REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE.

BY SIMON GREENLEAF,
COUNSELLOR AT LAW.

VOL. V.

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1829.

JUDGES

OF THE

SUPREME JUDICIAL COURT

OF THE

STATE OF MAINE,

DURING THE PERIOD OF THESE REPORTS.

The Hon. PRENTISS MELLEN, L. L. D. *Chief Justice.*

The Hon. WILLIAM P. PREBLE,
Resigned June 13, 1829.

The Hon. NATHAN WESTON, Jr. } *Justices.*

The Hon. ALBION K. PARRIS,
Appointed June 25, 1829.

Attorney General, ERASTUS FOOTE, Esquire.

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CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

OXFORD,

MAY TERM,

1827.

CLEMENT *vs.* DURGIN.

In a prosecution by complaint against the owner of part of a mill dam, for flowing lands, the owner of another part of the same dam, in severalty, is a competent witness for the respondent.

Where a commission issues to any judge or magistrate of another State, to take depositions in a cause pending in this Court, the official certificate of the judge or magistrate is received as *prima facie* evidence of his authority.

The right to flow the lands of another, in order to raise water sufficient to carry a mill, subject to the claim of the owner for damages, is given, by necessary implication, in the statute regulating mills, and therefore needs not to be proved by writing, under the statute of frauds.

The damages occasioned by such flowing may be waived or relinquished by parol.

THIS case, which was a complaint for flowing the lands of the complainant by the respondent's mill-dam, [*Vid. Vol. I. p.* 300.] came again before the Court, at the last *October* term in this county, for trial of the issue whether the respondent had good right to erect the dam, and flow the land of the complainant, without the payment of any damages therefor.

At the trial of this issue, before *Preble J.* the respondent offered *James Osgood* as a witness, whose competency to testify was denied, on the ground of interest. And it appeared, from his own examination to this point, that he held a mortgage deed of one half of the privilege on which the dam was erected, and of the whole of a fulling-mill erected thereon; of which he had been in possession

more than four years; but that his title was not derived from the respondent, nor did they hold any thing in common. This objection the Judge overruled.

The respondent also offered a deposition taken under a commission issued from this court, "to any Judge of any court of record in the State of New York," the return of which was signed "*Smith Stilwell* Judge of St. Lawrence Common Pleas." To this the complainant objected, for want of evidence that the person making the return was a Judge of a Court of record. But this objection also was overruled.

The complainant further objected to the admission of parol evidence to prove the issue on the part of the respondent; contending that the claim of the respondent was an interest in land, which could only be sustained by deed or other instrument in writing. This objection also the judge overruled; and a verdict was returned for the respondent; to which the complainant filed exceptions.

Dana, for the complainant, argued against the admission of *Osgood*, because, though only a mortgagee, the legal estate in the privilege and half the dam was in him, and he had the actual occupancy; so that this process would lie against him, by the statute; and his interest must necessarily be affected by the judgment in this case, so far as the judgment might regulate the height of the dam. 4. *Mass.* 50. *Goodwin v. Richardson* 9. *Mass.* 469. 2. *Greenl.* 132. 1. *N. Hamp. Rep.* 169. 6. *Mass.* 50.

He argued against the admission of the deposition, from the abuses which such a rule might occasion; as corrupt parties might themselves personate the magistrates of other States, or procure others to do so, if the bare signature of the magistrate were to be received as satisfactory evidence of his official character. The rule of this court, which requires higher evidence where the deposition is taken without a commission, and the statute of the United States regulating the mode of authenticating the judgments of State Courts, are proofs that this objection is founded in authority and good reason.

He further contended that the right claimed by the respondent was a perpetual right to flow the land of the complainant, and intercept his pernancy of profits. It went to take away from him all beneficial use of his soil forever, and vest in a third person a per-

manent and exclusive interest in it. Such a title, being "an interest concerning lands," was within the statute of frauds, and therefore could be proved only by writing. *Cook v. Stearns* 11. *Mass.* 537. *Ricker v. Kelly* 1. *Greenl.* 117. The cases which would seem to support the contrary doctrine, he said, were cases of license to do a particular act, or for a limited time; or where a valuable consideration had been already paid, and the contract had been partially executed.

Greenleaf and *Bradley, for the respondent*, insisted on the admissibility of *Osgood*, on the ground that the dam was a personal chattel, which an out-going lessee might lawfully remove, being merely of timbers and plank; alleged to have been erected solely by *Durgin*, and by him justified. *Osgood* therefore could have no interest in its existence. Nor would he be bound by the verdict and judgment in this case; because he was not even a party in interest; nor had he a right to cross examine the witnesses, nor to interfere in the trial. Nor could a recovery in this case affect a future process against him, since *Osgood* held nothing in common with *Durgin*, and the respondent might have grounds for an exemption from damages totally different from any defence which another could set up. 1 *Phil. Ev.* 232. 1 *Stark. Ev.* 184.

As to the deposition, they relied on the uniform practice to receive the certificate of the commissioner as *prima facie* evidence of his official character, and sufficient, till it should be repelled by counter proof.

To the point of the license, they argued that this was given by the statute, which permitted the flowing of any lands, where it was necessary to raise a sufficient head of water for a mill, without the consent of any owner of the lands. It was a perpetual license, appurtenant to every mill; and where the owner of the lands can interpose no negative, it cannot be necessary to obtain his consent. *Tinkham v. Arnold* 3. *Greenl.* 120. But here the right to flow is not an interest in lands, but only an easement, and so not within the statute of frauds. *Wood v. Lake Say.* 3. 1. *Phil. Ev.* 335. *Webb v. Paternoster Palm.* 71. 7. *Taunt.* 384. 2 *Stark.* 588. 589. The sole question was upon the right to damages, and this was open to inquiry by parol.

Clement *v.* Durgin.

The opinion of the court was delivered in the following *June* term, at *Augusta*, by

Weston J. With regard to the objection to the competency of *James Osgood*, on the ground of interest, it appears that the witness owned on one side, and the respondent on the other, each to the thread of the stream, over which the dam was extended. They were not therefore owners of the dam in common; but each of a part in severalty. A verdict for or against the respondent, could not be used for or against the witness in a complaint or action. The respondent might possess, by purchase or otherwise, the right, so far as he was concerned, to flow without payment of damages, which might not extend to or protect the witness. Their interest being several and not joint, neither would have a remedy against the other for contribution, where the party injured complained against them severally. Whether by the nature of their occupancy, they might not have been joined as respondents in the same complaint, is not a question before us. This process has no effect to remove the dam; therefore the witness is in no danger on that ground; and we are satisfied, as the case is now presented, that the witness had no such interest, as would exclude him as incompetent.

A question was raised at the trial, and is reserved for our consideration, whether a deposition taken under a commission, by a person who represents himself as a judge of the St. Lawrence Court of Common Pleas in the State of *New-York*, which was objected to by the counsel for the complainant, could be received, without proof of the official character of the judge. By *ch.* 85 of the revised laws, prescribing the mode of taking depositions, *sec.* 6, which in this particular is a re-enactment of the old law, it is provided that all depositions taken out of this State, before any justice of the peace, public notary, or other person legally empowered to take depositions in the State or county where such depositions shall be taken and certified, may be admitted as evidence in any civil action, or rejected, at the discretion of the court. In the exercise of this discretion, prior to the promulgation of the existing rule of this court, on the subject of commissions, if the deposition appeared to have been taken with formality and solemnity, having an official authentication, presenting upon the face of it no ground

of suspicion, it was usually received as evidence. But the rule before alluded to, having afforded every facility for the issuing of commissions to take depositions out of the State, upon application to either of the judges or to the clerk, and the court being disposed to regard with more favor such as are taken under commission, by interrogatories and cross interrogatories, prescribed by the rule as a more satisfactory mode of eliciting truth, have therein declared that in all cases of depositions taken out of the State, without commission, it shall be incumbent on the party producing such deposition, to prove that it was taken and certified by a person legally empowered thereto; thereby plainly implying that no such evidence would be required in the case of depositions taken under commission. And we can perceive no well founded objection to the receiving of the official certificate of the judge or magistrate in these cases, as *prima facie* evidence of his authority. Upon a suggestion of fraud or collusion, supported by affidavit, or otherwise, to the satisfaction of the court, they would either reject the deposition, or afford opportunity to ascertain more perfectly the official character of the person by whom it might be certified, and the circumstances under which it may have been taken. As there is no objection to the execution of the commission in question on the face of it; and no proof or suggestion that there is any thing false in the caption; the objection to its being received was, in our opinion, properly overruled.

