charged was held in trust by Joseph Adams and his executrix for the benefit and indemnity of his co-sureties as well as himself and his estate) got possession of said policy and by an arrangement made with the co-respondent to indemnify her in any event, collected on or about December 20, 1879, amount due on the policy as administrator of George F. Adams, and still holds it although due demand has been made upon both the respondents in their capacities as executrix and administrator as aforesaid.

While some of the facts above recited are formally denied in the answers on the ground of want of knowledge on the part of the respondents, the proof of those not admitted is plenary, and the real controversy between the parties is substantially limited to three inquiries. Was there collusion between the respondents to deprive the complainants of their equitable rights in the proceeds of the life policy? Was the assignment from George F. to Joseph Adams perfected by delivery, and if it was, what was its effect? Have the complainants such an ample and sufficient remedy at law as precludes a resort to equity and the maintenance of this process?

Certain other facts which have a bearing upon the decision of these questions ought here to be noted.

George F. Adams left no widow but did leave three legitimate minor children who have a legal guardian, the sister of said George F., but who are not here represented and have not been made parties to this suit, though it is apparent they have an interest in the questions here presented. The body of the assignment upon the back of the policy is in the handwriting of Joseph Adams who was a lawyer of long and reputable standing.

The signature of George F. Adams was attested by two witnesses, one of whom was his sister, and it was affixed on the day when he was about to leave for California by a night train

shortly after an official examination of his accounts with the bank which ascertained his defalcation. The testimony of the insurance agent shows conclusively that, shortly after the execution of the assignment by George F. Adams the policy with the assignment upon it duly executed was in the actual possession of the assignee, for he brought a copy of the assignment made by himself (including copies of the signatures of the assignor and the attesting witnesses,) and probably the policy itself to the insurance agent to have it communicated to the company and their consent procured.

It appears further that upon the suggestion of the agent to Joseph Adams, that the company would probably purchase the policy of him, said Joseph replied that he preferred to keep it running and afterwards when an installment of premium fell due he paid it by his check for sixty-three dollars. The deposition of one of the complainants offered to prove, and mostly consisting of, declarations of Joseph Adams is incompetent as to all matters occurring in the lifetime of the deceased. R. S., c. 82, § 87, as amended by c. 145, laws of 1873; *Trowbridge* v. *Holden*, 58 Maine, 120.

The depositions offered by the respondents to prove declarations of their decedents are alike inadmissible, though for a different reason. The plaintiff's testimony is incompetent because a party shall not and ought not to be heard to testify in his own case when his adversary is prevented by death from appearing to testify in relation to the same matters. The temptation to falsehood and the danger of injustice thence arising are too great.

On the other hand the depositions offered by defendants cannot be received so far as they consist of declarations made by the decedents in their own favor or in support of the position now taken by their representatives, when not made in the presence of the complainants nor accompanying any act which properly belongs to the transactions between the parties.

The written request of Joseph Adams to the two complainants, reciting the fact of the assignment of the policy to him and asking them to pay his third of the liabilities under the bond to the

Gardiner bank and promising to reimburse them "so soon as sufficient funds shall come into my hands on the said policy," which is offered by the complainants — is competent evidence in this suit against his executrix, while other declarations of his, oral and written, at different times in the absence of the complainants, offered by respondents, being declarations of a party in his own favor, cannot be received (though put upon the plausible ground that they are declarations against his own right as assignee of the policy) because the equitable rights of the complainants in the trust fund, whatever they may be, accrued by force of legal and equitable principles, which the assignee could not control, and at the time when the assignment was made, and therefore cannot be affected by any subsequent acts or declarations of the assignee and trustee in disparagement of the rights of the beneficiaries in the trust, in a suit to have the trust declared and enforced against the representatives of the parties to the assignment. We feel that we ought to remark here that the record presented for adjudication consisting of one hundred and sixty-four large printed pages less than half of which exhibit anything material or relevant, suggests either an obliviousness or a disregard of the rules of chancery practice designed to prevent a case from being incumbered with useless matter, which is much to be regretted. In the taxation of costs it will be necessary to inquire where the fault rests which resulted in the production of so much unnecessary printing, *e. g.* page upon page of magistrates' certificates of the taking of depositions upon which no question arises, and much other matter which does not serve to elucidate the case and which by the mutual action and attention of counsel ought in all cases to be eliminated. Too many cases are painfully suggestive of the slaughter of the bird mentioned in Æsop's Fab. LVII, Croxall's ed. Philadelphia, 1802, page 90.

Turning now to the principal questions discussed in the arguments of counsel:

I. We cannot say upon the proof here presented that the executrix of the will of Joseph Adams was guilty of any fraudulent collusion with the co-respondent for the purpose charged of depriving the complainants of their equitable rights in the pro-

ceeds of the assigned policy. The respondents, both of them, deny under oath that there was any such fraudulent collusion. We think the circumstances of the transaction not inconsistent with honest intentions, and the arrangement perhaps as convenient to preserve the rights of all the parties who might be interested as any that could have been adopted. There seems to have been no secrecy as to the course of proceeding. That is a badge of fraud which is in this case wanting, at least so far as the executrix of Joseph Adams is concerned. The only indication of it which we observe in the whole case, is the unsuccessful attempt on the part of the administrator of George F. Adams, to withhold the evidence of the assignment; and this was *post litem motam*. But there was an open question between the two estates (for the correct adjustment of which both the executrix and the administrator were held to the different parties whose rights and interests they respectively had in charge,) as to the completion of the transfer of the policy from George F. to Joseph Adams, and as to the effect of that transfer, a question in which the minor children of George F. Adams had in reality a greater interest than his administrator representing his estate and creditors could have.

The proceeds of this policy if not assigned by George F. Adams, would go under R. S., c. 75, § 10, to his minor children after deducting the premium paid therefor within three years prior to his decease, and would not constitute assets of his estate for the payment of debts.

But George F. Adams in his lifetime had entire control of it. It was competent for him to sell it to the company, to raise money by pledging it as security, or to use it to secure those who had contracted liabilities in his behalf thus indirectly securing his debts with it. But any remainder after the discharge of the liens which he placed upon it would still enure to the benefit of his children. It made little difference then whether the sum due on the policy was collected by the executrix of the assignee or the administrator of the party insured, provided proper security were given that it should be forthcoming when it should be determined who was entitled to it. It might well be more convenient for the

executrix to receive than to give such security, and so it was arranged. But by taking this security and thereupon consenting that the three thousand dollars due on the policy should be collected by her co-respondent, the executrix could not free herself from any trust in favor of his co-sureties which might affect the policy or its proceeds in the hands of her testator. If the complainant's right in equity to be indemnified out of the proceeds of the policy is established, the executrix must be declared to hold it in trust for them, though she has allowed it to pass into the hands of another, and she must look to the security she has received for her own indemnification. The money in such case would be regarded as in the hands of her agent.

II. We can have no doubt that the assignment was perfected by delivery. Aside from the clearly proved facts of actual possession and control by Joseph Adams after his son had left home never to return alive, it is simply incredible that parties situated as they were should have taken the trouble to do what they confessedly did towards effecting a transfer of the policy without completing the transaction by an actual intentional delivery and acceptance. No other hypothesis will explain the subsequent acts and doings of Joseph Adams (who was reputed an honest man and a respectable lawyer) in procuring the assent of the insurance company to the assignment, in paying the subsequently accruing premium, and in using the assignment to procure a credit for himself and to induce the complainants to pay his third of the amount due the bank as well as their own.

The transfer being complete, under the circumstances here developed, we think it enured to the benefit of the complainants as co-sureties with Joseph Adams.

The general doctrine on which this depends was incidentally recognized as sound by this court in *Gould* v. *Fuller*, 18 Maine, 366, and it is supported by the cases there cited. It matters not that the security may have been given for the indemnity of one of the sureties only. The rights of the co-sureties result not from contract or the intention of the principal and the surety who is indemnified, but from the effect of settled principles of equity arising out of the relation which the co-sureties bear to each other.

It is not for the principal debtor while the contract remains unadjusted and the duties of his sureties to each other unsettled to cast the whole burden upon one or a part of the sureties, by securing the others, when all in the inception of the undertaking stood upon equal footing. What the debtor puts in the power of one for his relief, constitutes a fund for the indemnity of all. *McMahon* v. *Fawcett*, 2 Randolph, 514; S. C. 14 Am. Dec. 796; *Deering* v. *Lord Winchelsea*, 2 Bos. & Pull. 270; *Hinsdill* v. *Murray*, 6 Vt. 136; *Messer* v. *Swan*, 4 N. H. 481.

In one of A. C. Freeman's useful notes in 15 American Decisions, 526, (appended to the case of *Moore* v. *Moore*, 4 Hawks, 358, there given) may be found the general rule as stated in Brandt on Suretyship, § 233, from which it appears that ordinarily when one of several sureties has the means of indemnification for himself, put into his hands by the principal before the debt is paid, he becomes trustee of it for the benefit of all the sureties, "even though he obtained it by his own exertions and it was intended for his sole benefit." The case (*Moore* v. *Moore*,) and the note of Mr. Freeman, alike emphasize the well taken distinction that a surety before becoming such, may fairly stipulate for a separate indemnity for himself, and if he does so, his co-sureties are entitled to the surplus only, after his exoneration, and other authorities to this effect are cited. But this is of no importance in the case at bar, as the fund assigned, seems to be ample for the security, not only of Joseph Adams but of the complainants also. See also, White and Tudor's Leading Cases in Equity, part 1, page 171. Nor does it seem to affect the co-surety's right in such case that the conveyance is conditioned only for the indemnity of the party to whom it is given, and not for the payment of the debt. *New Bedford Savings Inst.* v. *Fairhaven Bank*, 9 Allen, 175.

III. It was formerly supposed that all claims and questions between co-sureties (except where there was an express contract between them, even those where contribution only was sought,) were properly cognizable only in equity. Story's Eq. Jur. Redfield's ed. 1866, c. VIII, § 495.

While it is now well settled that an action at law may be maintained by one co-surety against another without an express con-

tract, (*Bachelder* v. *Fiske*, 17 Mass. 464; *Davis* v. *Emerson*, 17 Maine, 64,) it by no means follows that a process in equity will in no case lie, even where that is the principal result sought. Ordinarily it may be found that an adequate and complete remedy may be had at law where the purpose is merely to compel contribution, and where it is so, that is the remedy to be pursued. But the cases which most unequivocally recognize this doctrine, have a reservation in favor of equity jurisdiction where the remedy at law, though open to the pursuer, would not be complete, or is doubtful or circuitous, or in cases where there are a multiplicity of parties interested, having distinct and independent claims. *Jones* v. *Newhall*, 115 Mass. 244. That jurisdiction will be sustained in equity by courts which hold this doctrine, in cases analogous to the one here presented, may be seen in *Lane* v. *Stacy*, 8 Allen, 41.

To say nothing of the insolvency of the estates both of the principal and co-surety in the present case, it is obviously desirable that the rights of the complainants in the fund created by the assignment of the life policy should be ascertained by a process in equity, in which all the parties interested in that fund may be before the court, and perhaps a multiplicity of suits avoided. It may well be that these respondents are stimulated to defend here by their accountability in various contingencies to the children of George F. Adams. Both the valid completion and the effect of the assignment from him to his father, were in controversy here. It would be little to the credit of the administration of justice if, when in a suit at law one or the other or both of these respondents had been held liable to the complainants as for money had and received, another jury at the suit of the children should find that there was no valid delivery of the assignment, and consequently hold them accountable to the children also. Manifestly it is a case where the rights of all concerned should be ascertained in one process in equity. This is not a case where the proceedings at law in the suit between the two respondents which they have offered in evidence would bar the rights of the complainants. It only serves to illustrate the necessity for a resort to the equity jurisdiction, in which alone

the rights of all parties interested may be finally determined. As evidence here it serves no purpose unless it be to show that another tribunal reached the same conclusion to which we are brought, upon the question of the completion of the assignment by delivery.

But by some unaccountable oversight, the children of George F. Adams have not been made parties to this suit. Their guardian gives testimony in behalf of the respondents, and it may be true that the defence is conducted wholly in their interest and behalf, but we can have no judicial knowledge of that fact. Courts will carefully guard the rights of infants interested in all such processes. *Stinson* v. *Pickering*, 70 Maine, 273; *Tucker* v. *Bean*, 65 Maine, 352. This case is in no condition for the entry of a decree until the minor children of the assignor have been regularly made parties and have had an opportunity to to be heard if they have anything further to allege and prove.

The bill also needs amendment in the prayer for a decree, so far as the executrix is concerned. It asks for a decree that Joseph Adams held the assignment in trust for the benefit and security of his co-sureties, the complainants, as well as himself, but is silent as to the only party who can now legally represent Joseph Adams in the premises.

Remanded to nisi prius for further proceedings in conformity herewith.

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

STATE OF MAINE, by *scire facias*,

vs.

JOHN HOWLEY and others.

Cumberland. Opinion May 31, 1882.

Recognizance.

A recognizance taken in the superior court is a part of its records, and in its keeping.

It is not necessary in a recognizance to state the offense with the precision required in an indictment. It is enough if it can be sufficiently understood from its tenor at what court the party was to appear, and from the description of the offense that the court taking the recognizance had jurisdiction.

Where the recognizance recited that the principals therein kept, and deposited certain intoxicating liquors in their dwelling house in P, describing its position accurately, a portion of which is used by them for purposes of traffic, with intent to sell the same in violation of law, it was held good.

ON EXCEPTIONS from superior court.

Scire facias on a recognizance.

The defendants filed special demurrer to the writ, which was overruled and the defendant alleged exceptions.

The opinion states the material facts.

Henry B. Cleaves, attorney general, for the plaintiff, cited: *Bridge* v. *Ford*, 7 Mass. 209; *Com.* v. *Daggett*, 16 Mass. 447; *Com* v. *Downing*, 9 Mass. 520; *Com.* v. *Nye*, 7 Gray, 316; *State* v. *Baker*, 50 Maine, 45; *State* v. *Young*, 56 Maine, 219; *State* v. *Hatch*, 59 Maine, 410.

Henry W. Swasey, for the defendants.

It is not declared in the writ, that the alleged recognizance is recorded in said superior court. It is well settled that *scire facias* can issue from no court, but one in possession of the record upon which it issues. *State* v. *Brown*, 41 Maine, 536; *Commonwealth* v. *Downey*, 9 Mass. 520; *State* v. *Smith*, 2 Maine, 62. See *State* v. *Baker*, 50 Maine, 46, where the declaration immediately after setting out the recognizance, alleges "all of which appears of record."

That the recognizance must be matter of record in the court taking it, is elementary law. 2 Bl. Comm. p. 341; *State* v. *Smith*, 2 Maine, 62; *Libby* v. *Maine*, 11 Maine, 344; *Bridge* v. *Ford*, 4 Mass. 643; *Bridge* v. *Ford*, 7 Mass. 211.

It is submitted that the healing powers of R. S., c. 133, § 22, cure simply the ills therein named, viz: any omission to record the default of any of the conusors at the proper term, and any defects in the form of the recognizance.

The recognizance should recite the cause of caption. *State* v. *Brown*, 41 Maine, 535.

In *scire facias*, upon a recognizance to the State in a prosecution for crime, the court, in order to discover what crime is charged, can look only to the recitals in the recognizance. *State* v. *Lane*, 33 Maine, 536.