It is further insisted, that the issue tried between these parties, could only be proved on the part of the respondent by deed, or other instrument in writing; and not by parol proof, which was received by the judge, although objected to by the counsel for the complainant. This objection is founded upon the statute of frauds; upon the ground that the right to flow, without payment of damages, is an interest in land. But we regard it as rather in the nature of a license to do certain acts in, or upon, the land of another, of which parol proof has always been deemed admissible; as, to cut trees upon, or to pass over the land of another, or to build a fence or a bridge thereon. In these, and many other cases of the like kind, proof of a parol license from the owner, would be a good defence to an action of trespass, brought by him for the doing of these acts.

Such a license is in its nature revocable; unless the party, to whom it is given, has been thereby led to incur expense; in which case it is not revocable; at least without tendering an indemnity.

In *Taylor v. Waters*, 7 *Taunt.* 374, the plaintiff averred that the proprietor of the opera house, or King's theatre, in the Hay-market, had granted him six silver tickets of admission to the same, for the space of twenty-one years, which he had not been permitted to enjoy. Among other objections made to the action, it was insisted that this was an interest in land, which could not be granted, but by written instrument. *Gibbs C. J.* in delivering the opinion of the court, after adverting to a series of decisions, says "these cases abundantly prove that a license to enjoy a beneficial privilege on land, may be granted without deed, and, notwithstanding the statute of frauds, without writing." And he further deduces from the authorities, that such a license cannot be countermanded, after it has been acted upon.

Winter v. Brockwell, 8 *East.* 309, was an action of the case for a nuisance, in erecting a sky-light over the area above the plaintiff's window, by means of which the light and air were excluded; but it being proved by parol, that this was done with the express approbation of the plaintiff, who also gave permission to have part of the frame work nailed against his wall, it was held by the court, notwithstanding it appears in a note to the case that the statute of frauds was objected, that the defence was well sustained; upon the ground, either that a license of this kind is not revocable, until the expenses incurred by the party licensed are refunded; or that a license, once executed, is no longer countermandable; for which lord *Ellenborough* cites *Webb v. Paternoster*, *Palmer*, 74. *Wood v. Lake*, *Sayer* 3, cited in 1. *Phil. Evid.* 354, *Crosby v. Wadsworth*, 6 *East.* 602, and *Ricker & al. v. Kelly & al.* 1. *Greenl.* 117, are also authorities to show that this is not a case within the statute of frauds.

The right to flow, subject to the claim of the party injured for damages, is given by statute. These damages, the party may waive or relinquish by parol. He thereby gives the other party no new interest in, or right over, his lands; but he foregoes a right to damages, which he might have enforced by complaint, in the na-

ture of a personal action. Suppose it be desirable to a neighborhood that a fulling mill, or a grist mill, should be erected at a suitable place upon a stream, the owner of which is not inclined to make the erection, from an apprehension that it may not prove sufficiently profitable to remunerate the expense. As an inducement, the owner of land, which may be flowed by raising a suitable and necessary head of water for this purpose, engages by parol to set up no claim for damages. The owner thereupon proceeds to build a mill and dam, on the faith of this engagement. He is subsequently called upon by complaint, by the owner of the land, to answer in damages, for causing the water to flow back upon his grounds. The respondent proves, by parol, that he did so, by the license and permission of the complainant. We cannot doubt that this would be a good defence. He claims no interest in the land of the complainant; but he justifies a certain act done in relation to it, which, without the license of the owner, would have been unwarrantable. The license given might have been countermanded, before it had been acted upon; as if a party promise to give money, no action lies upon it; but having given it, he cannot recover it back. He cannot reclaim what he has given away. So in this case, having given the license, and it having been acted upon, he cannot enforce an action or complaint for damages. *Judgment on the verdict.*

HOWARD *vs.* CHADBOURNE.

In an action brought by a mortgagee, against a stranger, to recover possession of the lands mortgaged, the fact that the demandant had assigned his interest to a third person, cannot be given in evidence under the general issue, but must be specially pleaded in bar.

In such a case, the mortgagor was admitted a competent witness for the mortgagee, the latter having released him from so much of the debt as should not be satisfied by the land mortgaged, and covenanted to resort to the land as the sole fund for payment of the debt.

THIS case, which was a writ of entry upon a mortgage deed with covenants of general warranty, &c. made by one *Levi Sawyer* to

the demandant, and is reported in 3. *Greenl.* 461, was again tried at the last *October* term in this county, before *Preble J.* upon the issue of *nul disseisin.* The mortgage deed was dated *June* 10, 1817, and recorded *April* 1, 1819. The tenant claimed to hold under a deed of release without covenants, made by *Sawyer* to him *July* 3, 1818; and recorded *July* 27, 1818; and the question still was, whether the tenant, at the time of the release to him, had notice of the previous mortgage to the demandant. This fact the demandant offered to prove by the deposition of *Sawyer*, the mortgagor, to which the tenant objected, on the ground of his interest in the suit, as already decided by the court. To remove this interest, a release was produced from the demandant, *Elliot G. Vaughan* and *Benjamin Elwell*, by which they "release, acquit, and forever discharge the said *Sawyer* of and from so much of the debt originally due from said *Sawyer* to said *Howard*, (and secured by mortgage of certain lands in *Hiram* now occupied by *Simeon Chadbourne* and by said *Howard* assigned to said *Vaughan*, and by said *Vaughan* assigned to said *Elwell*,) as shall not be satisfied by said land; meaning hereby that said land shall be resorted to as the sole and only fund for the payment of said debt";—and covenanting that they would "never sue, trouble nor molest said *Sawyer* for the debt, in his person, goods, or lands, other than the lands so mortgaged as aforesaid, but shall ever be stopped by these presents from so doing."

The counsel for the tenant objected that this did not release the interest of the witness; but the Judge was of a different opinion, and admitted the deposition. It was then contended, that if it could take any effect as a release, it was a discharge of the whole debt, after which no action could be sustained on the mortgage;—and if not so, yet that the demandant was not entitled to recover in his own name; having, by his own shewing, proved an assignment of the mortgage from himself to *Vaughan*, and from him to *Elwell.* Both these points also, the Judge overruled; and the tenant filed exceptions to his opinion, the jury having found for the demandant.

Fessenden, for the tenant, to the point that the demandant, having disclosed an assignment to *Elwell*, had no right to recover in this action, cited 1. *Chitty on Pl.* 10. 11. 6. *Mass.* 239. *Hills v.*

Elliot, 12. *Mass.* 30. 3. *Johns. Ca.* 311. 15. *Mass.* 233. 14. *Mass.* 134. 8. *Mass.* 554.

He contended that the release either did not restore the competency of *Sawyer;* or, if it did, it operated to extinguish the debt. It released his body, and all *his* property, personal and real. Thus far, at least, the debt was discharged; and the demanded premises not being his property, were not within the terms of the release. The debt, therefore, was wholly gone, because the demandant had parted with all remedy against the debtor; and is seeking, in this action, the property of another person. *Co. Lit.* 209. *Powel on Mort.* 7. 8. 2. *Burr.* 969. 1. *Johns.* 583. 2. *Greenl.* 322.

But on general principles of public policy, he insisted, the witness was inadmissible; as his testimony went to destroy his own deed to the tenant; which the spirit of established rules would not permit. *Walton v. Shelley*, 1. *D. & E.* 296. *Churchill v. Suter*, 4. *Mass.* 156. *Storer v. Batson*, 8. *Mass.* 440. *Deering v. Sawtel*, 4. *Greenl.* 391. *Howard v. Chadbourne*, 3. *Greenl.* 461.

Greenleaf, for the demandant replied that as the assignment from *Howard* to *Vaughan* was subsequent to the deed to the tenant, who entered claiming a fee, nothing passed by the assignment, except the mere right, and the assignee could not count upon his own seisin. But if it were otherwise, the objection should have been taken by plea; and cannot be shewn under the issue of *nul disseisin. Wolcott v. Knight* 6. *Mass.* 418.

As to the effect of the release, which may well be of part of a debt, 5. *Dane's Abr.* 449. *sec.* 6; it was only a release of the person, and a certain class of the property of the debtor;—a voluntary surrender of all remedies, save one. A mortgage is never held discharged by any transactions short of absolute payment of the money; unless the intent of the parties is manifestly otherwise. *Perkins v. Pitts*, 11. *Mass.* 125. *Cary v. Prentiss*, 7. *Mass.* 63. *Davis v. Maynard*, 9. *Mass.* 242. And here the manifest intent was to place the creditor on the same footing as if he had actually enter-

ed for condition broken, and discharged the residue of the debt, accepting the land in full satisfaction.

WESTON J. delivered the opinion of the Court.