In *Dailey et als.* v. *The State*, 4 Tex. Rep. 417, the head note is, "It is not necessary to recite in a recognizance the specific charge, but if it be attempted, a charge must be recited for which an indictment will lie, or else the recognizance is void. It is not an offense to have stolen goods in one's possession, simply; there must be a criminal knowledge or felonious intent. Therefore a recognizance to answer a charge of having stolen goods in possession is void." *State* v. *Cotton*, 6 Tex. 425; *M'Donough* v. *State*, 19 Tex. 293.

No complaint will lie in such a case as recited in this recognizance. *State* v. *Learned*, 47 Maine, 429; *State* v. *Connelly*, 63 Maine, 214; *State* v. *Malloy*, 34 N. J. (Law), 410.

APPLETON, C. J. This is a writ of *scire facias* upon a recognizance entered into before the justice of the superior court for the county of Cumberland, to which a special demurrer was filed, assigning two causes therefor.

(1.) "That it is not declared in said writ that said alleged recognizance is recorded in said superior court here. That it is not by said declaration alleged that said superior court here has possession of any record of said alleged recognizance."

A recognizance is "an obligation of record, which a man enters into, before some court of record, or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like." Jacob Law Dictionary. Here the writ recites that it was taken at a term of the superior court, which is a court of record. The recognizance once taken becomes part of the record of the court taking it. It is not the case of a recognizance entered into in an inferior court, which neglected to send it to the appellate court.

It further appears of record that the recognizors being solemnly called made default.

It sufficiently appears by the facts admitted by the demurrer, that the court issuing this writ had possession of the records on

which they were issued. Indeed the recognizance is a record of the court and in its keeping.

(2.) It is insisted "that recitals in said alleged recognizance do not charge the said John Howley with any crime."

The principal, John Howley, was charged in the complaint against him, with having at Portland kept and deposited certain intoxicating liquors in the dwelling house, and its appurtenances situated in the northeasterly corner of York and Park streets in said Portland, part of which said dwelling house is used for purposes of traffic by said Howley and Holcraw, "with intent to *sell the same in violation of law.*"

If Howley intended to sell the liquors kept and deposited to be sold in violation of law, he intended to sell them in violation of the law of this State. The law to be thereby violated is the law of this State. It could be of no other State. A violation of law is a violation of the law of this State. The recognizance sufficiently describes the offense charged.

It is not necessary in a recognizance to state an offense with all the precision required in an indictment. It is provided by R. S., c. 133, § 22, that no action on a recognizance shall be defeated nor judgment thereon arrested . . for any defect in the form of the recognizance, 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 offense charged* that the magistrate was authorized and required to take the same." All this statute requires is, that it should appear from the description of the offense, that the court taking the recognizance had jurisdiction. It does not require technical precision in the description. It is not questioned that the court had jurisdiction. In *Com.* v. *Nye*, 7 Gray, 316, the recognizance was to answer to an indictment against him for a violation of the "act concerning the manufacture and sale of spirituous liquors," and this was held under a statute similar to that of this State to be a sufficient description of the offense charged. But no offense was charged. It did not appear for what the defendant was indicted, whether for the manufacture or the sale of liquors in violation of law. SHAW, C. J., in his opinion says, "by the provision in the R. S., it is not now necessary

that a fuller description of the offense should appear on the face of the recognizance." In the case at bar the *description* of the offense is more definite and precise. Indeed no one reading it can doubt that "from the description of the offense charged," that the court was authorized and required to take the recognizance. *State* v. *Hatch*, 59 Maine, 410; *State* v. *Crowley*, 60 Maine, 105.

Judgment for the State.

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

JAMES FULLER *vs.* JOHN DAVIS, and another.

Piscataquis. Opinion June 1, 1882.

Poor debtor's disclosure. Citation. Disinterested justice.

All defects of form in the citation of a debtor will be held as waived, when the creditor or his attorney appears at the time and place therein specified, selects a justice, submits to the jurisdiction without objection thereto and examines the debtor.

When it appears by the bond in suit and by the officer's return on the execution which is made part of the case by the plaintiff, that the arrest was made in the county in which the disclosure was had, the fact of jurisdiction is established.

The fact that one of the justices hearing the disclosure was a creditor of the debtor, does not disqualify him from acting in the premises.

ON REPORT.

Debt on poor debtor's bond.

The opinion states the material facts.

J. B. Peaks, for the plaintiff.

The record of the justices is not conclusive as to their jurisdiction, and want of jurisdiction may be shown by parol. *Spaulding* v. *Record*, 65 Maine, 220; *Foss* v. *Edwards*, 47 Maine, 145; 23 Maine, 144; *Hackett* v. *Lane*, 61 Maine, 31; *Poor* v. *Knight*, 66 Maine, 482.

The facts which determine their jurisdiction must appear of record. *Inman* v. *Whiting*, 70 Maine, 445, and cases cited. R. S., c. 113, § 46, provides that "a debtor who has been twice

refused a discharge shall not again disclose before such justice; but may before a judge of the Supreme Judicial Court," &c.

Now to give magistrates jurisdiction, the application and citation must state that the debtor has not been twice refused a discharge. This fact should appear of record. *Gurney* v. *Tufts*, 37 Maine, 130; *Vinton* v. *Weaver*, 41 Maine, 430.

The jurisdiction of magistrates cannot be conferred by the parties. *Call* v. *Mitchell*, 39 Maine, 465. Much less can it be waived. *Stanton* v. *Hatch*, 52 Maine, 244; *Brown* v. *Allen*, 54 Maine, 436; *Inman* v. *Whiting*, 70 Maine, 445. One of the magistrates was not disinterested. He was a creditor of the debtor who was disclosing before him.

D. D. Stewart, for the defendants, cited: *Lovering* v. *Lamson*, 50 Maine, 334; *Bachelder* v. *Sanborn*, 34 Maine, 230; *Dunham* v. *Felt*, 65 Maine, 218; *Bliss* v. *Day*, 68 Maine, 201; *Ayer* v. *Fowler*, 30 Maine, 347; *Granite Bank* v. *Treat*, 18 Maine, 340; *Kimball* v. *Irish*, 26 Maine, 444; *Clement* v. *Wyman*, 31 Maine, 52; *Lewis* v. *Brown*, 51 Maine, 109; *Baldwin* v. *Merrill*, 44 Maine, 55; *Neal* v. *Paine*, 35 Maine, 160; *Hooper* v. *Goodwin*, 48 Maine, 79; *Page* v. *Plummer*, 10 Maine, 334; *Smith* v. *Brewer*, 61 Maine, 70; *Cummings* v. *York*, 54 Maine, 386; *Goodwin* v. *Cloudman*, 43 Maine, 577; *Hussey* v. *Allen*, 59 Maine, 269.

APPLETON, C. J. This is an action of debt on a poor debtor's bond. In the condition of the bond is the recital that John Davis, Jr. "has been and is now arrested by William Paine, deputy sheriff for said county of Piscataquis by virtue of an execution issued against and on a judgment obtained against him, the said John Davis, Jr. by the said James Fuller." Then follows a description of the judgment.

The plaintiff next introduced the execution on which the arrest was made and to obtain release from which the bond was given.

By the officer's return thereon, it appeared that the arrest was made by and the bond given to a deputy sheriff of Piscataquis county and in that county.

The certificate of discharge by the justices before whom the disclosure was had, is in strict conformity with the provisions of R. S., c. 113, § 33.

It is objected that the citation is insufficient. But it contains all the essential facts required by R. S., c. 113, § 26, or by the statute of 1874, c. 198. But were the citation to be deemed defective, the creditor appeared by his attorney, who took no exception to its deficiency or validity either as to its form or its substance, submitted to the jurisdiction of the justices and examined the debtor for two days. By so doing he must be held to have waived all objections on account of any defects, if any there were, in the citation. *Page* v. *Plummer*, 10 Maine, 334; *Lord* v. *Skinner*, 9 Allen, 376; *Lynde* v. *Richardson*, 124 Mass. 557.

The certificate of the justices states that the debtor had caused the creditor to be notified according to law and is *prima facie* evidence of a legal service. *Granite Bank* v. *Treat*, 18 Maine, 340; *Bliss* v. *Day*, 68 Maine, 201. There is nothing to throw doubt upon the legality of the service and if there was, any illegality is waived by the appearance.

But it is claimed that the magistrates had no jurisdiction because it does not appear in what county the arrest was made. But such is not the fact. The very bond on which this suit is brought states that it was given to procure a release from arrest in the county, where the magistrates giving the certificate resided and had jurisdiction. The bond which is the basis of this case, proves the jurisdiction of the magistrates. If parol evidence is admissible to disprove jurisdiction, much more can its existence be established by the very proof on which the plaintiff rests his case. Both the bond in suit and the execution on which it was taken show the arrest in Piscataquis county and consequently jurisdiction in the magistrates of that county.

It was objected that Henry Hudson was interested and could not legally act as one of the justices to hear the disclosure of the debtor. But such was not the fact. That the debtor owed him did not disqualify him. Besides, the objection was not taken at the hearing, though known to the creditor.

Judgment for the defendants.

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

HATTIE A. STEVENS and another, in equity,

vs.

JONATHAN MOORE and others.

Somerset. Opinion June 1, 1882.

Equity. Pleading.

A general allegation of fraud is not sufficient in a bill in equity praying for relief, the acts constituting the fraud must be set out.

Where the bill alleges that the defendant made fraudulent representations, which are relied upon as constituting the fraud, it should also allege, that the representations were false and made with the knowledge of their want of truth, or made by the party as of his own knowledge when he had no knowledge.

ON REPORT.

Bill in equity. Heard on bill, demurrer, answer and proof.

The following are the material parts of the bill:

"Humbly complaining, . . . Hattie A. Stevens, . . . that on the fifteenth day of June, in the year of our Lord, one thousand eight hundred and seventy-eight, she, by the name of Hattie A. Collins, and the said Joseph Stevens made a contract of marriage to be thereafter consummated between them and in consideration thereof the said Joseph Stevens at said Solon then conveyed to your oratrix by the name of Hattie A. Collins, the building in said Solon occupied by said Joseph Stevens as a tailor's shop and dwelling house, and the land on which the same stood and connected therewith, but named in the deed affection for her and certain services to be performed, that thereafterwards in consideration thereof said marriage was consummated between your orators on the third day of the July then next following and continues to exist until the present time.

"That on the ninth day of December in the year of our Lord one thousand eight hundred and seventy-eight, Jonathan Moore of said Solon, fraudulently and wickedly intending and contriving to injure, cheat and defraud your oratrix, the said Hattie A. Stevens of said premises, and deprive her of all benefit and use

thereof, and to have, appropriate and convert the same to his own use and benefit, asked her to let him see the deed aforesaid from her said husband to her, and after examining it, told her that the deed was not good and valid, that under it she could not hold the premises; that her husband was owing large sums, that his creditors could take the premises for his debts and advised her to put them into some person's hands to save for her; that she should do it at once, for the officers would be after it immediately; that he would take part of it and hold it for her if she would find some one else to take the balance, that it would not answer for him to take the whole. That being a woman unacquainted with business and entirely unskilled in legal proceedings, and believing that said Moore, who was their family physician, was acting a friendly part and representing things truly as they were, she became alarmed and greatly feared lest she should lose the premises conveyed to her in consideration of her marriage, and which she expected and trusted to keep as a residence for herself and family, and be turned out upon the world without a home, and so she was induced to act in accordance with the wicked, treacherous and fraudulent representations and proposals of said Jonathan Moore, and selected her mother, Mrs. Mary Collins, to take a conveyance of such portion of the premises as the said Jonathan Moore did not take.

"That thereupon the said Jonathan Moore in furtherance of his aforesaid wicked, corrupt and fraudulent design, procured a scrivener in said Solon to make two notes, running to Ann E. Moore, of said Solon, wife of said Jonathan, of that date, one for two hundred dollars, payable in one year with interest at six per cent. and one for one hundred and seventy-two dollars payable in two years, with interest at six per cent. to be signed by your oratrix, Hattie A. Stevens, and a mortgage of the whole premises to said Ann E. Moore, conditioned to secure the payment of said notes, and also a deed of the whole premises to the said Mary Collins, with covenants against all incumbrances except said mortgage to Ann E. Moore; that influenced by the aforesaid wicked, deceitful, corrupt and fraudulent representations of the said Jonathan Moore she signed the said two notes and executed

the said mortgage to Ann E. Moore, and the deed to her mother, Mary Collins, and caused both said deeds to be executed by her said husband, Joseph Stevens, and both deeds were duly recorded the next day, December 10, 1878.

"Your orators further say that said mortgage and two notes to Ann E. Moore and deed to Mary Collins were without any consideration whatever, either of benefit to your orators or either of them, or of loss, injury or inconvenience to said Jonathan Moore, Ann E. Moore and Mary Collins, or either of them; that no settlement was made by your orators or either of them with the respondents or either of them, and no receipts were passed; that said notes and deeds were made solely for the purposes herein above named. . . .

"Your orators further say that the said Ann E. Moore well knew and perfectly understood, that said two notes and mortgage deed, made and executed to her, were entirely without any consideration, moving from her and her husband Jonathan Moore or either of them, and were obtained entirely through the fraud of her said husband. Yet agreeing, contriving, conspiring and confederating with her said husband to defraud your oratrix, and put the same in use for the benefit and use of her said husband, on the third day of January, A. D. 1880, at said Solon she did assign in due form the said mortgage deed together with both said notes to Lucius L. Morrison of Skowhegan, in said county, in payment and discharge of a judgment that said Morrison then held against her said husband, Jonathan Moore.

"Your orators further say that at the time and long before he took said assignment of said mortgage of January 3, 1880, from said Ann E. Moore to him, said Morrison, well knew and perfectly understood that said notes and mortgage were entirely without consideration, that they were obtained by the fraud of said Jonathan Moore, and well knowing all this he combined and confederated with the said Jonathan Moore and Ann E. Moore to put the same in use in consummation of said fraud, and took said assignment in payment of said judgment he held against said Jonathan Moore, in pursuance of said confederation.

"Your orators further say that said Morrison, on the twenty-fourth day of March, A. D. 1880, published a notice in the Somerset Reporter of that date, by which he intended to institute and commence proceedings to foreclose said mortgage, which notice, although fatally defective for the purpose of its design, shows a determination to make said mortgage available to him, and to deprive your oratrix of her said property so mortgaged."

John H. Webster, for the plaintiffs.

If any portion of the bill is good the demurrer must be overruled and judgment on the demurrer to be final. Chancery Rule, 36; *P. S. & P. R. R. Co.* v. *B. & M. R. R. Co.* 65 Maine, 122; *Burns* v. *Hobbs*, 29 Maine, 273; *Laughton* v. *Harden*, 68 Maine, 208.

The consideration of the conveyance under which complainant took the land is the most valuable known to the law, that of marriage. *Prewitt* v. *Wilson*, U. S. S. Court, 1881, Reporter of March 30, 1881.

Jonathan Moore occupied to her the confidential relation of family physician. Standing in that confidential relation equity devolves on him the burden of proof "to establish affirmatively the perfect fairness, adequacy and equity" of his claim. 3 Green. Ev. 253 and 254, and cases cited, physician and patients.