It having appeared in evidence, that the demandant had assigned his interest to a third person, it is insisted that this action cannot be maintained in his name. In support of this point, *Gould v. Newman*, 6 *Mass.* 239, has been, among others, cited as an authority. In that case, the assignment of the mortgage was specially pleaded. Thus pleaded, it was holden to be a good bar; but *Parsons C. J.* there says, "under the general issue it is very clear, that this conveyance by the plaintiff, could not be given in evidence." And in *Wolcott v. Knight*, cited in the argument, it was expressly decided that a conveyance by the demandant to a third person, under whom the tenant does not claim, must be pleaded in bar; and cannot be given in evidence under the general issue. Had it been so pleaded, it might have been replied, that nothing passed by the demandant's deed to *Vaughan;* and this replication would have been sustained in point of fact, if at the time of its execution, the tenant had, as he claims to have had, an actual adverse seisin.

With regard to the competency of the deponent, *Levi Sawyer*, under whom both parties claim, on the ground of interest; we are of opinion that it was removed by the release, which is in the case. He had entered into no covenants, by which he would, in any event, be made liable to the tenant. Prior to the release, it was for his interest that the demandant should prevail; as his debt to him would thereby be paid, to the extent of the value of the land. By the release, the demandant, and those who have become parties in interest under him, have accepted for their debt, so far as the witness was concerned, their chance to recover the land in controversy, and have covenanted not to sue or molest him in his person, or to take any of his property therefor, other than the land; and have further agreed that the instrument by them executed, should forever estop them from so doing. Being thus secured and protected from liability, he stood indifferent between the parties; and his deposition, subsequently given, was properly received in evidence.

It would be doing violence to the terms of the release, and to its plain and obvious meaning, to consider it a discharge of the debt, as a lien on the land. Nothing was farther from the intention of those who made it; nor is there, from the terms of the instrument, the least ground for misapprehension or doubt. It was intended to remove the interest of the witness, and to leave the debt, as a lien upon the land, unaffected. This was a lawful purpose; and it is clearly expressed.

There is no difficulty, with regard to the judgment to be entered. The debt being first ascertained; it is to be the usual conditional judgment, as on mortgage. If the right to redeem is of any value, it cannot be exercised, except upon payment of the whole debt due. If that exceeds the value of the land, the tenant is not obliged to pay the difference; and the instrument given to the witness releasing him therefrom, with which the tenant has no privity, cannot affect the form of the judgment; which is to be rendered for the demandant upon the verdict, as on mortgage.

GIBSON *vs.* WATERHOUSE.

A motion for a *venire de novo* comes too late, if not made till after judgment is arrested, though it be made in the same term.

If judgment is arrested for one bad count, the defendant is entitled to his full costs on all the issues, as the party prevailing.

After the judgment in this case was arrested for the badness of one of the counts, [See 4 *Greenl.* 226.] the plaintiff, in the same term, moved for a *venire facias de novo;* which the defendant opposed, claiming a judgment for his costs.

Greenleaf and D. Goodenow argued in suppor tof the motion for the plaintiff.

1. Wherever a good cause of action is legally stated in one or more counts, and the jury have found the facts to be true, by a gen-

eral verdict, the judgment is not to be forever stayed, because of some bad counts in the writ. If the plaintiff asks in season, the uncertainty as to which counts the damages apply, may be cured by the Judge at *nisi prius*, by reference to his notes. If not, the course is to award a *venire de novo*. *Johnstone v. Sutton*, 1. *D. & E.* 542. *Eddowes v. Hopkins*, *Doug.* 376. *Barnes* 478. *Tidd's Pr.* 335. *Hopkins v. Beedle*, 1 *Caines* 347. 583. 2. *Pick.* 424.

The establishment of a rule to arrest judgment for one bad count, others being good, was lamented by Lord *Mansfield* as an absurd and inconvenient rule, in *Grant v. Astle*, *Doug.* 730. It is cured in *Virginia* by the statute of jeofails, by which judgment is to be rendered for the plaintiff if there be one good count. *Mandeville v. Wilson*, 5. *Cranch* 18. A *venire de novo* may be awarded after a writ of error is sued out. *Doug.* 732 *note*. *Livingston v. Rogers* 1 *Caines* 587. It was refused in *Holt v. Skolfield*, 6. *D. & E.* 694, but the propriety of this decision is questioned by the learned editors, referring to *Barnes* 478, and *Doug.* 377, as the better decisions, under a "*sed vide.*"

The rule that a motion for a *venire de novo* must be made before judgment, applies only to the unsuccessful party. The arrest of judgment is nothing more than an order that no judgment be entered upon *that* verdict. If the writ is such that no verdict can remove the ground of the motion in arrest, then judgment must be stayed forever. But if the defect can be cured by sending the cause to another jury, it ought to be done, if the plaintiff asks for it, even after the judgment on that verdict is arrested. The contrary doctrine involves the absurdity of supposing the plaintiff to be able to resolve at once every question, however intricate or deep, which such a motion may present, and to know, *uno intuitu*, whether it will be decided for or against him. Moreover, if there is a single good count in his writ, he has no need to ask for a *venire de novo*, in any case where the verdict can be amended by the Judge's notes.

2. As to costs;—the defendant ought not to recover any, because he is not the "party prevailing." All the proceedings are against

him till after verdict; and then he avails himself of an uncertainty in the finding, to evade a judgment against himself, by staying farther proceedings. There is an obvious difference, in this respect, between the cases where the judgment is arrested for a defect which goes to the whole ground of the action, and prevents the plaintiff from recovering in any form; and those in which a good title to recover appears in every count, save one. If the matter moved in arrest, would entitle the defendant to a verdict if taken by way of objection at the trial, there is a manifest reason for giving him costs on arresting the judgment forever. But this is not such a case. The objection is altogether technical, and, if made before verdict, would instantly have been removed by leave to amend, or by a direction to the jury. To suffer it now to interfere in the merits of the case, seems to subject the law to a reproach which it does not deserve.

3. But if costs are allowable to the defendant, the taxation ought to be limited to the costs incurred in defending against the defective count.

Fessenden and *Deblois*, for the defendant, denied the power of the court to award a *venire de novo* in any case after a general verdict. It is admitted that authorities may be found which seem to authorize it; but the later decisions are otherwise. It was an ancient common law proceeding, but has been superseded by the power conferred on courts, as well by common as statute law, to grant new trials.—6. *Dane's Abr. ch.* 183. *art.* 8. *sec.* 1. *Witham v. Lewis.* 1. *Wils.* 48. New trials are granted where the verdict is general; *venires de novo* only where it is special, or defective. *Johnstone v. Sutton* 1. *D. & E.* 528. *Holt v. Skolfield*, 6. *D. & E.* 694. *Harwood v. Goodright Cowp.* 89. *Kynaston v. The Mayor &c. of Shrewsbury*, 2. *Stra.* 1053 *note. Grant v. Astle, Doug.* 732. *note.*

But if the court has the general power contended for, the application in the present instance comes too late. The suit being already terminated by an arrest of judgment, there is no case where a *venire de novo* has been issued after judgment, and while such judgment remains unreversed. In *Grant v. Astle*, the judgment was

first reversed on error, and then the *venire* ordered. So is 2. *Stra.* 1051. 1154. *Tidd's Pr.* 814 clearly shews that the motion must be made before judgment. *Witham v. Earl of Derby*, 1. *Wils.* 54. *United States v. Sawyer*, 1. *Gall.* 86. *Lickbarrow v. Mason*, 6. *D. & E.* 131. Analagous to this is the practice of ordering a new trial at the bar of the Supreme Court, after the judgment of an inferior court has been reversed on error brought. 5. *Mass.* 391. 3. *Johns.* 443. *Bent v. Baker*, 3. *D. & E.* 27. 6. *Cranch*, 268. 274. The result of all the authorities is, that if no evidence has been offered on the bad counts, a general verdict may be amended by the Judge's notes; but if evidence has been offered on all the counts, and the verdict is general, the plaintiff may have a *venire de novo* before judgment; and if he take judgment, it may be reversed on error. But if the judgment is once stayed on motion of the defendant, it is stayed forever.

In such case, the defendant is the party prevailing, within the meaning of the statute; and as such is entitled to his full costs. And so was the judgment in *Little v. Thompson*, 2. *Greenl.* 228. *Hart v. Fitzgerald*, 2. *Mass.* 513. 514.

Mellen C. J. delivered the opinion of the Court.

At *May* term, 1826, the motion in arrest of judgment, which had been duly filed at the term preceding, was argued; at that time there was an attempt made to amend the verdict, by the notes of the Judge who presided at the trial; but as no satisfactory certificate could be obtained from him to authorize such an amendment, the judgment was arrested. Before the adjournment of the court, a motion was made, on the part of the defendant, for costs, which was opposed; and a motion was made, on the part of the plaintiff, for a *venire facias de novo*, which was also opposed by the defendant. Both these motions have been argued; and it remains for the court to dispose of them.

We will first consider the application for a *venire facias de novo*.—There is no question as to the power of this court to grant it, in those cases where a judgment, rendered in favor of a defendant, has been reversed *on error—Harwood v. Goodright, Cowp.* 87. 89.

Grant v. Astle, *Doug.* 722. *Bent v. Baker*, 3. *D. & E.* 27. *Brown v. Clark*, 3. *Johns.* 443. *Keyes v. Stone*, 5. *Mass.* 391. *Wilson v. Mower*, *ib.* 407. In Massachusetts, and in several cases decided by this court on error, the award of a *venire facias de novo* is carried into effect in the simple mode of ordering a new trial at the bar of the Supreme Judicial Court, which is had accordingly in the usual form. This seems to be the course, also, in the Circuit Court of the United States. *The United States v. Sawyer.* 1. *Gal.* 86. In all these cases, by the reversal of the judgment, the defect or fault, which occasioned the reversal, is removed out of the plaintiff's way; and on a second trial he may proceed as though no verdict had ever been given; and, on motion, may in many cases, by an amendment, be able to avoid further danger. We apprehend also, that the same consequences will follow, or rather that a plaintiff may obtain the same advantages, *pending a motion in arrest of judgment*, by a motion for a *venire de novo*; or, according to our practice, by a motion to set aside his own verdict, on account of the defect complained of by the defendant; and then proceeding to another trial, on an amended declaration, where his case will admit of it. In *Hopkins v. Beedle*, 1. *Caines*, 347, a motion in arrest of judgment was made. *Kent J.* in delivering the opinion of the court, says, "With respect to the *third* count we are of opinion that it is insufficient to sustain an action; but as the verdict is general, the judgment must be arrested: the plaintiff, however, on application, *might have been entitled to a venire facias de novo*, on payment of costs." So also in *Lyle v. Clason*, 1. *Caines*, 581, a similar motion was filed; and *Kent J.* in delivering the opinion of the court, after commenting on the insufficiency of *one* of the counts, says "the judgment must be arrested, *unless the plaintiff wishes for a writ of inquiry de novo*, which he is entitled to, on payment of costs." In this last case, the defendant had been defaulted. By this course of proceeding, a defendant enjoys all the advantages which he could obtain by a reversal of the plaintiff's judgment on a writ of error, and at less expense; and a plaintiff is also placed in the same situation in which he would stand, after the reversal of his judgment.

From the view we have thus taken of the subject, it is evident, the plaintiff's motion comes too late. He did not elect in season to abandon his verdict and move for a new trial, but trusted to the failure of the defendant's motion in arrest of judgment. As that was sustained and the *judgment arrested*, the suit was then completely terminated, and could no longer be the subject of revision in any form.

With respect to the question of costs, we are sensible that the different courts have given different opinions. We incline, however, to decide in conformity to several decisions in Massachusetts, allowing costs in such cases to the defendant; considering him as entitled to them by the statute of that State, which gives costs to the *prevailing party*. That statute has been re-enacted in this State, long since the above construction of it was given; and by such re-enactment, the construction seems also to have been adopted. In the case of *Little v. Thompson*, 2. *Greenl.* 228, we allowed costs to the defendant, after arresting the judgment. No injustice is done to the plaintiff, as the fault was his own, which rendered the arrest of judgment necessary.

Plaintiff's motion overruled. Costs allowed to defendant.

RIPLEY *vs.* BERRY & AL.

Where land is conveyed by deed, referring to a plan, between which, and the original survey, there is a difference in the location of lines and monuments; the lines and monuments, originally marked as such, are to govern, however they may differ from those represented on the plan.

THIS was an action of trespass for cutting the plaintiff's trees on his lot No. 4, in *Denmark*. His title was by deed from *James Lloyd*, dated *Dec.* 1, 1818, in which the lot was described as containing seventy-five acres, "on a plan of sundry lots in said *Denmark*, made by *Isaiah Ingalls*, in *March* 1809, be the same more or less, in conformity with the plan aforesaid, and however the same may be bounded." The defendant held the lot No. 1, adjoining the plain-

tiff's lot, by a deed from Mr. *Lloyd*, dated *Dec.* 2, 1818 ;—and the question was whether the *locus in quo* was a part of lot No. 1, or of lot No. 4. The side of No. 4 farthest from the defendant's land, was bounded by a pond, marked on the plan. By applying the scale to the edge of the pond as thus laid down, and measuring off the estimated length of line towards the defendant's land, the plaintiff's lot would extend far into that claimed by the defendant. But Mr. *Ingalls* testified that the pond was marked on the plan by conjecture only ; but that the lines and courses of the lots laid down on the plan were actually surveyed, except a part of the check lines. And they were marked and certified to have been surveyed, on the original plan. By comparing *Ingalls's* plan with a plan and survey made in this case by Gen. *Perley*, by order of court, it was manifest that *Ingalls's* plan did not agree with his actual survey. But by the original actual survey, the *locus in quo* fell within the lines of lot No. 1, as marked by *Ingalls*.

Weston J. before whom the cause was tried, ruled that the original survey controled all the other evidence in the case, and directed a verdict for the defendants, subject to the opinion of the court.

Dana and *Chase* for the plaintiff.

Greenleaf and *Pike* for the defendants.

Mellen C. J. delivered the opinion of the Court.

The decision of this cause depends upon the construction of the deed of *James Lloyd*, under whom the plaintiff claims. If, by such construction, lot No. 4, contains the *locus in quo*, the verdict must be set aside ; if not, then judgment must be entered on the verdict in favor of the defendants. It is a well settled principle, that whatever is included within the bounds of a lot as it was actually located upon the face of the earth, is to be considered as a part of such lot ; and, to use the language of the court in the case of *Pike v. Dyke* 2. *Greenl.* 213, "Where lots have been granted, designated by number according to a plan referred to, which has resulted from an actual survey, the lines and corners made and fixed by that survey, have been uniformly respected in this State, as determining the extent and bounds of the respective lots." It is admitted that by the *plan* of

Ingalls, referred to in *Mr. Lloyd's* deed, the *locus in quo* is no part of *lot No.* 4, but belongs to *lot No.* 1,—and the case finds that by the original survey and location, it was no part of lot No. 4. In other words, the *actual survey* and *location*, and the *plan* agree. It is true that by the case it appears that *Perley's* plan and that of *Ingalls* do not agree; but this recent survey and ascertained variance, cannot affect the question. It arises probably by considering the pond as having been actually surveyed, and correctly laid down on the plan; and then measuring northwardly from the margin of the pond, as laid down, to ascertain the north line of lot No. 4. But this process is fallacious and must be rejected; because *Ingalls* testified on the trial that the pond was laid down on the plan by conjecture. It is otherwise as to the lines; for it is admitted "that the lines and courses of the lots laid down on said plan were actually surveyed, except a part of the check lines," (and the line in dispute is not one of those) "and marked and certified to have been surveyed, on the original plan." It was admitted in the argument that this plan had been made for the use of *Mr. Lloyd*, and that when he caused it to be made he was the owner of the whole tract surveyed, of which the lots in question are a part. To *this* plan, with the above named certificate upon it, he refers in his deed; and by this description and reference, he and his grantee must be bound. For these reasons we are all of opinion that the instructions of the Judge were correct; and therefore there must be *Judgment on the verdict.*

STEVENS *vs.* MORSE & ALS.

Where the proprietors of a township, in order to encourage its settlement, voted to give lands and a sum of money to any person who would build mills on one of the lots designated, and maintain them for ten years, which was done;—this was held to give no right to flow the lands of any individual proprietor, holden in severalty at the time of the vote, though more than forty years had elapsed since the mills were built, without any claim of damage.

THIS was a complaint, under the statute regulating mills, against the owners of a mill, for flowing the lands of the complainant, in the

lot No. 10, in the 3d range, in *Paris*. The respondents pleaded 1st, that the complainant was not seised of the land ;—2d, that they had good right to keep up this dam, and flow the land supposed to be flowed, without payment of damages, by virtue of an agreed composition with the original owners of the land, and one *Lemuel Jackson* the original builder of the mill, under whom the respondents claimed ; —3d, that *Jackson*, and his grantees, had good right to flow the land without payment of damages ;—4th, that the flowing caused no damage. These pleas were traversed, and issues joined on the traverses.

At the trial of the three first issues, the title of the respondents to the mill lot No. 7, in the 3d range, on which the mill stood, was admitted as derived from *Lemuel Jackson*. The respondents offered in evidence the records of the original proprietors of the township No. 4, now *Paris;* from which the following facts appeared. The township was granted *June* 11, 1771 on the usual conditions of effecting a speedy settlement. *Jan.* 5, 1774, the proprietors voted to record their names on their several lots on a plan of the township, now lost ; and chose a committee to consider how they would dispose of or improve the mill-lot No. 7, and voted to clear a road to it ; which was done in *June* following. In *April* of the same year they voted to grant the mill-lot & 100 dollars, to any person who would undertake to build mills thereon within a year, and keep them in repair ten years, complying with certain other conditions respecting tolls. In *August* following they voted to grant a "farther encouragement" to any person undertaking to build a mill or mills in the township. Again in 1780 they renewed the offer of the mill-lot, adding two other lots, to any person who would erect a saw-mill and a grist mill within 20 months ; and appointed a committee to give deeds upon the performance of the conditions. And in 1783 it appeared that *Lemuel Jackson*, under whom the respondents claimed, had received a deed of the lots, and 150 dollars in money, upon giving his bond conditioned to build the mills in the manner stipulated, and keep them in repair ten years from *March* 5, 1785.