In transactions between parties in confidential relations towards each other even innocent misrepresentations of the law will be fatal. Bigelow on Fraud, 10, 14, 247 266, 267; *Bellage* v. *Southee*, 3 Hare, 534; *Dent* v. *Bennett*, 4 Mylne and C. 269; *Clarke* v. *Robinson*, 58 Maine, 133; *Clark* v. *Malpas*, 31 Beav. 80; *Sharp* v. *Leach*, 31 Beav. 491; *Fisher* v. *Budlong*, 10 R. I. 525; *Brice* v. *Brice*, 5 Barb. 533; *Sears* v. *Shafer*, 1 Barb. 408; S. C. 2 Seld. 268; *Whelan* v. *Whelan*, 3 Cow. 537; *Kuelkamp* v. *Hidding*, 31 Wis. 503.

The fraud practised by Moore on Mrs. Stevens is sufficient to authorize a court in equity to set aside the notes and mortgage were the transactions between strangers. *Pratt* v. *Philbrook*, 33 Maine, 17; *Clark* v. *Robinson*, *supra*; Bigelow on Frauds, 14; *Kuelkamp* v. *Hidding*, *supra*; *Bean* v. *Herrick*, 12 Maine, 262.

D. D. Stewart, for the defendant.

DANFORTH, J. To this bill a demurrer has been filed, as well as answers, upon which evidence has been taken upon both sides. The bill seeks a remedy for damage resulting from an alleged fraud.

Under the demurrer several defects are apparent, some of which may be amendable, but others are clearly fatal. It appears from the bill that the wrong purpose to be accomplished is to deprive the female plaintiff of certain specified real estate, while the act accomplished and from which relief is asked is the obtaining two promissory notes secured by a mortgage of the real estate described.

The more important defects, however, are found in the substance of the bill, in its failure to set out any case of which the court can take cognizance.

It must now be considered as well settled that a general charge in a case where fraud is relied upon is insufficient. Here the evidence to be introduced, or the minute facts which are important only as they bear upon others which are relied upon, need not be recited; but those which constitute the fraud and enough to to show that a fraud was committed or attempted must be alleged. Story's Eq. Plead. § 251.

In this case there is an entire failure in this respect. There are indeed certain definite representations set out which are alleged to be fraudulent. But it is evident that of themselves they are not fraudulent. If true they are not so. If honestly made believing them true, they are not. They are only fraudulent when false and made with a knowledge of their want of truth, or made by the party as of his own knowledge when he has no knowledge as to their truth or otherwise. *Pratt* v. *Philbrook*, 33 Maine, 17; *Clark* v. *Robinson*, 58 *Id.* 133. In this bill we find no allegations of these necessary constituents of fraud. For aught that appears the representations may be literally true, and if so, there can be no fraud in making them so far as regards this plaintiff.

Some reliance seems to be placed upon the allegation that the consideration in the deed represented to be void as against the

grantor's creditors, was a marriage with the grantee. This would undoubtedly be a valuable and sufficient consideration as to creditors. But this alone would not necessarily make the deed valid as to them. Much less is it a sufficient allegation of the dishonesty or knowledge of the want of truth in the representation of its invalidity. The substance of the representation is that the grantor was in debt and notwithstanding the deed, the property would be liable to be levied upon by his creditors. There is no allegation that the grantor was not in debt and it is not alleged that the conveyance was not made to keep the property from the creditors.

But even both these allegations would fail to show any dishonesty or fraud on the part of the defendant in the representations set out. It will be noticed that although the consideration alleged is sufficient, it also appears from the bill that such consideration was not named in the deed, but the only one there expressed is, "affection and services to be performed." What these services to be performed were, does not appear, nor is it necessary now to inquire whether such a consideration is so inconsistent with that of marriage as to prevent the latter being shown by parol evidence as an additional consideration so as to keep the property from creditors. It is enough for present purposes that so far as appears, the defendant had no other knowledge than that gained from an inspection of the deed, though the circumstances were such that he might well have expected it, if there had been any facts inconsistent with, or in addition to what there appeared. If then the statement that the property was still liable to attachment was not true, from the knowledge obtained by the defendant from the deed, and the absence of information from the party, he would seem to be justified in the statement made. There would seem to be then, no allegations in the bill, independent of the usual, formal and general statement of fraud, inconsistent with the entire honesty of the defendant, who is charged with having made them.

Thus much for the issue formed by the demurrer, from which it clearly appears that the process cannot be maintained under the allegations in this bill.

From the evidence in the case the plaintiff stands no better. That overwhelmingly shows that at the time of the conveyance, the grantor was deeply in debt and probably insolvent, and by a preponderance that the notes and mortgage were obtained under a claim of a balance of account due the defendant and as security therefor. Whether for a larger amount than was justly due appears more doubtful. But of that we have no occasion to inquire, as the bill puts the claim for relief upon another and entirely different ground, and the question as to the amount due is open upon a bill for redemption.

Demurrer sustained.
Bill dismissed.

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

EDWARD F. MORSE *vs.* NOBLE E. SMALL.

Oxford. Opinion June 1, 1882.

Pleading. Pleas puis darrein continuance.

A plea *puis darrein continuance* is a waiver of general issue and if the matter pleaded is found against the defendant the plaintiff is entitled to peremptory judgment.

ON REPORT.

Assumpsit on a promissory note for one hundred dollars, given by the defendant to the plaintiff July 24, 1879.

The opinion states the case presented to the law court and the material facts.

The following is the written acknowledgment of payment and relinquishment of all claims by the plaintiff pleaded in defence.

"Paris, April 2, 1880.

I hereby certify that I have received of O. F. Small in full payment of my note against Noble E. Small, on which a law suit is now pending in court, and I hereby relinquish to said Noble E. Small all further claims against him and this shall be his receipt in full of all claims, debts or accounts.

Witness: E. F. Morse."

M. E. Morse, Lister E. Poor."

Enoch Foster, Jr. for the plaintiff, cited: 1 Chitty, *659; Gould Pl. c. VI, § § 122, 126; Spaulding's Practice, 373; *Renner* v. *Marshall*, 1 Wheat. 215; *Kimball* v. *Huntington*, 10 Wend. 675; *Mckeen* v. *Parker*, 51 Maine, 359; Howe's Pr. 431.

R. A. Frye, for the defendant, cited: 32 Maine, 316; 35 Maine, 483.

The law presumes that the written discharge of the suit given by the plaintiff contains the agreement entered into between O. F. Small and the plaintiff, and parol evidence cannot vary or control the same. 60 Maine, 465; 23 Maine, 136; 62 Maine, 477.

The meaning and intention of the parties must be ascertained from the paper itself. 44 Maine, 496; 12 Maine, 58; 32 Maine, 474; 10 Wall. 604; Big. Estoppel, 416; 36 N. Y. 335; 28 Maine, 525; 36 Maine, 176; 43 Maine, 192; 49 Maine, 149; 51 Maine, 52; 48 Maine, 275.

VIRGIN, J. After the general issue was pleaded and joined, the defendant, at the September term, 1880, pleaded a written acknowledgment of payment in full of the note in suit and a relinquishment of all claims by the plaintiff *puis darrein continuance.*

In his replication the plaintiff alleged that by agreement the plaintiff's costs were to be paid as a condition precedent to the validity of the written acknowledgment, and that they had not been paid.

The defendant rejoined that he did not agree to pay the costs as a condition precedent to the validity of the written acknowledgment, and tendered an issue thereon to the country, which was joined by the plaintiff. Thereupon the parties went to trial and reported the testimony for the law court to render judgment upon.

The plaintiff and his wife testify unqualifiedly that by express agreement the plaintiff's costs were to be paid before the suit was settled and the note given up. The brother of the defendant who was the negotiator of the attempted settlement also testified to the same and that he wrote a letter to the plaintiff's counsel stating such to be the agreement and requesting him to make the

bill of costs as reasonable as he could. Moreover he testifies that the defendant understood that the costs were to be paid out of the fifty dollars, which the defendant paid to the witness.

Receipts though in writing are always open to explanation by parol.

We have no doubt of the soundness of the decisions cited by the defendant upon the question of estoppel; but we do not perceive their applicability to the case at bar.

The defendant having waived the general issue and placed his case upon a special issue which the testimony compels us to find against him, the plaintiff is entitled to a peremptory judgment on the note. *Mckeen* v. *Parker*, 51 Maine, 391; Spauld. Pr. 373, 374.

Judgment for the plaintiff for one hundred dollars and interest from date of writ.

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

JOHN E. DONNELL, in equity,

vs.

PORTLAND AND OGDENSBURGH RAILROAD COMPANY, FIRST NATIONAL BANK of PORTLAND and JOHN W. DANA.

Cumberland. Opinion June 1, 1882.

Stat. 1877, c. 158. Equity. Trustee process.

By the statute 1876, c. 101, as amended by statute 1877, c. 158, a new, more direct and efficacious remedy to a creditor was created by conferring upon the Supreme Judicial Court jurisdiction in equity, to reach and apply in payment of a debt due to such creditor any property, right, title or interest, legal or equitable, of his debtor residing or found in this state, which cannot become at to be attached on a writ or taken on execution in an action at law, and which is not exempt by law from attachment and seizure.

The proceeding is in the nature of an equitable trustee process, to enable the creditor in one process to establish the validity and amount of his claim against his debtor, and compel the appropriation of the debtor's property of whatever kind, provided it be not exempt or within reach of legal process, in the hands of some third person to the payment of his debt.

There must be some third person made a defendant who sustains the relation of equitable trustee to the debtor. An officer of a corporation cannot be held to sustain that relation to the corporation as a debtor.

ON REPORT.

Bill in equity heard on bill, answer and proof.

The material facts are stated in the opinion.

William L. Putnam, for the plaintiff, cited: *Silloway* v. *Ins. Co.* 8 Gray, 199; *Barry* v. *Abbott*, 100 Mass. 396, and cases there cited; *Tucker* v. *McDonald*, 105 Mass. 423; *Bresnihan* v. *Sheehan*, 125 Mass. 11.

It is claimed that we cannot hold checks in the hands of Dana, because he was treasurer and held them in his official capacity.

1. We say first, that even if these checks were by contemplation of law, in the possession and control of defendant debtor corporation, so that they were in no sense in the possession or control of Dana, that would be no answer under the circumstances of this case.

At the time when Dana negotiated, and for that purpose indorsed these checks, all parties were aware of the nature of this suit.

Serving the bill upon the railroad corporation and the bank, attached these checks as effectually as a pile of wood might have been attached by a writ at common law; and every one who was made party to the bill, who knowingly and voluntarily aided in disposing of the checks and defeating the attachment, is as much holden for the debt as would be a person knowingly carrying away from the officer the pile of wood. The advantage here is, that in equity all rights, including rights against the wrong doer who is a party to the bill, can be closed in one suit. Of course the debtor corporation would be primarily liable to make the tort good; but the corporation being insolvent, the burden falls on Dana, who has been an active participant therein; and he must protect himself as far as he can by the indemnity promised in the above vote of July 1, A. D. 1880, upon which he saw fit to rely. *Nelson* v. *Bridges*, 2 Beavan, 239; *Andrews* v. *Brown*, 3 Cush. 130; Story Eq. § 794-9. By filing the bill, complainant acquired a lien, and Dana by acting to defeat that lien, became

a wrong doer in equity. *McDermutt* v. *Strong*, 4 John. Ch. 687.

2. But there is a remedy against Dana by a more direct principle. Although he was treasurer of the corporation, yet with reference to the checks his identity was not absorbed in the corporation. "These checks were in the possession of the treasurer," and their form was such that they could not be, and at least were not negotiated without his indorsement. See *Farmington Savings Bank* v. *Fall*, 71 Maine, 52.

By reason of the fact of the form of these checks, there is no principle involved in the ordinary rule, that funds in the hands of agents cannot be trusteed, which furnishes any analogy applicable to this proceeding in equity.

In *Pettengill* v. *Androscoggin Railroad Company*, 51 Maine, p. 370, it was held that railroad station agents could not be holden by trustee process, for funds in their hands of the corporation employing them. The law is undoubtedly the same in Massachusetts; yet in *Silloway* v. *Ins. Co. ante*, promissory notes were held upon this equitable process in the hands of the general agent of the debtor corporation. See *Phœnix Ins. Co.* v. *Abbott et al.* 127 Mass. 558.

Webb and Haskell, for the defendants, cited: *Devoe* v. *Brandt*, 53 N. Y. 462; *Schutt* v. *Large*, 6 Barb. 373; *Jordan* v. *Parker*, 56 Maine, 557; 1 Story Eq. § 410; *Lindsey* v. *Lambert B. and L. Asso.* 4 Fed. Rep. 48; *Sprague* v. *Steam Nav. Co.* 52 Maine, 592; *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558.

Charles F. Libbey, for the First National Bank, one of the defendants.

VIRGIN, J. For many years the only mode by which a creditor could reach and appropriate to the payment of a debt due to him, the notes, bonds and other like property of his debtor which could not be reached by mesne or final process under the then existing laws, was to reduce his claim to judgment, arrest his debtor on the execution, and then wait for him to disclose and surrender such property. R. S., c. 113, § 36. These statutory provisions allowed sufficient time for debtors to so arrange their

affairs as frequently to render the remedy of but little practical value.

By the stat. of 1876, c. 101, 1877, c. 158, a new, more direct and efficacious remedy was created by conferring upon this court jurisdiction in equity, on a bill by a creditor, to reach and apply in payment of a debt due to him, any property, right, title or interest, legal or equitable, of his debtor residing or found in this state, which cannot be come at to be attached on a writ or taken on execution in an action at law against such debtor, and which is not exempt by law from attachment and seizure.

The essentials of these provisions seem to be, a creditor, a debtor in this state having some valuable legal or equitable interest not exempted by law from attachment or seizure, of such a nature or so situated that it cannot be reached by common law process against the debtor; and the property sought to be reached held by some third person who may be considered an equitable trustee of the debtor.

The intent of the statute, therefore is to enable a single creditor alone, without first fruitlessly exhausting all legal remedies or reducing his claim to judgment, by this one proceeding in the nature of an equitable trustee process, to establish the validity and amount of his claim against his debtor and compel the appropriation of the debtor's property of whatever kind, provided it be not exempt or within the reach of legal process, in the hands of some third person, to the payment of his debt. This construction has been given to a somewhat similar statute by the court in Massachusetts in numerous cases among which are the following: *Silloway* v. *Columbia Ins. Co.* 8 Gray, 199; *Sawyer* v. *Bancroft*, 12 Gray, 365; *Crompton* v. *Anthony*, 13 Allen, 33, 37; *Bresnihan* v. *Sheehan*, 125 Mass. 11; *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558.

The plaintiff contends that his case is within the new remedy. His material allegations are, that he is the *bona fide* holder of certain bonds with semi-anual interest coupons annexed thereto, issued by the defendant railroad corporation jointly with four other connecting railroad corporations not within this jurisdiction, eighty of which coupons amounting to $2400 are due and unpaid;

that all these corporations are insolvent and neither of them has any attachable property in this state; that the defendant corporation has on deposit in the defendant bank a large amount of money for which the bank has given its cashier's checks payable to the defendant, treasurer of the defendant railroad company, and which are in his personal custody and under his personal control so that they cannot be come at to be attached or seized on execution; and he seeks to have the bank and Dana apply the same to the payment of his coupons.

But from the bank's answer and the deposition of Dana it appears that the bank had no money of the railroad corporation; but that Dana, prior to the service of the bill on its cashier, purchased of the bank four cashier's checks payable to the order of Dana as treaaurer of the railroad corporation, issued without any knowledge on the part of the bank of the purpose of the purchase or of the use to be made of them; that prior to the service of the bill, two of the checks had been paid on presentation thereof by indorsees, and the remaining two were paid, on the morning of the next day after service, to *bona fide* indorsees thereof, without notice of any equities attaching thereto. Upon these facts the plaintiff does not ask for a decree against the bank. This disposes of one of the trustees.