The respondents also proved that the lot No. 10, was drawn to the original right of *Benjamin Stowell*, who was an original proprietor, and acted with the proprietors till after the mills were built ; some years after which he conveyed it to the ancestor of the complainant.

They also shewed the great inconveniences to which the early settlers were subjected from the want of mills, and their importance to the settlement and value of the lands ; and proved that no damages had been demanded by any proprietor of lands flowed by means of the same dam, except in the present instance.

The complainant proved that the lots in *Paris* were drawn, and the lot No. 10 assigned to *Benjamin Stowell*, in severalty, in 1773, before any vote respecting mills was passed by the proprietors.

Upon this evidence *Weston J.* before whom the cause was tried, directed a verdict for the complainant upon the three first issues, subject to the opinion of the court upon the sufficiency of the evidence to support the issues, on the part of the respondents ; the parties agreeing that if it furnished a sufficient bar to the process, the complainant should become nonsuit ; otherwise, the cause should stand for a trial of the fourth issue, and for any ulterior proceedings under the statute.

Daveis and *Stowell*, for the respondents, argued that as *Benjamin Stowell* was one of the proprietors, and also owned the lot now belonging to the complainant, when the mill-lot was granted to *Jackson*, the grant of this last lot, with the appurtenances, must, as to *Stowell*, be taken to pass the right to flow, as appurtenant. Any other construction would operate as a fraud on the grantee ; as it would give him the mill, and at the same time withhold from him that which was indispensably necessary for its use. It was evidently the intention of the proprietors, as it was obviously their interest, to encourage the erection of mills, by granting every possible facility and inducement. And had the question of the right to flow without payment of damages been directly under their discussion, it cannot be doubted that they would have secured it to the grantee by the necessary legal muniments. No probable reason can be given why they should have spent so many years in overtures for the building of mills, and evidently so much desired it, increasing their pecuniary offers till a contractor appeared, and finally paying him a large sum of money ; and yet have reserved to themselves the right to prosecute him for damages not then in existence, or even in prospect; or at best but in remote possibility, and of the most shadowy character. On the

contrary the plain inference from their whole record-book is, that the right to flow without impeachment was considered as an easement, passing with the mill-lot, and that the liability to receive damage in their lands was regarded as nothing in comparison with the advantages of their situation near the mills. *Adams v. Frothingham* 3. *Mass.* 252. *Leonard v. White* 7. *Mass.* 6.

Greenleaf and *S. Emery*, on the other side, were stopped by the Court; whose opinion was delivered as follows, by

Mellen C. J. As the title to the lands claimed by the complainant and respondents respectively is admitted, no question arises as to the first issue.

Whether the facts reported amount to proof sufficient to maintain the second and third pleas, or either of them, must depend upon an examination of dates and the order of the proceedings of the proprietors, in relation to the division of the township, and the building of mills on lot No. 7, in the 3d range, which is now owned by the respondents.

Nov. 1, 1773 the proprietors voted to draw the lots for a division of the township and chose persons to draw the lots. *January* 5, 1774, they voted that the proprietors names be recorded in the several lots on the plan of said township; and in the record of *December* 1, 1780, mention is made of the whole township having been lotted out into lots, and allotted to each proprietor, and of their having holden their lots in severalty and thereby increased the settlement. No other division was ever known to have been made; and it seems the plan is lost. Such being the facts, the inquiry is, whether the proprietary proceedings, detailed in the report, furnish proof of an agreement on the part of the complainant, or those under whom he claims, of a consent that the complainant's lot might be flowed for an agreed price, or without payment of any compensation; or, in other words, whether the votes of the proprietors are to be considered, in respect to the building of the mills, as binding on the successive owners of the other lots in town. By the report it appears that the first vote relating to the building of mills was passed *April* 20, 1774. The second vote on the subject was passed *August* 11, 1774, appointing a committee. The next vote was passed *August* 31, 1774, offering further encouragement to any person that would un-

dertake to build mills, and appointing another committee. *April* 18, 1780, they appointed a committee with distinct powers and authority to make an agreement with any person or persons who would build; another vote was passed *April* 17, 1782, and another on the 5th of *March* 1783, of a preparatory kind; and prescribing the mode in which *Lemuel Jackson* before mentioned should be paid for building mills, on his agreeing to erect them, which proposals it seems were accepted, inasmuch as on the 7th of said *March* the committee made and executed to him a deed of the lands mentioned in the vote of *March* 5th. From this view of dates and proceedings it appears that until *March* 5, 1783, *Jackson's* name does not occur as a contemplated contractor to erect the mills; all prior to that time was merely a series of preliminary arrangements; and if the votes respecting *Jackson*, and the contract with him as to the erection of mills, amount to proof of consent on the part of the proprietors, that he and those claiming under him should erect and occupy them, without being liable to pay damages; still the proprietary proceedings before that time can never be considered in the nature of an agreement with any one in particular for any purpose whatever.

How then stands the case? Admitting the contract with, and deed to *Lemuel Jackson*, to amount to a license to him, and those claiming under him to flow lands belonging to the proprietary, without payment of damages, this will not avail the respondents, because, as we have before stated, all the township, except the mill-lot, had been divided into lots and was holden in severalty, (so says the record of *December* 1, 1780,) for several years prior to the conveyance to *Jackson*. According to this record, lot No. 10 was not common land in *March* 1783; it belonged at that time to some person whose title thereto is admitted to be in the complainant. Being holden and owned in severalty, it was not subject to any proprietary control, more than if it had been situated within the limits of another township. These are plain principles, and they settle the question before the Court. It has been urged, that for a series of years prior to the division and allotment of the proprietary lands, there was an understanding among all concerned, that the-mill lot should be reserved for the purpose of having mills erected thereon for the general convenience; and that

therefore when the division was made, each assignee or owner of a lot must be considered as assenting to take his land subject to the right, in the owners or occupants of the mill-lot, to flow the adjoining lands without payment of any compensation. But such a construction would contradict the record ; it would be changing a vote or conveyance, absolute in its terms, into a conditional one ; it would be making a contract, instead of giving a construction to one already made. If a man's title, founded on a deed or record, could be varied and impaired in this manner by parol proof, or by the magic of construction without any proof at all, titles would be exposed to a thousand dangers, and thrown into confusion. In early times, the flowing of the lands in question, as in many other cases, was little or no injury to the owner ; but as the lands have become more valuable, that injury may become a matter of importance ; and we do not perceive why such an injury should not furnish as fair a claim for the damage which has actually been sustained, as in cases where the flowing has been occasioned by more recent erections.

Accordingly it is the opinion of the Court that the verdict must stand ; and a trial be had as to the fourth issue according to the agreement of the parties.

The inhabitants of TURNER *vs. The inhabitants of* BRUNSWICK.

The provision of *Stat.* 1821, *ch.* 122. *sec.* 17, that if a pauper notice be not answered within two months, the defendant town shall be barred from contesting the question of settlement, does not apply to cases where the settlement can be shewn to be in the town giving the notice.

THIS was *assumpsit* for the support of one *Joseph House* and his family, who were paupers ; and it was tried before *Preble J.* upon the general issue.

The plaintiffs proved that notice, in due form of law, was sent from the overseers of the poor in *Turner* to those in *Brunswick*, *May* 18, 1824 ; and again *October* 1, 1824 ; and relied on the fact that no

answer was returned within two months, as estopping the defendants from contesting the question of settlement, by virtue of the provision in *Stat.* 1821, *ch.* 122. *sec.* 17.

The defendants offered to prove that the legal settlement of the paupers was in *Turner*;—that in *May* 1821, a regular notice that they were chargeable was sent from *Turner* to *Brunswick*; to which the latter town replied within two months, denying the alleged settlement in *Brunswick*; and that *Turner* had not called on *Brunswick* at any time within two years after *May* 1821. This evidence the Judge rejected, as not admissible until a seasonable answer was shewn to have been given to the notices proved by the plaintiffs.

The defendants then proved that an answer, denying the settlement of the paupers to be in *Brunswick*, was put into the mail *May* 22, 1824, properly addressed to the overseers of the poor in *Turner*, but the postage was not paid;—that it arrived seasonably at the post office in *Turner*, and its being there was mentioned to one of the overseers, who declined taking it from the office, but thought it might be an answer to a notice they had sent to *Brunswick*;—that this was not mentioned to any other overseer; and the letter was finally sent to the general post office as a dead letter;—and that another letter not post paid, addressed to the same overseers, was advertised as a dead letter *Jan.* 1, 1825, but from what town it came was not recollected.