From his answer and deposition it appears that Dana, as treasurer and not otherwise, on and prior to June 30, 1880, in order to meet certain first mortgage coupons of $24,000, of the defendant railroad corporation, due and payable the next day (July 1), had accumulated the checks before mentioned amounting to $23,072.27, two of which he appropriated towards the payment to certain of the said first-mortgage coupons the day before they were payable and before service of the bill upon him. That on the morning of the next day after the service of the bill he as treasurer, pursuant to the order of the president and directors of said defendant railroad corporation, negotiated the two remaining checks to certain innocent parties having no notice of the pendency of this suit, in payment of certain of said first mortgage coupons payable that day and held by them; and the

balance of the proceeds thereof received from said parties he applied in payment of the remaining coupons.

There can be no doubt that neither the bank nor Dana could be charged in law as the trustee of the railroad corporation for and on account of the checks. R. S., c. 86, § 55; *Clark* v. *Viles*, 32 Maine, 32; *Skowhegan Bank* v. *Farrar*, 46 Maine, 293; *Bowker* v. *Hill*, 60 Maine, 172, 175. But by this process all kinds of property, including negotiable paper, may be reached.

And neither could Dana be held at law as the trustee for any kind of property belonging to the corporation in his official custody as treasurer; for that is the way and the only way that a corporation can hold its funds. The possession of the treasurer is the possession of the corporation; and the treasurer cannot be charged as the trustee of his corporation for its property in his official custody, for the reason that he is *quoad hoc* the corporation. *Pettingill* v. *And. R. R. Co.* 51 Maine, 370; *Sprague* v. *Steam Nav. Co.* 52 Maine, 592; *Bowker* v. *Hill*, *supra*.

We do not perceive how it can, or why it should be in anywise different in an equitable trustee process. There must be some third person made a defendant who sustains the relation of equitable trustee to the debtor. *Phœnix Ins. Co.* v. *Abbott*, *supra*. But if its officers can be summoned as trustees of the corporation then the action is in substance against the corporation as debtor with the corporation as trustee. *Pettingill* v. *And. R. R. Co. supra*.

We are aware that in *Silloway* v. *Columbia Ins. Co. supra*, the only trustee summoned, was the agent of the company resident in Massachusetts, the company being located in South Carolina. Our answer is that the question was not raised in that case. So several cases have been maintained in Massachusetts wherein no equitable trustee was made a party defendant because the question was not raised. SOULE, J., in *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 561. Again, the Massachusetts statute, where *Silloway* v. *Columbia Ins. Co.* was decided, expressly provided for the maintenance of the bill when the debtor did *not* reside in the commonwealth — the purpose of the statute being to reach property belonging to a non-resident debtor. BIGELOW, J., in *Davis* v. *Worden*, 13 Gray, 306.

Inasmuch therefore as there is no equitable trustee holden, the bill must be dismissed with costs.

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

INHABITANTS OF FAIRFIELD *vs.* INHABITANTS OF OLDTOWN.

Somerset. Opinion June 2, 1882.

Evidence. Pauper settlement.

The presumption is in favor of a ruling, and it is necessary in order to sustain exceptions to the admission of evidence, that the excepting party should make it appear that there was nothing in the case as presented at *nisi prius* which would justify the admission.

In assumpsit for pauper supplies where the defendant denied the settlement, the following letter from one of the overseers of the defendant town to one of the overseers of the plaintiff town, dated February 25, 1877, was admitted in evidence against the objections of the defendant. "I received your bill of supplies for the Gonyea family. I think it is a little large. When I was at your place the second day of January, you had furnished about twenty dollars to the whole family of nine, five of them belong to us and four to you; that would be twelve dollars and fifty cents for us. Now eight weeks and two days since at two dollars per week, would be about sixteen dollars and seventy cents, which would make twenty-nine dollars and twenty cents; that is the way I make it. There is one boy that we do not take. Please answer if I am not right." The letter was not a reply to a notice and did not relate to any of the supplies embraced in the suit. *Held*, that as the exceptions did not show but that there were phases of the case which would justify the admission the presumption of the correctness of the ruling was not overcome. APPLETON, C. J., and PETERS, J., dissenting.

ON EXCEPTIONS.

(Exceptions.)

"Assumpsit for support of certain paupers named as follows in the writ: Joseph Gordon and Catharine Gordon his wife, and Joseph Gordon, Jr. son of said Joseph and Catharine, and also Augustus Ingalls and Flora Ingalls wife of said Augustus, and Napoleon Ingalls and Emily Ingalls, children of said Augustus and Flora; and also, Joseph Charity and Susan Charity wife of said Joseph Charity, and Frank Charity son of said Joseph and Susan.

"The defendants denied that the paupers had ever acquired a settlement in their town.

"The plaintiffs claimed they had acquired such settlement by a five years residence of Joseph and Catharine Gordon, or Gonyea as they were sometimes called, between 1842 and 1869, and they introduced the testimony of the Gordons tending to establish such residence, if believed.

"The defendants introduced evidence by cross-examination of said Gordons, and by independent witnesses, tending to show the contrary. And this was the principal issue between the parties.

"Upon this issue the plaintiff offered in evidence the following letter sent by one of the overseers of the poor of Oldtown to one of the overseers of the poor of Fairfield.

"Oldtown, February 25, 1877.

Mr. Totman, Dear Sir: I received your bill of supplies for the Gonyea family. I think it is a little large.

"When I was at your place the second day of January, you had furnished about twenty dollars to the whole family of nine, five of them belong to us and four to you; that would be about twelve dollars and fifty cents for us. Now eight weeks and two days since at two dollars per week, would be about sixteen dollars and seventy cents, which would make twenty-nine dollars and twenty cents; that is the way that I make it. There is one boy that we do not take. Please answer if I am not right,

Yours truly, A. C. Brown."

"The defendants seasonably objected to the introduction of this letter as hearsay, and as inadmissible because a mere narrative of past transactions, but the court admitted it and allowed it all to be read to the jury who returned a verdict for the plaintiffs.

"Said letter was sent about two months after notice in the usual form had been sent by the overseers of Fairfield to the overseers of Oldtown in relation to said paupers. But it was not claimed by the plaintiffs that said letter was in answer to said notice; nor did it relate to any of the supplies embraced in this suit.

"To the foregoing ruling admitting the aforesaid letter the defendants respectfully except and pray that their exceptions may be allowed."

S. S. Brown, for the plaintiffs, cited: *Dennen* v. *Haskell*, 45 Maine, 430; *Hovey* v. *Hobson*, 55 Maine, 276; 68 Maine, 301; 10 Maine, 185; 49 Maine, 367; 4 Allen, 374; 9 Allen, 54; 12 Cal. 426; 116 Mass. 356; Hilliard, New Trials, 414.

D. D. Stewart, for the defendants, cited: *Burnham* v. *Ellis*, 39 Maine, 319; *Corinna* v. *Exeter*, 13 Maine, 321; *Franklin Bank* v. *Steward*, 37 Maine, 519; *Haven* v. *Brown*, 7 Maine, 421; *Maine Bank* v. *Smith*, 18 Maine, 103; *New Vinyard* v. *Harpswell*, 33 Maine, 193; 1 Greenl. Ev. 113; Story's Agency, § 134; *Fairlie* v. *Hastings*, 10 Ves. 127; *Dorne* v. *Southwork M'fg Co.* 11 Cush. 205; *Dartmouth* v. *Lakeville*, 7 Allen, 285; *Stiles* v. *West R. R. Co.* 8 Met. 44.

BARROWS, J. The only exception here alleged is to the admission against the defendants' objection of a certain "letter sent by one of the overseers of the poor of Oldtown to one of the overseers of the poor of Fairfield." It bears date February 25, 1877, and obviously relates to some transaction *then proceeding* between the officers of the two towns respecting the support of the paupers whose settlement was here in controversy. It appears in the exceptions, that it was not a reply to any notice from the plaintiffs to the defendants, and did not relate to any of the supplies embraced in this suit.

The exceptions seem to have been carefully drawn by the learned counsel for defendants, in view of the rule which requires the party excepting to the admission of evidence to overcome the presumption in favor of the ruling, and make it apparent that there was no phase of the case as presented at *nisi prius*, which authorized the admission of the testimony in question. *Hovey* v. *Hobson*, 55 Maine, 256, 276. We may be sure that nothing consistent with the truth was omitted in these exceptions to bring the case within the rule. The rule is a just and useful one, and, if adhered to, will lessen the reproach that attends the granting of new trials which are ultimately found to serve no purpose but to postpone at large expense, a result that was both inevitable and correct.

But while we may be quite certain that defendants' counsel has overlooked no fact which would tend to sustain his exceptions,

there still remain probable phases of the case which justify the admission within repeated decisions of the court, and without infringing upon the salutary doctrine for which he contends that mere admissions of agents as to past transactions are not competent to affect their principals. Our rule respecting the admission of evidence of former dealings between towns, through their officers and agents acting within the scope of the authority conferred on them by statutes, respecting paupers whose settlement finally becomes a subject of litigation between them, is laid down in *Harpswell* v. *Phipsburg*, 29 Maine, 313, and *Weld* v. *Farmington*, 68 Maine, 301, with sufficient clearness and precision for all practical purposes, and, so far as it differs from that of Massachusetts as shown in *New Bedford* v. *Taunton*, 9 Allen, 207; *Dartmouth* v. *Lakeville*, *Id.* 201, and S. C. 7 Allen, 285, we prefer it.

Seeing how often litigation as to the settlement of paupers or their progeny arises between towns after lapse of time has made it impossible to produce testimony which, in the outset of the controversy, was regarded by both parties as conclusive, we think the acts and doings of the town authorities when their attention is first called to the case, may fairly be regarded as possessing some probative force upon the question of settlement, even if the implied admission resulting therefrom must be regarded as an exception to the doctrine before referred to. For obvious reasons often adverted to in the cases bearing upon this point, any admissions thence implied are not to be held as binding or estopping the town for the future, except where the statutes give them that effect. They are simply to be weighed by the jury with the other evidence as part of the *res gestæ*, like other acts and facts from which a reasonable inference may be drawn, stronger or weaker, according to the concomitant circumstances. The letter was the act of the defendants' overseer in the progress of the transaction to which it related, and for aught we see was as competent as the town orders received in *Weld* v. *Farmington*, which served only to show that the defendants there had paid previous bills of the pauper whose settlement was disputed.

But the rule and its reasons and limitations were so fully discussed in *Weld* v. *Farmington*, 68 Maine, 301, that further elaboration is needless. It is well established both in this State and New Hampshire, is wholesome and works well in practice. *Norridgewock* v. *Madison*, 70 Maine, 174. Defendants' counsel still objects that the document here presented was but the act of one of the defendants' overseers. But the act of one of the board accompanied as we may fairly presume this to have been (since the exceptions do not assert the contrary) with proof that what he did was by authority from his associates, or had been ratified by them, would have the same effect as though a majority of the board had participated in the act. *Fayette* v. *Livermore*, 62 Maine, 229; *Smithfield* v. *Waterville*, 64 Maine, 412, 416, 417; *Linneus* v. *Sidney*, 70 Maine, 114. Here, then, we have one phase of the case not negatived by the exceptions which would justify the admission upon the main issue under such limitations as to the purpose for which it might be used and as to its effect as the law requires, touching which we presume the jury were duly instructed if defendants' counsel deemed them of sufficient importance as the case stood to request it.

There is still another phase of the case apparent, which would authorize the admission of this document. The burden was on plaintiffs to prove the requisite statute notice to the defendants' overseers, and the identity of the paupers described in the writ as Gordons with the Gonyeas, by which name the paupers seem to have been known at Oldtown. It is easy to see how the visit of the overseer referred to in the letter, and the arrangement for the adjustment of the bill for Gonyeas may have tended to remove any question that might be raised about the sufficiency of the notice.

The exceptions fail to make it appear that there was no phase of the case upon which the document objected to, properly supplemented by accompanying testimony, would be legitimate evidence, and as it may fairly be presumed that its use and effect

were properly limited, there is no occasion to send the case to a new trial.

Exceptions overruled.

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

VIRGIN, J. did not concur.

DISSENTING OPINION BY

APPLETON, C. J. This is an action of assumpsit for supplies furnished certain paupers named Gordon or Gonyea, who the plaintiffs claimed had acquired a settlement in the defendant town by a residence there of five years between 1842 and 1869. This was denied by the defendants.

Upon this issue the plaintiffs offered the following letter sent by one of the overseers of the poor of Oldtown to one of the overseers of the poor of Fairfied.

"Oldtown, February 25, 1877.

Mr. Totman, Dear Sir, I received your bill of supplies for the Gonyea family. I think it is a little large. When I was at your place the second day of January, you had furnished about twenty dollars to the whole family of nine, five of them belong to us and four to you; that would be about twelve dollars and fifty cents for us. Now eight weeks and two days since at two dollars per week, would be about sixteen dollars and seventy cents, which would make twenty-nine dollars and twenty cents. That is the way I make it. There is one boy that we do not take. Please answer if I am not right.

Yours truly, A. C. Brown."

To the admission of this letter the defendants except.

The letter relates to past transactions. It is not an answer to any notice given by the plaintiff town. It has no relations to any supplies embraced in this suit. It is not shown to have been authorized or ratified by the official associates of the writer.

This evidence was hearsay. It will hardly be contended that if the plaintiffs had offered of the oral declarations of Brown identical in terms with his letter that they would have been received. *Dartmouth* v. *Lakeville*, 7 Allen, 285; *New Bedford* v. *Taunton*,

9 Allen, 207. Brown was a competent witness and if the facts stated in the letter were relevant and material the defendant had a right to their delivery under the sanction of an oath and to the privilege of cross-examination. It is immaterial whether the hearsay declarations of Brown were oral or reduced to writing.

If it be urged that Brown was an officer of the town still nothing is better settled than that the declarations of an agent as to past transactions are not admissible. *Burnham* v. *Ellis*, 39 Maine, 319. His narrations of the past are not receivable. He can no more admit away the rights of the town, than any other agent can admit away the rights of his principal. *Corinna* v. *Exeter*, 13 Maine, 321.

The cases cited do not sustain the admission of hearsay evidence.

In *Harpswell* v. *Phippsburg*, 29 Maine, 313, it was held within the scope of the official powers of overseers of the poor to settle and pay claims against their town for supporting paupers. In *Fayette* v. *Livermore*, 62 Maine, 229, the court held that one overseer might make a personal examination as to the necessity of supplies and that if his conclusions were ratified and affirmed by his associates, supplies furnished by his order and the furnishing ratified by his associates would constitute a furnishing by the town. It is not necessary that a majority of the overseers should make a personal examination of the necessity for supplies. They may act upon the information of one of their fellows. *Smithfield* v. *Waterville*, 64 Maine, 413; *Linneus* v. *Sidney*, 70 Maine, 115. In *Norridgewock* v. *Madison*, 70 Maine, 174, evidence of payments for pauper supplies after notice and without denial of liability on the part of the town so paying was held admissible. In *Weld* v. *Farmington*, 68 Maine, 305, the instructions were that the acts of town officers bind their town only when acting within the scope of their duty; that the statute requires overseers of the poor to relieve a person found destitute in their town at the town's expense; that when thus acting, their acts bind the town. In that case a record of town orders given by the overseers of the poor for the support of a pauper were held admissible. The evidence was received because it was the action

of town officers while in discharge of their duty. But that case furnishes no justification for the admission of a letter written by one of a board without the authority of his associates and not in the discharge of any official duty and containing merely a narrative of past events.

In no case has it been held that the declarations whether oral or written of an overseer, who was a competent witness, as to past transactions, were admissible. The ordinary and effective securities of an oath and cross-examination are wanting. The report negatives any phase of the case, in which such testimony could be admissible.

To determine whether the admission of this evidence was authorized resort must be had to the case as reported and not to conjecture. If from the facts as reported and from the necessary inferences from those facts, nothing appears to justify the admission of the evidence; it should have been rejected. In this case there is nothing which will sustain its admission. It is not for the court to sanction the admission of evidence, which, upon the case as reported is manifestly hearsay and illegal, because it may be guessed or imagined, that, upon some possible and undisclosed state of facts, it might be legally receivable.

PETERS, J., concurred.

MICAH W. NORTON *vs.* MITCHELL WILLIS.

Somerset. Opinion June 2, 1882.

Evidence. Market value. Sales.

It is admissible to show at what price property has been actually sold, as evidence tending to show its market value. Otherwise, as to unaccepted offers of sale or purchase.

Associated with other facts, it may be competent to show what a defendant in an action of trover gave for six horses at a lump price, when the value of only three of them is to be ascertained. Standing alone the evidence would amount to nothing.

ON EXCEPTIONS.

Trover to recover the value of three horses.

The opinion states the material facts.

Augustine Simmons, for the plaintiff.

Walton and Walton, for the defendant.

The price paid for an article is not evidence of fair market value. It often depends upon the advantages or necessities of one party or the other, changing the price in the particular instance.

Thus the measure of damages in cases of this sort is not what their value is to A because he has facilities for keeping them, or to B because he has none, but what is their fair market value as articles of sale and merchandise. *Gardner* v. *Field*, 1 Gray, 151.

We have many times witnessed the rejection of such testimony at *nisi prius*.

Still more incompetent was evidence of the price paid for six horses when the value of but three were in issue.

The evidence was advantageous to the plaintiff and injurious to the defendant. That is shown by the conduct of the parties. The plaintiff offered the evidence and it was admitted against the objections of the defendant. *Warren* v. *Walker*, 23 Maine, 453; *Winkley* v. *Foye*, 8 Foster, 518; *Boyce* v. *Cheshire R. R.* 42 N. H. 97.

PETERS, J. In an action of trover to recover the value of three horses, the plaintiff was permitted to show what the defendant gave in a lump price for these and three other horses. This was upon the question of value. The defendant's counsel contends that evidence of what an article cost or sold for is not admissible. This proposition is not maintainable. It is a common thing to allow competent witnesses to give their opinions as to what property is worth and how much it would probably sell for. *A fortiori*, is it proper to prove how much the property has in fact sold for. It is sometimes competent to show how much similar property has sold for, in order to arrive at the value of property in question. And it would be strange if it were improper to show the price at which the same property was sold for. *Warren* v. *Wheeler*, 21 Maine, 484; *Fogg* v. *Hill*, *Idem*, 529; *Snow* v. *Railroad*, 65 Maine, 230.

Such evidence has been admitted by many courts. *Shattuck* v. *Railroad*, 6 Allen, 115; *Kent* v. *Whitney*, 9 Allen, 62; *Brigham* v. *Evans*, 113 Mass. 538; *Whipple* v. *Walpole*, 10 N. H. 131; *Thornton* v. *Campton*, 18 N. H. 20; *March* v. *Railroad*, 19 N. H. 376; *White* v. *Railroad*, 30 N. H. 188; *Carr* v. *Moore*, 41 N. H. 131; *Kelsea* v. *Fletcher*, 48 N. H. 282; *Hoit* v. *Russell*, 56 N. H. 559. In *Watts* v. *Sawyer*, 55 N. H. 38, the court says: "In practical affairs, the value of a thing is taken to be what it will sell for in the market; hence, evidence of sales, that is, of cost, is every day admitted on the question of value." In *Hildreth* v. *Fitts*, 53 Vt. 684, the court says: "Any genuine sale of the property fairly made, near the time of the conversion, we understand may be given in evidence on the question of damages." *Dowdall* v. *Railroad*, 13 Blatch. 403; *Campbell* v. *Woodworth*, 20 N. Y. 499; *Gile* v. *McNamee*, 42 N. Y. 44; *Knickerbocker Life Ins. Co.* v. *Nelson*, 78 N. Y. 137; 2 Whar. Ev. § 1290, and cases cited in note. 2 Greenl. Ev. § 649.

The evidence of unaccepted offers of sale or purchase of property, is ordinarily not admissible, and it is this principle, rather than the other, which the argument upon the brief of the defendant's counsel has reference to. To buy or sell at a price is one thing; to offer to buy or sell at such price is quite another thing. There is too much contingency and uncertainty about offers to buy and sell, to give them importance as tests of value, and such evidence may be easily fabricated. But even to this rule there may be exceptions, where the offers are for property exposed for sale in open market in public places. *Winnisimmet Co.* v. *Grueby*, 111 Mass. 543; *Wood* v. *Insurance Co.* 126 Mass. 316; *Cliquot's Champagne*, 2 Wall. 114; *Whitney* v. *Thacher*, 117 Mass. 523; *Whelan* v. *Lynch*, 60 N. Y. 469; 1 Sedg. Dam. 6th ed. 585.

It is further objected, that it was not competent to prove what price the six horses were purchased at together by the defendant, when only the value of three of them was to be ascertained. Of course, such evidence is more removed from the operation of the rule governing this class of proof than that before named, and, standing alone, might be of little or even of no probative force;

and, still, it helps in a general way to describe and identify the property, and, associated with other facts, may afford aid to the solution of the issue involved. The exceptions do not disclose in what connection this fact came into the case. We can conceive of conditions under which the fact would have weight and be legally available. It is what the defendant himself gave for the property. In such a matter something must be left to the judgment and discretion of the presiding justice, who in this case, no doubt, received the evidence under circumstances which rendered its admission proper and reasonable.

The counsel for the defendant evidently relies upon no other objections to testimony presented in the case.

Exceptions overruled.

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

INHABITANTS OF HOULTON *vs.* INHABITANTS OF LUDLOW.

Aroostook. Opinion June 7, 1882.

Pauper Settlement.

It is provided by R. S., c. 24, § 1, that, if a marriage be procured by the agency or collusion of town officers for the purpose of changing the settlement of a pauper, the settlement shall not be changed thereby. This prevents the wife taking the settlement of the husband. But their children will take his settlement instead of hers.

The man's settlement was in the town of Ludlow; the woman's in Houlton. The officers of Houlton procured the marriage on May 25, 1877. On July 27, 1877, a child was born who became legitimated by the marriage. *Held*, that the child took the settlement of the father and not that of the mother. BARROWS and SYMONDS, JJ., dissenting.

ON EXCEPTIONS.

Assumpsit for pauper suplies furnished Mrs. Nina L. Milroy and her infant child.

The settlement of the paupers was denied by the defendants on the ground that the marriage of Nina L. Milroy then of Houlton, to Theodore Milroy then of Ludlow, was procured by the agency or collusion of the municipal officers of the plaintiff town. The verdict was for the defendants. The marriage took place May 25, 1877. The child was born July 27, 1877. The presid-

ing judge in his charge to the jury, having referred to the marriage as inoperative, if procured by collusion to affect the settlement of the child was requested but declined, *pro forma*, to give the following instructions.

"The child had the settlement of its father, Theodore Milroy, unaffected by any question of how the marriage was procured, and so far as the settlement of the child is concerned and the liability of the defendant town for so much of the supplies as was furnished for its benefit, no question of collusion or agency of the officers of either town or of any other person can intervene. If you find the defendant town liable for supplies furnished for the benefit of the child, you may determine from the whole of the testimony the amount of such supplies."

To the refusal to give such instructions the plaintiffs alleged exceptions.

Lyman S. Strickland, and Madigan and Donworth, for the plaintiffs.

Powers and Powers, for the defendants.

PETERS, J. The town of Houlton sues the town of Ludlow for pauper supplies furnished a married woman and her infant child. It appears, that the woman, having her settlement in Houlton, was married on May 25, 1877, to a man whose settlement was in Ludlow, and that the marriage was procured by the overseers of Houlton, with a view of transferring the settlement of the wife to that of the husband. But by the statute her settlement, on account of such fraud or collusion, remained unchanged. On July 27, 1877, the child was born. It was ruled at the trial that the child took the mother's and not the father's settlement. The ruling was erroneous.

The statutory provision to be interpreted is this: "When it appears in a suit between towns involving the settlement of a pauper, that a marriage was procured to change it by the agency or collusion of the officers of either town, or any person having charge of such pauper under authority of either town, the settlement is not affected by such marriage." The act originally passed in 1846, (c. 226,) which is much condensed by the present statute without any design to alter its meaning, asserts, that, if the

marriage be procured by overseers or agents, "with a view of changing the settlement of such pauper or person *thus married*," and of fixing the settlement of "such pauper or person" in another town, "then such marriage shall be deemed so far fraudulent that *no new* settlement shall be acquired by such marriage, but the settlement of *such pauper* or person shall remain unchanged by such marriage."

It is "the settlement of a pauper" that is not to be changed by the marriage, namely, the married pauper. Only one person is spoken of, and no language is used which can reasonably be construed to extend the application of the statute beyond the one pauper. When she was married, there was no other person in existence whose settlement could be affected thereby. "The settlement of *such* pauper or person shall remain unchanged by such marriage." Such person is the person whose marriage is fraudulently procured. How can a person unborn gain a "*new* settlement" or "*change* a settlement," in the language of the act? But for the statutory provision before quoted, the settlement of the mother would have been transferred from Houlton to Ludlow by the marriage, and this change the statute prevents. But the settlement of her lawful children could undergo no such change, for the reason that they would have no settlement in Houlton to be changed. Following the condition of their lawful father, their settlement would be in Ludlow.

The ruling, made at the trial, entirely disregards the positive provision of the statute, that "legitimate children have the settlement of the father, if he has any in the state." This is without exception or qualification, and cannot be overcome by any implication to be derived from any other statute.

It is said that the interpretation of the statute which we adopt may separate mothers from their children. But the other interpretation separates children from their fathers, to whose possession and care they in most instances legally belong, and upon whose ability and efforts to support and educate them they principally depend. By the ruling, the father would have his settlement in one town, and his lawful offspring have theirs in another town, legitimate children being thus classed with illegitimate children, a result never before seen in the operation of the pauper laws in this state.

It must be considered, that, if the doctrine implied by the ruling at *nisi prius* prevails, it must be a general doctrine for such cases. It would not seem to be a just penalty for all cases, that, because the marriage is collusively procured, not only should the wife's settlement be unchanged by it, but that all of her husband's children begotten with her should be taken from his settlement and annexed to hers. Even in the case at bar, an extreme case perhaps, an unjust act has not been consummated. There was no injustice in inducing a man to marry a woman, whose child soon to be born became honestly legitimated thereby. As it is, Ludlow avoids the support of the wife. Had the husband married some other woman, or this woman under other circumstances, he with all his family might have been a charge upon that town.

Exceptions sustained.

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

DISSENTING OPINION BY

BARROWS, J. Section first of chapter twenty-four of the Revised Statutes, provides among other things as follows: "When it appears in a suit between towns involving the settlement of a pauper that a marriage was procured to change it by the agency or collusion of the officers of either town . . . the settlement is not affected by such marriage."

This suit brought by Houlton against Ludlow involves the settlement of Nina L. Milroy and her infant child, and the defence was, that neither of the paupers has a settlement in the defendant town, because it was alleged that the marriage of the mother through which alone either of them could derive a settlement in Ludlow, "was procured to change it by the agency or collusion of the officers of" Houlton. The defendants' brief statement asserts that at the time of the marriage, the mother was chargeable as a pauper to Houlton where she had her settlement, and that the marriage thus fraudulently procured took place at the Houlton poor-house without the usual preliminary formalities. The exceptions show that the mother was married to Milroy, May 25, and the child was born July 27, 1877; that "the presid-

ing judge in his charge to the jury having referred to the marriage as inoperative *if procured by collusion to affect the settlement of the child*" was requested to instruct the jury that "the child had the settlement of the father unaffected by any question how the marriage was procured," and, in substance, that as to one of the paupers whose settlement was involved in this suit although they might be satisfied that the marriage (through which alone the settlement in Ludlow was to be derived) was procured by the fraud and collusion of the officers of Houlton, this would not prevent the child from having its derivative settlement in Ludlow, nor affect the right of Houlton to recover so much as had been expended for that pauper, and, in fine, that as to him, the fraud which changed his settlement from Houlton to Ludlow might be regarded as not forbidden by the statute, and therefore that the marriage collusively brought about for that purpose would have its intended effect, the statute to the contrary notwithstanding. I see no good reason for so restricting the operation of this remedial statute as to deprive it of the most important part of its power to restrain the mischief which it was enacted to prevent.

Least of all in a case like the present where it could hardly be doubted that if the marriage was procured by the collusion of the officers of the plaintiff town to change the settlement of the mother, they had the same purpose with regard to the child which was so near its birth and prospectively chargeable. The collusive furnishing of supplies by town officers to prevent a man from gaining a settlement in their town by having his home therein for five successive years, "without receiving supplies as a pauper" has never been regarded by the courts as interrupting the process of gaining a settlement, even though the supplies may have been received and consumed and the case thus brought within the precise terms of the statute. It seems to have been supposed that in that instance the courts had power without being liable to the charge of judicial legislation to guard towns against the fraudulent practices of the officers of other towns. Upon the same narrow construction of the settlement acts which the plaintiffs call for here, it would seem that the court ought to say in such cases, the man has received pauper supplies within the five years, and though their reception was procured by the fraudu-

lent practices of the town officers, he gains no settlement because the statute requires five years residence without receiving pauper supplies and makes no provision that the fraud of the town officers shall affect the question. But here the inquiry is, how shall a statute provision, obviously framed to prevent a fraudulent practice, lest it should otherwise be permitted by oversight to succeed, *be construed?*

The rule is too familiar to need citations in its support that it shall, if possible, be so construed as to accomplish the end which the legislature had in view, and not so as partially to defeat it; that it shall be liberally construed to advance the remedy for the mischief which it aims to prevent. What is that mischief? It is the collusive interference of town officers to procure marriages to change the settlement of their poor, and thus to relieve their towns from a burden present or prospective by imposing it upon some other town. I do not perceive that it is necessary so to construe the act that the greater part of the temptation to practice the fraud upon the law, shall still remain, and the more important settlements in controversy *shall* be affected by marriages thus procured in defiance of the statute prohibition.

The paupers referred to in the statute are "the paupers whose settlement is in controversy in the suit," and I see no substantial reason why the collusion of the town officers should not have the same effect upon the derivative settlement of the child that it has upon the derivative settlement of the wife. The marriage is as obviously procured to affect the settlement of the child as it is that of the wife. The plain meaning of the statute is that the settlement of any pauper shall not be affected by a marriage so procured. That the marriage would change the settlement of a child who would be otherwise illegitimate whenever it would change that of the mother, is clear, and the express mandate of the statute is that the settlement, *i. e.* the settlement of the paupers in controversy in the suit, "shall not be affected by such marriage."