This evidence the Judge ruled to be insufficient to prove an answer to either of the notices sent; and directed a verdict for the plaintiffs; to which the defendants excepted.

Fessenden, in support of the exceptions contended that the statute estoppel did not attach, where the settlement of the pauper was in the town giving the notice. The statute has prescribed the modes of gaining a settlement, among which that by estoppel is not to be found. But upon the ground taken by the plaintiffs, a new mode of gaining a settlement is created, by estoppel.

By a reasonable construction of the statute, no town has a right to call on another town to support its own poor. The call in such case may be treated as a nullity. The third section makes it the

duty of all towns to support the poor persons "lawfully settled therein," as well as those falling there into distress, but having their settlement in some other town. The fifteenth section provides for their removal *to* the place of their settlement, not *from* it.

Further, the pauper who is the subject of litigation, is never made a party to the suit, nor permitted to be heard. And ought his domicil to be made dependent on the negligence of other persons, and himself exposed to a forcible removal from his home? Nor is this the only abuse growing out of the opposite doctrine. It offers inducements to send notices to many towns at once, in the hope to entrap some one by a neglect to answer; and thus directly encourages fraud. On these grounds the meaning of the legislature must have been merely to preclude the defendants from shewing the settlement to be in a third town; but in no case to debar them from contending that the burthen belonged exclusively to the plaintiffs. *Leicester v. Rehoboth* 4. *Mass.* 180. *Bridgewater v. Dartmouth ib.* 273. *Westminster v. Barnardston* 8. *Mass.* 104. *Greene v. Monmouth* 7. *Mass.* 467. *Needham v. Newton* 12. *Mass.* 452. *Topsham v. Harpswell* 1. *Mass.* 518. *Freeport v. Edgecomb ib.* 459. *Quincy v. Braintree* 5. *Mass.* 86.

He further insisted that the answer to the notice of 1821, was sufficient for all purposes. No new reply was necessary, the defendants having once for all denied that the settlement of the paupers was in their town. *Newton v. Randolph* 16. *Mass.* 426.

Greenleaf and *W. K. Porter*, for the plaintiffs, relied on the language of the statute, as creating a peremptory bar. It provides that if the notice is not seasonably answered, the defendants "shall be barred from contesting the question of settlement with the plaintiffs in such action." It regards the silence of the party as conclusive evidence of the charge. *Westminster v. Barnardston* 8. *Mass.* 107. *Bridgewater v. Dartmouth* 4. *Mass.* 273. And with good reason; for the plaintiff town, in consequence of such silence, may have lost its remedy against another town by neglecting to give notice. On the same principle the neglect to reply has been held to preclude any inquiry whether the person relieved was in fact a pauper.

Freeport v. Edgecomb 1. *Mass.* 463. It fixes, as between these parties, both the question of settlement, and of pauperism.

The suit here is between corporations; and they, as such, can have no knowledge of any facts whatever. Even their officers may not be able to ascertain the settlement of paupers they are called on to support, especially when derived from remote ancestors, &c. If knowing the facts, they fraudulently give notice to a town where the pauper has no settlement, the remedy is plain against them personally, for the damages thus occasioned.

As to the notice of 1821, it had done its office. A new notice was necessary to recover for new expenses. *Green v. Taunton* 1. *Greenl.* 228. *Topsham v. Harpswell* 1. *Mass.* 518.

MELLEN C. J. at the ensuing term in *Kennebec*, delivered the opinion of the Court as follows.

The general question in this case is, whether the defendants are estopped to deny that the settlement of the paupers is in *Brunswick*, by reason of their omission to give a seasonable answer to the notice which was given to them by the plaintiffs in *October* 1824. In the discussion of the cause this general question has been divided. 1. It has been urged on behalf of the defendants that as they returned a seasonable reply to the notice given them by the plaintiffs in *May* 1821, and therein denied that the pauper's settlement was in *Brunswick*, that answer was, in its nature, a continuing protection to *Brunswick* against an estoppel by reason of their omitting to send an answer to the notice of *October* 1824. 2. If not, then it is contended that, on the facts stated in the report, the statute estoppel cannot operate against the defendants, although they did not return any answer to the notice last mentioned. The former of these questions has not been expressly decided in Massachusetts or this State; and the latter appears to be perfectly new. We have not found it necessary particularly to examine the alleged legal effect of the answer to the notice of 1821, because our opinion is founded upon the construction of those parts of the act of 1821. *ch.* 122. which give the right to one town to send notice to another, and prescribe the mode and con-

sequences of such notice. We have listened with attention to the able argument of the defendant's counsel, on this branch of the defence, and are all satisfied that it is sound and unanswerable. It is a well known maxim, as has been observed, that estoppels are not to be favored. It is not our duty to apply them except in those cases where they are clearly applicable. On the trial, proof was offered on the part of the defendants to shew that for the last fifteen years, the paupers have all dwelt and had their home in *Turner;* and had their legal settlement fixed in that town by the said act of 1821. This evidence the presiding judge excluded. But, in deciding the cause, we must consider these facts as though proved; and then the single question is presented, "has the town in which a pauper, or person supplied, has his legal settlement, a right to the benefits of the statute estoppel, in case the town to which notice is given, omits to return an answer within two months?" A careful examination of several of the provisions of the above mentioned act will lead to a satisfactory solution. We have examined the several cases cited by the defendant's counsel, and find that in none of them was there any pretence that the person to whom the supplies had been furnished, had, at the time, his settlement in the plaintiff town.

It is provided in the eleventh section of our statute before mentioned, "that it shall be the duty of said overseers, in their respective towns, to provide for the immediate comfort and relief of all persons residing or found therein, not belonging thereto, but having lawful settlements in other towns, when they shall fall into distress," &c. It is also provided in the same section that expenses so incurred may be recovered by action or complaint. The fifteenth section among other things, provides "that all persons actually chargeable or who through age or infirmity, idleness or dissoluteness, are likely to become chargeable to the place wherein they are found, but in which they have no lawful settlement, may be removed to the places of their lawful settlement if they have any in the State." The section then prescribes the form of proceeding to accomplish the object, by application to a justice of the peace. The sixteenth section provides for effecting the same object by application to the Court of Common Pleas, and directs what measures shall be pursued. The

seventeenth section is the important one, and that which has an immediate bearing upon the question we are now considering. Among other things it provides "that said overseers may in all cases, if they judge it expedient, previous to any such application to any justice of the peace, or of the Circuit Court of Common Pleas, to send a written notification, stating the facts relating to any person actually become chargeable to their town, to one or more of the overseers of the place where his settlement is supposed to be," requesting a removal, &c. And if such removal is not effected or objected to by them, in writing, within two months, such overseers may remove him to the town notified; which town shall be liable for the expenses of his support and removal, "to be recovered by action as aforesaid by the town incurring the same; and shall be barred from contesting the question of settlement with the plaintiffs in such an action." The eighteenth section provides "that said overseers shall relieve and support, and, in case of their decease, decently bury all poor persons residing or found in their towns, having no lawful settlement within this State, when they stand in need," and authorises a recovery, in certain cases, of their relations. From this view of the statute it will be seen that the seventeenth section has an immediate relation to the eleventh, fifteenth, and sixteenth sections; and those three all relate to expenses incurred by, or to removals from, towns, in which the pauper or person furnished with supplies, had not his legal settlement; then follows the seventeenth section, providing for notice previous to the commencement of an action, and declaring that the omission to return a seasonable answer shall be an estoppel on the town notified, to contest the question of settlement with the plaintiff town. In no part of the act can we find any intimation that a town in which a pauper has his legal settlement, can by any mode, except a judgment of court, avail themselves of the benefits of the statute estoppel. The possession of such a power, might become mischievous in its abuse; besides, it would operate to change the settlement of the pauper, in a manner not contemplated in any part of the second section. For instance, let us suppose that a pauper has his legal settlement in A., but that the overseers of that town, notwithstanding, send

notice to the overseers of B. that the pauper has his legal settlement in their town; and by some inattention or accident, no answer is returned by the overseers of B. to the overseers of A. within two months. Now if, in such a case as this, the statute estoppel is applied, the paupers settlement is changed from A. to B.; because B. cannot contest the question of settlement with A., the plaintiff town; of course a judgment is rendered against B., and this judgment becomes a complete bar to any further disturbance or agitation of the question between those towns. This is an effect never contemplated by the statute; and the language of the seventeenth section shews it; for it only provides that the town, omitting to return a seasonable answer, shall be barred from contesting the question of settlement with the plaintiffs; but it does not profess to touch the question of settlement; much less to change it. It only throws upon the defendant town the burthen of seeking for the town where the pauper has his legal settlement; and obtaining a reimbursement from such town; and this is the penalty the negligent town is compelled to pay in consequence of its negligence. The eighteenth section above mentioned contains the same idea as the others, respecting the settlement of the pauper; proceeding on the principle that his legal settlement is not in the town furnishing relief. Viewing the several provisions of the act which we have been considering, in the light in which we have placed them, the whole appears rational, just and consistent; calculated to insure comfort and relief to the destitute and suffering; to stimulate towns to their duty and their interest; but at the same time to guard their rights secure from any eventual injury. On the whole we are all of opinion that the defendants should have been permitted to prove that the paupers had their legal settlement in *Turner* at the time the notices were given to the overseers of *Brunswick;* and accordingly there must be a new trial.