In the original enactment (c. 226, laws of 1846,) there was an express provision running thus, "then such marriage shall be deemed so far fraudulent that *no new settlement shall be acquired* by such marriage," which excludes the possibility of *deriving a*

settlement for the child through the fraudulent act of the town officers as completely as for the wife, and such was doubtless the design of the makers of the statute. Unless all settlements so derived were cut off, the town officers practicing the fraud would, without fear of defeat as to the more important part of their object, continue their course of fraudulent collusion, sure that it would be in part successful; and the fraud which vitiates all transactions between man and man, and all the judgments of courts thereon, would have at all events one secure stronghold from which, upon the construction contended for by plaintiffs' counsel, not even the court could oust it.

I cannot but think that the statute provision is simply declaratory of the common law, and that aside from it, it would still be competent for the court to apply the same common law principle which they do in a case of a collusive furnishing of pauper supplies by town officers, and not suffer the settlements of paupers to be affected by any collusive action on the part of the officers of the town which proposes to profit by it and impose the burdens which it would otherwise have to bear upon some other town. But however this may be, it seems clear to me that the statute covers any derivative settlement acquired by the marriage, that of the prospective progeny as well as that of the woman, and that it applies to those who become paupers after the collusive action of the town officers, as well as those who are paupers at the time the marriage is brought about. Any other construction would tend to defeat the manifest design of the statute and encourage the practices which it was meant to prohibit. Although this was a case of the procurement of the marriage of a woman who was at the time a pauper at the plaintiffs' poor-house, I do not feel disposed to sanction a construction which would result only in withholding relief until the marriage had been accomplished, and to encourage town officers to busy themselves in getting rid of their prospective paupers by procuring their intermarriage with men having settlements elsewhere, thus by well managed grafting ridding themselves of entire pauper races.

Plaintiffs' counsel urge that it is but justice that Ludlow being the place of settlement of the father of a child, which, but for the marriage would have been a bastard, should take and support the child. Even if the law made towns liable for the support of

bastard children begotten by their inhabitants as it does not, (wisely leaving the settlement of such children, where the burden of supporting them would be least—in the same town with the mother) counsel would still, in thus arguing, assume what is not in evidence, and what is as likely to be untrue as true. Town officers engaged in planting a prospective pauper upon another town, are not very particular about the paternity of the expected burden, and if they can find some worthless man, who has a settlement out of their own town, willing to be their instrument, it could hardly be expected that they would look into the evidence of paternity as they would if they were engaged simply in the performance of their legitimate duty to prosecute the father of a bastard child and compel *him* to assist the mother in its maintenance. The jury in effect found the town officers of Houlton guilty of procuring this marriage, in order to change the settlement of these paupers, the mother *and child*. Plaintiffs' counsel concede that this is right so far as the mother is concerned. They make no complaint of the verdict or of the instructions as to her, and the jury were doubtless told that the honest performance of their duty by the Houlton town officers in prosecuting the father of a child likely to be born a bastard, would not subject them to the imputation of a breach of the implied mandate of this statute, even though such prosecution resulted in a marriage between the father and mother of the child, but that they must find the agency and collusion of the town officers for the purpose of procuring a change of the settlement of the paupers whose settlement was here in controversy, by means of the marriage.

Finding this, the case is within the *letter*, as well as the *spirit* of the statute, as regards the child as well as the mother.

The settlement of neither is affected by the marriage.

But as the majority of the court hold that these doctrines are not tenable, it seems desirable that the legislature should inquire, in the interest of humanity and public policy, whether the statute should not be either repealed or amended. As now construed, it not only fails to remove the temptation to fraudulent action on the part of town officers, but its practical effect is to impose upon the defrauded town the support of infants separated from mothers and turned over to strangers to be maintained at greater

cost, without the aid of the maternal instincts which even in the poorest, contribute so largely to their well being in infancy. The chief object of giving to both wife and children the settlement of the husband and father, is thus thwarted.

SYMONDS, J., concurred.

JOHN E. PLUMMER *vs.* EASTERN RAILROAD COMPANY.

JOHN E. PLUMMER AND WIFE *vs.* same.

Cumberland. Opinion June 12, 1882.

Negligence. Railroads. Contributory negligence.

A traveler in crossing a railroad, is bound to exercise such care as a prudent man, in approaching such a place, would ordinarily use for the protection of life.

The fact that one in attempting to cross a railroad does not, at the instant of stopping on it, look to ascertain if a train is approaching, is not *conclusive* evidence of a due want of care on his part.

His omission to do so is to be submitted to a jury for their consideration.

ON motion to set aside the verdict of the jury.

These two actions were tried together and the jury returned a verdict in the first for five thousand and one hundred dollars, and in the second for twelve hundred dollars.

The case and material facts are stated in the opinion.

Strout and Holmes, for the plaintiffs.

Webb and Haskell, for the defendant.

Both the plaintiffs declare that acting upon the presumption, that there could be no train coming from the westward, they approached and passed upon the crossing without looking that way, and only looked up, when they were almost under the approaching train.

They both admit that they only turned their attention to the track towards Portland, and did not take any precaution as to trains in the other direction.

This was gross and inexcusable negligence, and contributed to the accident. It was such contributory negligence as effectually defeats their actions.

The plaintiffs have not any pretence or pretext for excuse of their reckless and rash proceeding, in any ignorance of the exist-

ence or situation of the crossing. They were perfectly familiar with it, and with all its features of blindness, concealment or obscuration.

Now as matter of law, such conduct on their part was contributory negligence. And in cases when the facts are undisputed, negligence is a matter of law for the court. *Penn. Ry. Co.* v. *Righter*, 13 Vroom, 180; in Law Reg. vol. 20, p. 142; *Grows* v. *M. C. R. R.* 67 Maine, 104; *Clark* v. *Boston and Albany R. R.* 128 Mass. 1; In *Chicago and Alton R. R.* v. *Amelia T. Robinson*, decided in 1881, reported only in papers, it was held, to be, "the duty of a person approaching a railroad crossing to carefully look out for trains, although the signals required by law are not given and it is gross negligence to omit this precaution." *Wildes* v. *Hudson, R. R.* 29 N. Y. 315; *Ernst* v. *Hudson, R. R.* 39 N. Y. 61; *Wilcox* v. *Rome and O. R. R.* 39 N. Y. 358; *Railroad Co.* v. *Huston*, 95 U. S. 697; *Butterfield* v. *Western R. R.* 10 Allen, 532; *Allyn* v. *Boston and Albany R. R.* 105 Mass. 77.

APPLETON, C. J. This is an action on the case against the defendant corporation for negligence, by reason of which, the plaintiff while attempting to cross their track with his wife received a severe injury, for which compensation is sought.

There are no exceptions to the rulings of the presiding justice. It may, therefore, be assumed that they were in strict accordance with the legal rights of the parties.

The case comes before us on a motion for a new trial, on the ground that the verdict was against the law.

The plaintiff claims that no bell was rung nor whistle blown, as should have been done to give notice of the approaching cars. The evidence on this point is contradictory, but the jury must have found against the defendant on both these questions. The matter was properly left to the jury and no sufficient reasons are shown for interfering with their conclusions as to these points.

But the defendants, not contesting the findings of the jury on these points, insist that there was contributory negligence in not stopping and looking in both directions for coming trains.

Whether contributory negligence existed or not is a mixed question of law and fact; the fact is to be determined by the jury

on competent evidence and in accordance with the principles of law as given by the court for their guidance. "It is negligence," say the court in *Grows* v. *Maine Central*, 67 Maine, 104, "to attempt crossing the track of a railroad without looking to see if the cars are approaching. If the traveller does not look and his omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge in omitting to sound the whistle or ring the bell."

This case came before the court on demurrer to a declaration in which it was alleged that the plaintiff saw the cars were approaching and about forty rods from the crossing.

It is in evidence that the plaintiff did not stop immediately before crossing the railroad track. It was held in *Pennsylvania Railroad Company* v. *Beale*, 73 Penn. 504, that the failure of a traveller to stop, immediately before crossing a railroad track, was negligence *per se*. It was held otherwise in New York, where it was decided that it was not, as matter of law, negligence for a person approaching a railroad train in a carriage upon a highway, not to stop; his omission to do so is a fact to be submitted to a jury. *Kellogg* v. *Railroad Co.* 79 N. Y. 72. The fact that a person who, in attempting to cross a railroad, does not at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive of a due want of care on his part. *Chaffee* v. *B. & L. Railroad Co.* 104 Mass. 108; *Williams* v. *Grealy*, 112 Mass. 79.

The bell not having been rung nor the whistle blown, the negligence of the defendant is established. Was the plaintiff under the circumstances in the exercise of ordinary and common care? The morning train had already passed. The train from the west was not due. The customary signals of approaching cars had not been given. It was the bounden duty of the defendant to give those signals of danger, and the plaintiff had a right to expect them, and not hearing them, to assume that there was no car sufficiently near to endanger the passage over the track. *Tabor* v. *Missouri Railroad Co.* 46 Mo. 353. It is true the plaintiff did not stop and listen, but he states that as they drove

"most down to the station," his wife asked if there were any cars coming, to which he replied no, not from Boston, "unless there was extra trains, and he (I) was looking for the train." To the inquiry which way? his reply was, "from Portland, and I looked towards Boston and I did not see any train coming from any direction." The wife testifies that she asked her husband if there were any cars coming, to which he answered in the negative, giving as a reason that the train had not time to get out so that another could come from Oakhill; that she looked Portland way and then the other way and the train was close upon them—that she had looked away from Portland before this, through the opening to see if she could see any. The plaintiff and his wife looking in both directions hearing no sounds of cars, whistle or bell, and with vision somewhat obstructed by buildings and trees, attempted to cross, and in that attempt were injured. The jury found they were in the exercise of ordinary and common care. Is that verdict so manifestly erroneous that it should be set aside. It is true the plaintiff was bound to exercise his sight to avoid danger, but he was not bound to use the greatest possible diligence. He was bound to exercise such care as a prudent man approaching such a place would ordinarily use for the protection of life. It is uncertain to what extent he could see the cars through the intervening obstructions. His attention was called to the danger and he and his wife looked to see if there was a train in view. The obstructions may have prevented their seeing. Seeing nothing, hearing no warning of danger through the negligence of the defendants, in attempting to cross, the plaintiff was injured. Under the circumstances of the case, it was for the jury to determine whether he exercised the care the law requires. The jury saw and heard the witnesses; they examined the premises and with the best means of judging have arrived at a conclusion, which is not so manifestly erroneous as to demand our interference. *Kellogg* v. *N. Y. C. & Hudson R. R. Co.* 79 N. Y. 72; *The Cleveland C. & C. Railroad Co.* v. *Crawford*, 24 Ohio St. 631; *Stackus* v. *New York, C. & H. R. R. Co.* 79 N. Y. 465.

Motion overruled.

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

VIRGIN and SYMONDS, JJ., non-concurred.

APPENDIX.

THOMAS A. RICH and another, appellants,

vs.

MARY K. GILKEY.*

Penobscot. Opinion November 28, 1881.

Revocation of a will, when valid.

The destruction of a will by a person not possessing testamentary capacity, is not a revocation of it. There must be *animus revocandi*, and such person does not and cannot possess an intention, of revocation any more than an insane man can.

And where the destruction of a will by the testator is the effect of the exercise upon his mind of undue influence it is not a revocation of the will.

An appeal from the decision of the judge of probate in the matter of the probate of the will of Sylvanus Rich.

The will was dated April 9, 1872. In March, 1879, he made a codicil giving his niece, Mary K. Gilkey, the income of ten

*This case was heard at *nisi prius*, and the report of it is here inserted because of the great learning employed in the preparation of the opinion, its literary merit and the importance of the question discussed, together with the fact that other members of the court were consulted upon these questions and, having carefully considered them, they concurred in the views expressed by Judge PETERS in all particulars. Without this, this book has the full number of pages required. — REPORTER.

thousand dollars during her life. On the sixteenth of March, 1880, the testator destroyed this codicil and made another disposing in a different way of the property given by the former codicil in trust for Miss Gilkey. The testator died on the eighteenth of April, 1880. The judge of probate sustained the first codicil and admitted the same to probate.

The cause came on for trial at the October term, 1881, when by mutual agreement the following entry was made:

"Referred to the presiding judge, who may decide all questions upon the merits as affected by considerations of expediency and compromise, including costs, and enter all and any decrees necessary to carry his decision into effect."

The material facts are stated in the opinion.

A. W. Paine and John Varney, for the plaintiffs.

Barker, Vose and Barker, for the defendant.

PETERS, J. When this cause was referred to me for decision, in view of the fact that the jury trial might be broken off by the sickness of a juror, I hardly comprehended the extent of the duties which have been cast upon me. I had supposed my office would be performed by the recommendation of some sum which the estate had better pay and the other party had better receive, in a spirit of compromise, than to pursue the case to an end upon the strict application of legal principles and a close sifting of all the facts that might be produced in evidence. Had I anticipated that the respective parties would adhere so closely as they have to supposed legal rights, I should not have so readily taken upon myself a self-imposed responsibility. Having, however, examined and considered all the issues of law and fact sufficiently to form as satisfactory conclusions as it is probable I ever could arrive at, I file in the case the following opinion.

There is no doubt that Captain Rich, the testator, destroyed the codicil in favor of Mary Gilkey in his lifetime.

The questions of fact are these: First, Was the testator, at the date of the destruction of the codicil, possessed of testamentary capacity? Second, If he had testamentary capacity, was he induced to do the act by undue influence? It would not be

inconsistent to find that a testator was not possessed of sufficient mental capacity to make a will, and also that he was operated upon by undue influence.

The questions of law are: First, Whether, if the codicil was destroyed by the testator, while lacking the possession of testamentary capacity, it can be legally upheld and probated by means of oral evidence? And, secondly, whether the same result follows, if the destruction was induced by undue influence alone.

An examination of the questions of law comes first in the natural order.

I feel clear in the belief that a person who has not testamentary capacity, cannot revoke a will in any manner whatever. He can neither make nor unmake a will. A codicil stands upon the same footing as a will. A will legally made stands until legally revoked. It cannot be revoked by any act of destruction, unless the act is done with an intention to revoke; and a person not having testamentary capacity cannot have an intention to revoke a will; he is legally incapable of it. In such case the burning of the will can have no effect whatever, provided the contents can be clearly and certainly proved by other evidence. The written instrument may be burnt, the surest and best evidence of the will may be thus destroyed, but the will itself, if a draft of it can be proved, outlives the act of destruction, and the testamentary dispositions stand.

This is a common principle in the law, applicable to the loss or destruction of papers and records generally. For instance, A gives B a deed of land. The deed is lost or accidentally destroyed; but the conveyance stands, if the contents of the deed can be proved by satisfactory evidence.

It is said that this opens a wide field for error and fraud, to establish wills upon oral evidence. To my mind, many more frauds would be committible if the contrary rule were admitted. It is upon proof, complete and undoubted, and not upon less than proof, that wills may be orally established, it is to be noticed.

The counsel for the executors contend that, if a will destroyed after a testator's death can be upheld and established by oral

evidence, one destroyed before his death cannot be. I do not concur in this view of the learned counsel. I do not find the distinction admitted by the authorities, excepting, possibly, where the law is so enacted in one or two of the states. Nor do I see the force of any such attempted distinction. I cannot well perceive that the act of wrongfully destroying a will five minutes before death would be valid, and the same act be not valid, if done by the same hand and in the same way five minutes afterwards.