Verdict set aside, and a new trial granted.

Proprietors of Fryeburg Canal *v.* Frye.

The proprietors of FRYEBURG CANAL, *plaintiffs in error*, vs. FRYE, *original plaintiff.*

Though the power of referees, appointed under *Stat.* 1821. *ch.* 78, does not extend to cases in which the title to real estate comes in question, yet a claim of damages occasioned by the making of a canal, not being of that character, is within the scope of their authority.

A proprietors' committee having in their behalf entered into a submission of demands to referees, under the statute, representing themselves as duly authorised so to do, and the proprietors having been heard upon the merits before the referees, making no objection to the submission;—upon error brought by them to reverse a judgment rendered upon the award, the Court presumed that the committee had due authority, though the want of it was assigned for error.

The statutes relating to the *Fryeburg* canal are private statutes.

The remedy by complaint, given in the statutes relating to the *Fryeburg* canal is cumulative, not precluding a resort to the process of the common law, nor to the statute-remedy by arbitration.

ERROR to reverse a judgment of the Court of Common Pleas, rendered upon a report of referees, made under a statute-submission. The plaintiffs in error, having been incorporated with power to divert the course of Saco river by cutting a canal across one of its bends, at one of their meetings holden *Dec.* 30, 1825, chose a committee "to settle, in behalf of said proprietors, with claimants for damages or loss of land, by reference or otherwise." On the same day the defendant in error made and signed his demand in writing against the proprietors, pursuant to the statute, claiming of them a thousand dollars for the injury and damage he had sustained in his lands in consequence of their opening and managing the canal. The proprietors also at the same time, by their committee, in like manner made and signed a demand against him, of a thousand dollars for the benefit he had derived by turning the river into a new channel. These demands were annexed to a rule drawn, signed and acknowledged before a magistrate according to the statute, by which the demand of the defendant in error, and all other demands between the parties, were submitted to the decision of referees therein named. The referees,

after hearing the parties, awarded four hundred dollars to the defendant in error; which report, being returned to the Court of Common Pleas, and recommitted on motion of the proprietors, was finally accepted, and judgment rendered thereon.

Upon the record of this judgment, which exhibited only the foregoing vote, demands, submission, and award, and the ulterior proceedings in court, the proprietors filed the following errors:—*First*, that the parties had no power by law to submit any demand to referees;—*Second*, that they had no authority to submit to arbitration the demand of the proprietors against *Frye*;—*Third*, that the committee had no power to make a demand for the proprietors, nor to enter into any submission to referees;—*Fourth*, that the proprietors had no authority to submit *Frye's* demand to referees;—*Fifth*, that it did not appear that *Frye* commenced against the proprietors a complaint or process in the Court of Common Pleas, nor in this Court, at any time after ninety days nor within two years from the time of filing a demand for his damages with the clerk of the proprietors;—*Sixth*, that judgment was rendered upon the report; whereas by law it ought to have been rejected, and judgment given for the proprietors for their costs;—*Seventh*, that the submission was not only of the demands annexed, but of all other demands, which the committee had no sufficient authority to submit;—*Eighth*, that it did not appear that *Frye* had at any time filed his claim of damage with the clerk of the proprietors. The defendant pleaded *in nullo est erratum.*

At the opening of the record, *Greenleaf* and *Chase*, for the defendant in error, moved that the writ might be quashed, on the ground that it did not lie in the present case, where the proceedings were not according to the course of the common law. And they urged a distinction between this case and other judgments upon reports of referees, which had been reversed by writ of error, in that the subject matter of this was never cognizable at common law.

But THE COURT did not admit the distinction, and refused the motion; considering the question as virtually settled by the previous decisions.

N. Emery and *Fessenden* for the plaintiffs in error, relied chiefly on the point that the committee of the proprietors had exceeded

their power, in submitting to referees more than was contained in their vote. They were authorised to settle by arbitration any claims of individuals against the proprietors for damages for loss of land, and nothing more. But they have assumed to go beyond this, and submit not only the demand of the defendant in error against them, but theirs against him, and all other demands.

They further argued that the demand itself was not cognizable by referees, under the statute, because it involved the title to real estate. *Fowler v. Bigelow* 8. *Mass.* 1. 1. *Dane's abr. ch.* 13. *art.* 4. *sec.* 3.

But if it were, yet the corporation has no authority to enter into any arbitration. Its powers and liabilities depend wholly on the statutes respecting the canal; and these have provided a particular mode, by demand filed with their clerk, and a complaint prosecuted after ninety days and within two years, from the time of such filing, in which all demands for damages, like those in the present case, are to be enforced. The minority are not bound by any other mode. And these statutes are public in their character, like those incorporating towns, &c. as they relate to a river which has obtained the character of a public river. *Commonwealth v. Springfield* 7. *Mass.* 9.

And here was no demand filed with the clerk. This should appear in the case, it being in the nature of a condition precedent.

Lastly, they contended that the demand was lost by not having been prosecuted within two years, which they said was a peremptory bar, by the terms of the statutes relating to this canal.

Greenleaf and *Chase*, on the other side, denied the right of the proprietors to assign that for error which was beneficial to themselves; and such was their claim for the benefit derived by *Frye* from the canal, which they had no other mode of enforcing. *Shirley v. Lunenburgh* 11. *Mass.* 379. *Whiting v. Cochran* 9. *Mass.* 532.

As to the authority of the committee to submit all demands, at this stage of the proceedings it is to be presumed. If not, the want of it is cured, it appearing from the record that the proprietors did attend and enforce "all demands" before the referees. Nor is this

a demand involving the title to real estate, so as to draw after it an award upon the title. The claim is purely for damages.

As to the statutes respecting the canal, they contended that they were private acts, of which the court could not judicially take notice, as they did not appear of record; and therefore the objections founded upon the particular provisions of those acts could not be supported.

WESTON J. delivered the opinion of the Court, at the ensuing term in *Kennebec.*

It is objected that the subject matter in dispute between these parties, affecting the title to real estate, could not be adjudicated upon by referees, appointed under a submission before a justice. If the title to real estate is necessarily involved in this controversy, upon the authority of *Fowler v. Bigelow*, cited in the argument, this error is well assigned. But it does not appear to us ,that the title to real estate is affected by the submission. The right of the plaintiffs in error, however derived, to make their canal across the defendant's land, is not disputed. He sought not to reclaim his land from their operations, nor does he pretend that he has a right so to do; but it being assumed that his land is gone, or rendered useless to him, by being covered by the waters of the canal, he claims damages for this injury. That the defendant also was the general owner of the land thus taken, is not denied or drawn in controversy. If the parties had, in the mode adopted, submitted the right of the plaintiffs in error to make the canal, or whether the defendant was or was not the owner of the land, for an injury to which he claimed damages, the question in dispute would be of a different character. The power of a justice of the peace in civil actions does not extend to cases, in which the title to real estate comes in question; yet it is every day's practice, to bring before a justice, actions of trespass *quare clausum fregit;* and where the defendant does not dispute the title of the plaintiff to the *locus in quo*, the justice may lawfully adjudicate between the parties. The dispute between these parties is of the

same character in principle ; it is a mere question of damages, and not of title.

It is further assigned for error, that in and by the record it appears that the committee, assuming to act in behalf of the plaintiffs in error, were not authorized thereto. There is, among the copies certified, a paper accompanying the submission, purporting to be a copy of a vote of the proprietors of the Fryeburg canal, under the signature of their clerk, by which it appears that the persons, who entered into the submission in their behalf, were appointed a committee to settle with claimants for damages or loss of lands, by reference or otherwise. This authority it is contended is insufficient; but admitting it to be so, we do not know that there may not have been other votes, prior to the submission or subsequent, by which it would appear that the committee were clothed with competent power. The committee, in entering into the submission, declare themselves duly and legally authorized for that purpose ; but they refer to no vote of the corporation, as evidence of their agency ; nor is it any where stated that they acted in virtue of the vote certified ; much less that this was their only authority. The justice, in his certificate of the acknowledgment of the parties to the submission before him, represents the committee in behalf of the plaintiffs in error, to have been duly authorized. It cannot therefore with propriety be averred, that it is apparent from the record, that the committee were not duly and legally empowered to bind the corporation. It appears that the plaintiff in error attended before the referees prior to their first award, and that their proofs and allegations were received ; that they procured a recommitment, and were again heard by the referees ; and it does not appear in any stage of the proceedings, prior to the acceptance of the report, that they disclaimed the authority of the committee who entered into the submission. It is certainly inequitable, after they had thus recognized the authority of the referees, and taken the chance of a decision in their favor, that they should now deny all obligation on their part to abide their award. If the want of authority in the committee had been formally assigned as an error in fact, it might well be doubted whether, under these circumstances, all objec-

tions of this sort are not to be regarded as waived. But the assignment is, that the committee of the proprietors "had no power or authority to make said demand for, or enter into any submission concerning, the subject matter of said demand, as in and by said record and process appears." Now, as has been before stated, it does not appear by the record, that the committee were not authorized.