It is said that a wrongful or accidental destruction of a will might take place many years before a testator's death, and in the meantime the testator might become satisfied with the fact of destruction and in his mind ratify the act, and still the instrument be established as his will after his death, if this doctrine be tenable. But the answer to this apprehension of danger consists in the requirement of the law that any person propounding for probate a will destroyed in the testator's lifetime, has upon himself the burden to prove that, notwithstanding destruction, the will continued to be the will of the testator unrevoked up to the testator's death. The presumption would be that the will was destroyed *animo revocandi*, and the burden would be upon the proponent to show, by circumstances or otherwise, that the will was not revoked by the destruction or by a ratification of the destruction while the testator lived.

I think these views are sustained by the great current of authority. The English cases, earlier and later, are that way. The old work on wills by Swinburne, who compiled his book as long ago as during the reign of Queen Elizabeth, gives this exception to the cases where a will becomes void by cancelling or defacing: "Where the testament was cancelled by the testator himself unadvisedly, or by some other person without the testator's consent, or by some other causalty." Jarman, the best authority on wills, English or American, vol. 1, p. 130, says: "The mere physical act of destruction is itself equivocal, and may be deprived of all revoking efficacy by explanatory evidence, indicating the *animus revocandi* to be wanting." He further says: "Thus, if a testator inadvertently throws ink upon his will, instead of sand, or obliterates or attempts to destroy it in a fit of

insanity, or tears it up under the mistaken impression that it is invalid, it will remain in full force, notwithstanding such accidental or involuntary or mistaken act." Mr. Bigelow, the American editor of Jarman's work, in his notes fully approves the doctrine quoted, citing many American cases in its support. The same doctrine is maintained by Prof. Greenleaf in his work on Evidence, § 681, vol. 2, and notes. Redfield, in his treatise on wills, in many places restates the same rule, and upon page 323 of volume 1, (1st ed.) says: "The soundness of the mind and memory is requisite to the valid revocation of a will, as to its execution. It follows, of course, that the performance of the mere act of tearing, cancelling, obliterating, burning, &c. without the *animo revocandi*, and which could not exist, unless the testator were in his sane mind, could have no legal operation upon the instrument."

In Bacon's Abridgement (vol. 10, p. 546,) it is laid down, that "the destruction of a will, even by the testator himself, does not amount to a revocation, if the testator had not capacity. Though the instrument is not in being, if the contents are known, it can be proved." Mr. Wharton expresses it this way; "Revocation will not be complete unless the act of spoliation be deliberately effected on the document, *animo revocandi*. This is expressly rendered necessary by the will act, and is impliedly required by the statute of frauds."

In Smith's Probate Law, a Massachusetts work of merit, at p. 51, the author says; "It may be that the will was destroyed by the testator in a fit of insanity, or that it was lost, or accidentally or fraudulently destroyed. Such accidental or fraudulent destruction will not deprive parties of their rights under its provisions, if they can produce the evidence necessary to establish the will."

In *Clark* v. *Wright*, 3 Pick. 67, a codicil fraudulently destroyed in the testator's lifetime was established, upon parol proof of its contents, by the Massachusetts supreme court of probate. The same doctrine was affirmed by the same court in the case of *Davis* v. *Sigourney*, 8 Metc. R. 487, and reaffirmed in *Wallis* v. *Wallis* 114 Mass. R. 510. In *Newell* v. *Homer*, 120 Mass. 277, the petitioner was held to prove a destruction of the will after the

the death of the testator, merely because he, in his petition, had so alleged the fact.

The New York cases are in accord with the foregoing cases. In *Smith* v. *Wait*, 4 Barb. 28, it was ruled that if a testator was incompetent to make a will, he was incompetent to revoke a will made before, and that an insane man can have no intent such as is necessary to revoke a will. In *Idley* v. *Bowen*, 11 Wend. 227, it was held that a revocation by burning the will by the testator, could be impeached by showing the incompetency of the testator at the time of the act. *Schultz* v. *Schultz*, 35 N. Y. 653, is an instructive case to the same effect. In *Nelson* v. *McGiffert*, 3 Barb. Ch. R. 158, Chancellor WALWORTH held it was competent to show that a will had been destroyed by a testator when his mind had become so far impaired that he was incompetent to peform a testamentary act.

The case of *Johnson's Will*, 40 Conn. 587, strongly supports the same view. So does the case of *Collagan* v. *Burns*, 57 Maine, R. 449, as far as it goes. Many other cases in the state courts do.

Late cases in the English court of probate are emphatical in the same direction. In one case it is said, "the act done (burning a will) by the testator can in no sense be his act, for he was out of his mind." In another case the court said, "all the destroying in the world without intention will not revoke a will, nor all the intention in the world without destroying; there must be the two." In another case, the famous case involving the will of Lord ST. LEONARDS, decided as late as 1876, the late Chief Justice COCKBURN said, "the consequences of a contrary ruling would be in the highest degree mischievous. To disallow oral proof might lead to the defeating of justice in many, if not in as many, instances as might arise from the court acting upon such testimony." Much more could be profitably quoted from late English cases, in elucidation of this legal question, did these limits allow. The English cases have gone so far as to decide that a revocation of a will by spoliation may be of a conditional character. A testator destroyed a codicil, not knowing that it disturbed a previous will. The court said: "Where there has been

a physical destruction of a testamentary paper, the court has often been called upon to form an opinion as to the intention of the deceased at the time he did the act. In this case we have come to the conclusion that the testator destroyed the codicil with no intention of revoking the will, and that the court should give no more effect to the act than it would do if the testator had destroyed the paper under a mistake as to the instrument he was destroying. It was not done *animo revocandi*." The following cases will verify the foregoing propositions. *Brunt* v. *Brunt*, L. R. 3 Pro. and Div. 37; *Cheese* v. *Lovejoy*, L. R. 2 P. D. 251; *Sugden* v. *Lord St. Leonards*, L. R. 1 P. D. 154; *James* v. *Shrimpton*, L. R. 1 Pro. and D. 431; *Brown* v. *Brown*, 8 Ell. and Bl. 876; *Powell* v. *Powell*, 1 Pro. and D. (L. R.) 209.

I therefore have no doubt, that a will destroyed by a person not possessing testamentary capacity, is not a revocation of such will. There must be *animus revocandi*; and such a person does not and cannot possess an intention of revocation any more than an insane man can.

As to the question of law secondly stated, namely, the effect of the exercise upon the mind of the testator of undue influence, although at first having doubts about the point, I am of the opinion that the same result follows where the act of destruction is produced by undue influence, as where incapacity exists. There can hardly be a logical difference, whether the act of destruction be accomplished by a testator who has no mind to exercise, or, having a mind of his own, is prevented from exercising it. Insanity takes away testamentary capacity, while undue influence does not allow it to act. There must be *animus revocandi*. In the one case providence prevents it; in the other case it is prevented by the wrongful act of man. In each case the hand of the testator acts; but the mind does not go with the act. The hands survive the head. If the rule were otherwise, the law would allow one man to cancel another man's will without his consent. It must be borne in mind, that, where undue influence is practiced, the testator's will is overpowered and subverted, and the will of another is substituted in its stead. He is not his own master. He does not act voluntarily, for his own volition does not play a

part. Proper influences merely persuade the will, while undue influences take it away. The first are an appeal; the last are an usurping and conquering force. The old tree, forsooth, sends out its life, but the graft incorporated upon it turns it into unnatural fruit.

This is the more apparent from another view of the same facts. A man makes a legal will. In a codicil he undertakes to cancel the will. But if he has not mental capacity, or if he is induced by undue influences to attempt a revocation, the codicil is of no avail, and the will stands unrevoked. Suppose, however, instead of revoking the will by a codicil, the attempt is made to do it by destroying the will. Must not the act in this way be as free and unconstrained as if done in the other way? Does not the same principle apply? If the mind or will of the testator be held in imprisonment by undue influence, can it revoke a will in one way when it cannot in another? Can a testator accomplish by burning what, under the same conditions, he cannot do with pen and ink? I think not. The question in this phase has not so often arisen as in the form first discussed, namely, a want of capacity, but no particular distinction between the two is found in the cases, nor does, in my judgment, a valid distinction exist.

Then comes a question, whether the general or common law is changed by any of our statutes. I think not.

Section 3, c. 74, Revised Statutes, our statute of wills, is this: "A will so executed is valid, until destroyed, altered, or revoked by being intentionally burnt, cancelled, torn or obliterated by the maker, or by some person by his direction and in his presence, or by a subsequent will, codicil, or writing, executed as a will is required to be," &c., &c. This is substantially like the English statute of wills, and similar to statutes in most if not all the American states, and is in precise accordance and consistency with the views already expressed and the cases cited. Nothing can be much plainer. To revoke, there must be an intention to revoke. If a testator has not a sound or sane intention, he has no intention. If his intention is supplanted by another man's intention then legally he has no intention.

But another statute is relied upon as upsetting or qualifying this statute. Section 7, c. 64, Revised Statutes, reads thus: "When the last will of any deceased person, who had his domicile in this State at the time of his death, is lost, destroyed, *suppressed or carried out of the State*, and cannot be obtained after reasonable diligence, the execution and contents thereof may be proved by a copy and the legal testimony of the subscribing witnesses to the will, or by any other evidence competent to prove the execution and contents of a will, and upon proof of the continued existence of such will up to the time of the decease of said testator unrevoked, letters testamentary shall be granted as on the last will of the deceased, the same as if the original had been produced and proved."

The latter statute was first enacted in 1861. The former has existed ever since we were a state. Even if the phrase, "continued existence of such last will," means physical existence, which I do not agree to, even then the two acts are not inconsistent, and do not clash with each other. One would not repeal nor limit the other any more than the other would the one. One would go further in some respects than the other, and the other further in other respects. Each occupies its own ground. The 1861 act allows oral or parol proof of a will not destroyed, but which is merely suppressed or carried out of the State, while the other is silent about such a case. The act of 1861 is declarative and cumulative only, and does not abrogate nor undertake to abrogate any other act. If the act of 1861 had been passed to alter the great body of the law of the world upon this subject matter, its terms would have been more positive and significant. It directly admits "other evidence competent to prove the execution and contents of a will" than the will itself.

But my judgment inclines strongly to the belief, that the phrase, "continued existence of such last will up to the time of the decease of such testator unrevoked," does not mean the continued physical existence of the will. The word "existence" sometimes means a physical and sometimes a legal existence. A will may have a physical and not a legal existence, and *vice versa*, or it may have both. A deed may be destroyed, so as to have

no physical existence, and still have a legal existence, if its contents can be proved. So a will may exist, although the written instrument be destroyed. And oftentimes a will does not exist as a will, although not destroyed. By the statute first quoted, "a will so executed is valid until destroyed by being intentionally burnt." If unintentionally burnt, it is still valid—is still a will—and still has a legal but not a physical existence.

I think the phrase, "continued existence . . . unrevoked," means no more than that the will shall continue or remain *unrevoked*. The statute, in this respect, merely repeats the requirement of the common law, that a person setting up a destroyed will shall show that such will had a continued legal existence down to the testator's death, that is, that the testator continued in the same mind down to the day of his death. The phrase "continued existence" is explained in *Botts* v. *Jackson*, 6 Wend. 173, to mean, that the testator permitted it to stand as his will till his death; and it is there said, "the execution of the will not only must be proved, but there must be also satisfactory evidence of its existence at the death of the testator, or of his intention that it should exist and stand till his death; that the mere fact of due execution is not evidence of such existence or intention." The deduction is that if a will is made and adhered to by a testator till his death, and he desires it to exist, or supposes it to, then it does legally exist till his death, unrevoked, though prior thereto, it has been lost or mislaid, or accidentally or fraudulently despoiled. The writing or script may be gone, but the will remains.

But in either interpretation of the statute of 1861, the conclusions reached will stand. I am happy to add, that I have consulted some of my judicial associates upon these questions, who have carefully considered them, and concur in the views expressed by me in all particulars.

So much for the law of the case, then as to the facts. Here I possess the functions of a jury. In deciding facts which are suitable for the jury-tribunal, I feel a disposition to be somewhat influenced by what I think an intelligent and fair-minded jury, properly instructed, would be likely to do upon the same testimony.

Certain important facts appear to me to be unquestionable, namely: That for Miss Gilkey, the beneficiary under the destroyed codicil, the testator had the fondest and warmest affection. Its depth and strength are disclosed by a continuous stream of evidence in his letters produced, which I think could never have been fully appreciated, had it come merely from the mouth of witnesses. He spoke it, wrote it, acted it. She seemed, partially at least, to fill a void in his heart created by the loss of a dearly loved wife, to whom she alone of all the family about him was related. This affection continued from her childhood to womanhood. It never abated. It baffled all family opposition. He educated and supported her, and seemed desirous to make her dependent upon him for all her wants. His letters held up before her vision the rainbow of promise against want in the future. In consonance with all this, when he found the sun of his life descending, although in full health and strength, unasked by her, uninfluenced by anybody that I can see, with much deliberation, against family wishes, he made this codicil. He took his executors as trustees of the fund, but fortified himself against doubt by adding another trustee. He resolutely adhered to the codicil till his last sickness at least.

Now, after he had lain a month on his death-bed, a very aged man, weighed down and weakened by disease, so far into the sunset of his life that the shadows of its twilight were fast settling over his understanding, surrounded by persons naturally disturbed by the existence of the codicil, with no notice to the beneficiary, with no after-mention of it to her, the affection between her and him lasting till his last sands of life ran out, he destroyed the codicil.

What cause was there for this change which so suddenly came over his mind? I think the inference is irresistible that the act was caused by another or others, whether the influence exerted over his mind was an undue influence or not. What his strength did his weakness would not have repudiated. How much truth in the situation scripturally described: "Verily, verily, I say unto thee, when thou wast young, thou girdest thyself, and walkest whither thou wouldst; but when thou shalt be old, thou shalt

stretch forth thy hands, and another shall gird thee, and carry thee where thou wouldst not."

Nor was it unnatural that the heirs should have unwillingly seen this bestowment upon one not an heir, or that they should have resisted it. Perhaps it would have been unnatural in them if they had not resisted it. Undoubtedly, they did no more than seemed proper to do, looking at the matter from their standpoint. Nor do I, possessing plenary powers under the terms of the reference, feel bound to declare whether there was an undue influence exercised or not, or declare an absolute conclusion one way or the other upon the issues, whether the testator was incapacitated from having a reasonable or intelligent intention of revocation, or whether the will was destroyed by him through some misunderstanding or mistake.

Suffice it to say, that, under all the circumstances and conditions of the case, I deem it expedient to uphold the codicil in favor of Miss Gilkey as unrevoked, and allow it to be probated; allowing to the other side some concessions and considerations therefor.

First of which (concessions and considerations) is, that the last codicil shall also be probated. Logically, perhaps, if the first codicil stands, the second should fall. But as there is no contradiction between the two, except a recital in the last which ignores the first, both may stand. Precisely the same point occurred in an English case, *Robinson* v. *Clarke*, L. R. 2 Pro. D. 269. The court there said: "In a testamentary suit, where the parties have come to an arrangement, under the terms of which the court is applied to, to grant probate of two testamentary instruments, it will do so, provided such documents are not entirely inconsistent with one another." In the *Goods of Honywood*, L. R. 2 P. and D. 251, the court thought improper words in the recital of a will could be corrected by an explanation upon the record.

Another concession is, that the taxable costs of the appellee, claimed to be several hundred dollars, shall not be recovered from the estate.

Another concession is, that the estate shall not pay the expense of counsel fees to the appellee, though claimed upon the ground

that the estate should be taxed to pay for the expense of sustaining a codicil which by law should be sustained. But the bill therefor, five hundred dollars, which seems not an unreasonable amount for entire services, shall be paid by the executors and charged to the earnings of the trust estate now on hand.

Or, if both parties should prefer it, I should award as above, and instead of the life annuity, order an absolute conveyance to Miss Gilkey of the five thousand dollars of Boston and Albany stock, together with the earnings of the nine thousand dollars of stocks named in the codicil which have been due and payable since the death of the testator to this time.

Or, I would make any other commutation of the life estate into ready money or absolute property, which the parties may agree to.

And whatever conclusion may be accepted, suitable decrees will be entered accordingly.

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said ship." The ship destroyed belonged, in fact, to the father and a brother of the assignor. After the loss the brother died, leaving the father his sole heir; then the father died, leaving the assignor one of his heirs; next came the assignment; then the administrators of the father, who were also administrators of the deceased son, collected from the United States an award for the value of the ship, her freight and fittings. It turns out that the administrators are indebted to the assignor, not for a share of the award specifically and separately, but for his share of all his father's personal estate in their hands.

Held, that this instrument creates a valid equitable assignment of the assignor's interest in all the fund which comes to his father's estate from the total losses sustained by the father and deceased son by the destruction of the ship.

Held, also, that all the expenses of obtaining the award and its collection are a charge upon the fund, to be deducted therefrom; but that the assignor's share of all other charges and expenses, and all sums of money advanced to him by the administrators, are a charge upon his interest in the other assets of the estate in preference to imposing them upon the interest assigned. *Ib.*

See MORTGAGES, 3. MORTGAGES (Chattel), 1.

ATTACHMENT.

1. The specification of the claim sued in the writ upon which real estate was attached was "To amount due on account, $707.92. Interest, 75.00," with an additional allegation that under the money count, the plaintiff would claim to recover the balance due on account. *Held*, that these specifications were insufficient under R. S., c. 81, § 56, to create any lien upon the real estate by the attachment. *Belfast Savings Bank* v. *K. L. & L. Co.* 404.

2. An attachment by a creditor of the individual partner will not affect the lien acquired by an earlier attachment in favor of a creditor of the copartnership; and no different rule should prevail in equity in cases where the distribution of the partnership estate only is proceeding on equitable principles in insolvency. *Cunningham* v. *Gushee*, 417.

See ATTORNEY AT LAW, 1. EVIDENCE, 2. FRAUDULENT CONVEYANCE, 1. LIENS, 4. MORTGAGES (Chattel), 6, 7. OFFICER, 4, 5, 6.

ATTORNEY AT LAW.

1. An attorney at law, having control of a suit, has control of the remedy and the proceedings connected therewith and may release an attachment of real or personal property, and such release will bind his client as between such client and a party purchasing or taking a mortgage of such released estate on the strength of such release. *Benson* v. *Carr*, 76.

2. The object of R. S., c. 81, § 66, was not to restrict or annul the general authority of an attorney. It leaves that untouched. *Ib.*

See POOR DEBTOR, 8. EVIDENCE, 4.

BANKRUPTCY.

BOND.

counts or abatements) and any amount collected on a warrant of distress, and paid over, also deducting such compensation as the collector is entitled to receive for his services for the collections actually made and paid over by him. *Ib.*

6. In 1862, A sold and conveyed to S, certain real estate in Illinois. In April, 1870, an agreement was entered into between the parties by which A was to re-purchase all the property he had conveyed to S in 1862, for the amount of the purchase money paid him by S, and interest. . . . . On April 4th, 1870, the parties met and found the amount due S, to be sixty-three thousand nine hundred and ninety-three dollars and thirty-seven cents. A gave S his three promissory notes of five thousand dollars each, leaving a balance due on account, of forty-eight thousand nine hundred and ninety-three dollars and thirty-seven cents. At the same time S gave his bond in which, in consideration that A would pay his three notes for five thousand dollars each, and in consideration of the further payment to be made by said A, on the execution of the deed hereinafter mentioned, of forty-eight thousand nine hundred and ninety-three dollars and thirty-seven cents, with interest from the date thereof, until such payment, he covenanted, &c., and obligated himself upon the fulfillment of said payment by said A or his assigns, within ninety days, to re-deed the premises described in A's deed of 1862, excepting what may have been sold. The ninety days expired and the payments were not made. On the twenty-sixth of June, 1870, S, by his indorsement on the bond, agreed to extend the within obligation twenty days from date, if certain things therein stated were done. The twenty days expired and the payments were not made. On the thirteenth of August, 1870, the parties met again, and A agreed in writing to accept S's draft on him for fifty thousand dollars, payable in sixty days, upon which writing S made the following indorsement: "If I shall draw upon said A, as above, I hereby agree at the same time, to transmit to him the title deeds, certificate of stock," . . which form the consideration of said acceptances, S never drew upon A, and on the sixteenth of September, 1870, notified A by letter, that he regarded the bond of April 4th, as no longer binding on him by reason of non-compliance on his part and that he held the fifteen thousand dollars, in partial liquidation of damages sustained thereby. In an action to recover the fifteen thousand dollars paid as aforesaid by A against S's executors,

Held: that the bond had expired; that there was no extension of it nor any waiver by S of a strict compliance with its terms, and that the action would not lie. *Alden* v. *Goddard*, 346.

7. A recovery upon a penal bond may be had against principal and sureties for an amount exceeding the penalty, to the extent of the interest upon the penalty from the date of the breach; such interest being no part of the penalty, but damages for its non-payment after it has become due.

Wyman v. *Robinson*, 384.

8. A plaintiff in replevin gave a bond for one hundred and ten dollars, while the goods replevied greatly exceeded that amount in value. The defendant in replevin recovered for the value of the goods against a third party, into

CONSTABLE.

See OFFICERS, 1, 2.

CONSTITUTIONAL LAW.

1. Stat. 1880, c. 246, entitled "an act for the taxation of telegraph companies," is constitutional, and a tax imposed under its provisions is valid.
State v. *Telegraph Co.* 518.

2. This statute was intended to and does impose a tax upon the use of the property, or business of the corporation, and not upon the property itself.
Ib.

CONTRACT.

1. When the trustees of an institution incorporated for educational purposes are capable of receiving money and carrying out the design of a subscription wherein the subscribers promise to pay to the order of such trustees the sums set against their names in six years from date to make up a building fund for said institution, such trustees are amenable to law in case of negligence or abuse of their trust; and when such subscription is accepted, and still more, when the trust is entered upon there is an implied promise for its faithful execution, and that is a sufficient consideration for the promise of each subscriber, to the fund.
Trustees Maine Central Institute v. *Haskell*, 140.

2. To take a contract for the sale of more than thirty dollars' worth of goods, out of the statute of frauds, (R. S., c. 111, § 4,) "the note or memorandum thereof" need not contain a recital of the consideration, but that may be proved by parol. *Williams* v. *Robinson*, 186.

3 The memorandum need be signed by one only of the parties, but it must mention the other. *Ib.*

4. The memorandum must contain within itself or by some reference to other written evidence the names of vendor and vendee, and all the essential terms and conditions of the contract expressed with such reasonable certainty as may be understood from the memorandum or other written evidence, referred to, if any, without the aid from parol testimony. *Ib.*

5. When a memorandum containing the names of the vendor and vendee is made, signed and delivered by the vendor to the vendee, and accepted as and for a completed memorandum of the essential terms of a contract, and it is capable of a clear and intelligible exposition, it is conclusive between the parties, and parol evidence is not competent to vary its terms or construction; and if in fact some of the conditions actually made be omitted from it, the party defendant cannot avail himself of them. *Ib.*

6. Parol evidence identifying the subject matter of a contract does not destroy the sufficiency of the memorandum. *Ib.*

DEDICATION.

DEED.

bounded by distinctly marked and specified lines extending from shore to shore on opposite sides of the island, with undisputed monuments. Elsewhere it was bounded by the waters of Deer Isle Thoroughfare. Having bargained it to C for a full and adequate consideration, he made a deed to C, in which he described it as "a parcel of land on Merchants' Island," butted and bounded by the aforesaid lines and monuments, (which divided it from the remaining portion of the island,) and "containing thirty acres more or less." The part of the island from which it was divided by these lines contained about one hundred and ninety acres. M owned no other land on the island. C owned the land adjoining the thirty acre lot and on the execution of the deed went into the actual occupation of that also and has lived on it ever since. His deed was recorded January 1, 1867. In April, 1869, M's creditors levied on it as his property.

Held, in a suit brought by the grantee of the levying creditors against C, that C obtained a good title to the thirty acre lot by the deed, and that the natural boundaries supplied whatever was necessary to define the lot conveyed; and that there was enough in the deed, read in the light of the facts agreed, to constitute a sufficient description. *Ib.*

5. Informalities in the recitals of a guardian's deed given in good faith, mistakes of the guardian in stating the date of the issuing of authority, authority having been given, or the insertion of irrelevant matter should not be regarded as sufficient to avoid such deed.

Williamson v. *Woodman*, 163.

6. Where a ward brings his suit in affirmation of a sale of his real estate by his guardian, it is neither for the guardian nor his surety to set up the invalidity of the sale or deed. *Ib.*

7. Prior to the enactment of R. S., 1841, c. 91, § 1, the deed of one who was disseized could not, during the continuance of the disseizin, convey a title to his grantee. *Carville* v. *Hutchins*, 227.

8. Where a grant of land is made with fixed and definite metes and bounds capable of being ascertained on the face of the earth, it cannot be enlarged so as to include adjoining land by the mere addition of the words "together with the buildings thereon standing," although such adjoining land is covered by corners of the buildings referred to. *Ib.*

9. If the recitals of a tax deed do not show that the tax had remained unpaid for a term of nine months from the date of assessment before giving notice of the sale the deed will not be efficacious to pass the title. It will be the same if the recitals do not also show that the notices of the sale were posted in the same manner and in the same places that warrants for town meetings are required to be posted; also if they do not show the length of time or manner of giving the personal notice of the sale to the owner or occupant; also if they do not show that there was an offer to sell such fractional part as may be necessary to pay the tax and charges. *Wiggin* v. *Temple*, 380.

10. Where the tax deed upon its face is not effective to pass the title to the property, a party, contesting its validity, will not be required to deposit with the

DEMURRER.

DISCHARGE.

DISCLOSURE.

DISINTERESTED.

DISSEIZIN.

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EQUITABLE ASSIGNMENT.

See ASSIGNMENT.

EQUITY.

his co-sureties that he had received it and requested them to pay his third of the sum due, on the bond, promising to reimburse them when he realized on the life policy. They however paid nothing until called upon by the bank after J. A. had died also, insolvent. Upon the call of the bank they paid the amount of the cashier's deficit, one-half each.

With the consent of J. A's executrix, G's administrator took the policy giving her an indemnity and collected and still holds the amount thereof, though the complainants have demanded so much thereof as was necessary to reimburse them for the amount which they paid, of both the respondents who are respectively the executrix of J. A. and the administrator of G.

Held, that if the minor children of G. had been joined as defendants so that the rights of all parties might be settled in one suit, complainants would be entitled upon this showing to a decree in equity that the assigned policy was held by J. A. and the proceeds thereof by his executrix through her agent, and by the administrator of G. subject to a trust in favor of the complainants for their indemnity as co-sureties with J. A. on the bond. *Held further*,

1. That the co-sureties were entitled to the benefit of the indemnity under such circumstances although it was intended by the assignor and assignee for the benefit of J. A. alone.

2. That the consent given by J. A's executrix that her co-respondent might collect the money on the policy, and the fact that he did collect and now holds it having indemnified her cannot relieve the executrix from her responsibility to the complainants for the trust fund.

3. That the testimony of one of the complainants as to matters occurring in the life time of J. A. is not competent in this process against his executrix.

4. That the declaration of J. A. made after the assignment to him are not competent evidence for the respondents.

5. That before a decree can be had for complainants the minor children of the assignor must be made parties to the suit and have an opportunity to be heard through their guardian.

Scribner v. *Adams*, 541.

See ASSIGNMENT, 1. DEED, 13, 14. INSOLVENCY, 1. JUDGMENT, 1. MORTGAGES, 5. PLEADINGS, 9, 10. PRACTICE, (Equity.) TROVER.

EQUITY OF REDEMPTION.

See DOWER. EXECUTION, 1, 2. OFFICER'S SALE, 1.

ESTOPPEL.

See BOND, 3. TENDER.

EVIDENCE.

1. The deposition of a party may be offered in evidence to show an admission of his liability though the deponent is present in court.

Gilchrist v. *Partridge*, 214.

EXCEPTIONS.

EXECUTION.

PERFORMANCE.

See LEASE, 1. FRAUD, STATUTE OF, 5.

PERJURY.

See MALICIOUS PROSECUTION, 2.

PLEADINGS.

POOR DEBTORS.

SHERIFF.

See OFFICER, 1, 2, 3. REPLEVIN, 1.

SHIPPING.

1. When stores are furnished a vessel, about to depart on a foreign voyage, under an agreement with the owners that the bill is to be paid at the completion of the voyage, and the parties furnishing agree to keep the vessel insured to the amount of the bill of stores, the agreement to insure is binding only during that voyage, or to the time when it was agreed that the payment of the bill was to be made; and if at the completion of the voyage (the bill not being paid) the same parties agree to keep the bill insured, such agreement would in no way be a part of the original contract, and damages sustained by reason of its breach would not be a proper matter of recoupment in an action against the owners for the amount of the bill.

Gilchrist v. *Partridge*, 214.

2. A seaman discharged with his own consent in a foreign port, who was prevented by the conduct of the master from making application to the American consul at the place of discharge, may maintain an action at common law against the master for two months' wages as his part of the three months' extra pay which the U. S. R. S., § § 4582, 4584, required the master to pay to the consul on account of the discharge of such seaman.

Wilson v. *Borstel*, 273.

3. The administrator of a part owner of a vessel recovered judgment in an action, commenced by his intestate, for the earnings of the vessel, and appropriated a part of the proceeds in compliance with an assignment of the claim by his intestate, as collateral security for debt, and settled the balance of the debt as agent for the surety, and appropriated the balance of the judgment, fifteen hundred dollars, upon another debt of his intestate, which he settled as agent for the same surety, either debt largely exceeding the amount of the judgment. The estate of his intestate was rendered insolvent, and no part of this judgment was charged in the account of administration. The administrator had heard that there was another part owner to the vessel, but received no notice from him until the proceeds of the judgment had been appropriated as aforesaid.

Held, that the other part owner could recover of the administrator his portion of the earnings of the vessel, being less than fifteen hundred dollars, with interest, in an action for money had and received.

Call v. *Houdlette*, 293.

See EQUITY, 2.

SLATE.

See LIENS, 1, 2, 3, 4.

SPIRITUOUS LIQUORS.

See INTOXICATING LIQUORS.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS OF ACTIONS.

STATUTES CITED, EXPOUNDED, &c.

TROVER.

TRUST.

TRUSTEE PROCESS.

ERRATA.

Error noted in vol. 72, p. 517, line 6. For "*Ben. S. Collins*," read "*J. J. Parlin*."