Another error assigned, and upon which much reliance has been placed, is, that the defendant did not pursue the remedy pointed out by the statute creating this corporation, and the several acts in addition thereto. These acts not having been pleaded, or in any manner made a part of the record, or referred to therein, a question arises whether judicial notice ought to be taken of them. The counsel for the plaintiffs in error, insist that they are public statutes; principally upon the ground that the *Saco* is, at *Fryeburg*, a public river. It may have become such by long usage; but as this fact does not appear, and the canal being above where the tide ebbs and flows, according to the case of *Berry v. Carle*, 3 *Greenl.* 269, we cannot regard it as a public river of common right. These statutes seem therefore to belong to the class denominated special or private; and as such requiring to be pleaded or set forth. But if we look into these statutes, they do not sustain the error assigned. The claim of the defendant in error for damages was not in the nature of a new right given by statute, and in which a special remedy is provided, which in such case could alone be pursued. If these statutes had been silent on the question of damages, the common law would have afforded a sufficient and adequate remedy. In the special one provided, there are no words of exclusion; the language is not imperative but optional, and ought perhaps rather to be deemed cumulative than exclusive. But if not intended to be cumulative, it was a provision manifestly introduced for the benefit of both the parties; and if they both agreed to waive it, and to resort to a course, and to a tribunal, open to all the citizens, we are not aware that it was not competent for them so to do. The corporation were invested with the capacity to sue and to be sued; and if all concerned were disposed to enter into a submission before a justice, which in ordinary cases would be

binding, we perceive no sufficient reason why the parties should not be bound by the award.

It being the opinion of the court that there is no error in the record before us, the judgment of the Common Pleas is affirmed, with costs for the defendant in error.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1827.

RING *vs.* BURTON *adx.*

The provisions of *Stat.* 1821. *ch.* 51, *sec.* 28, apply to the cases where the creditor had already recovered his judgment against the administrator, before the estate was represented insolvent, as well as to those where the action was then pending, or is afterwards commenced.

It seems that the allowance of further time to settle an administration account, under the hand and seal of the Judge of Probate, ought to be made before the expiration of the six months mentioned in *Stat.* 1821. *ch.* 51, *sec.* 28 ; and that if a still further time be granted, the order should issue before the end of the term first allowed ;—*sed quære.*

Where an administrator, after judgment against him in that capacity, discovers new debts, and thereupon represents the estate insolvent, and proceeds regularly under the commission, the return of *nulla bona* on the execution does not support a suggestion of waste.

THIS was a *scire facias* commenced in *October* 1822, upon a judgment recovered at the Court of Common Pleas, in this county, on the second Monday in *January* 1822, by the plaintiff against the defendant as administratrix of the estate of *William Burton, Jr.* ; setting forth the delivery of the execution to an officer, and his return that he had made demand upon the administratrix, who refused either to pay the judgment, or to disclose estate of her intestate wherewith it might be satisfied ; and thereupon suggesting waste.

Ring *v.* Burton adx.

At *May* term, 1825, leave having been given to plead anew, the defendant pleaded that after the second Monday of *January* 1822, she discovered other just and legal debts due from the deceased, beyond the value of all his estate which had been inventoried or come to his hands; whereupon she represented the estate insolvent, and a commission of insolvency was issued *Jan.* 22, 1822;—that six months time was allowed to the creditors to produce and prove their claims, before the commissioners, of which due notice was given;—that *Jan.* 21, 1823, the commissioners made return to the Judge of Probate of a list of the claims proved before them, amounting to $696,69, which was received and filed;—that on the same day the administratrix presented her first account of administration, which after due notice was settled *June* 5, 1823, in which she accounted for the whole personal estate, being $928,04, and was allowed for sundry payments and charges, amounting to $906,32, leaving in her hands a balance of $21,72;—that on the same day when her account was settled, she applied for license to sell so much of the real estate of the deceased, as might enable her to pay the debts due from his estate, which was granted *Sept.* 6, 1823;—that on the 3d day of *June* 1824, the whole of the real estate having been sold by virtue of the license, the Judge of Probate, under his hand and seal, allowed her further time until *Sept.* 4, 1824, to exhibit and settle her final account of administration; on which last day she presented a petition, praying for the allowance of further time for that purpose; whereupon the Judge, at a Probate Court holden *Oct.* 1, 1824, allowed her, under his hand and seal, a further time until the Thursday next following the third Monday in *Jan.* 1825, to exhibit and settle her final account;—and afterwards, at a Probate Court, holden *Jan.* 20, 1825, being within the time allowed, and after due notice, her final account of administration was exhibited, allowed and settled; in which she was charged with the balance of her former account, and with all the proceeds of the real estate sold, and with all other estate of the deceased which had come to her hands, amounting to $264,54, and was allowed sundry charges and payments, amounting to $170,83, leaving in her hands a balance of $93,71, which the Judge on the same day decreed to be distributed *pro rata* among the creditors whose debts

were returned by the commissioners as proved before them;—and averred that no other estate had come to her hands, and that the debt of the plaintiff was not for the expenses of the last sickness of the deceased, nor of any other privileged character.

To this plea the plaintiff replied that the alleged allowance of further time on the third day of *June*, 1824, and again on the first day of *October*, in the same year, were neither of them made and granted under the seal of the Judge of Probate; nor was any seal affixed to any such order of allowance, on either of those days; but that the seal of the Judge of Probate was put upon them *May* 20, 1825, on the application of the defendant, and without the knowledge or assent of the plaintiff, or any order of notice to him to appear and shew cause; and on a day when no Probate Court was holden. And concluded with a verification.

The defendant hereupon demurred in law; assigning for causes of demurrer,—1st. that the plaintiff, having traversed a material fact in the plea, ought to have concluded to the country;—2d, 3d, and 4th, in substance, that he had traversed an allegation, the truth or falsity of which, could only appear by the records of the Probate Court, and yet had not denied the existence of the record;—5th, for duplicity.

Greenleaf and *Ruggles*, in support of the demurrer, cited 1. *Chitty on Plead.* 537, 625, to shew the replication bad, in form, both for the want of a proper conclusion, and for duplicity, in that it traversed both the fact of sealing, and the time when it was done.

As to the affixing of the seals, they contended that the omission of them was only a judicial misprison, in a matter of mere form; and it was clearly amendable within the case of *Sawyer v. Baker*, 3. *Greenl.* 29, and the authorities there cited. And it disturbed no vested rights of the plaintiff, for he had none, having brought his action prematurely. The right of action in these cases, upon the original demand, accrues only where no account is ever settled, and so no distribution can be decreed. If any account is settled, the remedy for neglect to pay the creditors, is by action on the administration-bond. *Shillaber v. Wyman*, 15. *Mass.* 322. *Coleman v. Hall*, 12. *Mass.* 570. *Hunt v. Whitney*, 4. *Mass.* 620.

They further insisted that the fact and time of affixing the seals could not be tried by plea collaterally; but only by the record itself.

Allen and *Fuller*, for the plaintiff, referred to *Stat.* 1821, *ch.* 51, *sec.* 28, giving this remedy where the administrator neglects to exhibit and settle his account within six months after the report of the commissioners is made; and contended that an account exhibited on that day, as in the present case, did not satisfy the language of the statute, nor protect the administrator.

They contended further, that after the expiration of that term of six months, the Judge of Probate had no authority to allow longer time to settle an account; and that his act, to that intent, was merely void. If not, he may issue his further order at any time, even after action brought, and thus deprive the common law tribunals of their jurisdiction.

To the point that the proceedings in the Courts of Probate might be avoided by plea, they cited *Sumner v. Parker.* 7. *Mass.* 79. 2. *Mass.* 120. 11. *Mass.* 507. And they relied on *Hunt v. Whitney*, 4. *Mass.* 620, to shew that in any event, costs ought not to be allowed to the defendant.

Mellen, C. J. delivered the opinion of the Court.

The principal facts are, that on the second Monday in *January* 1822, the plaintiff recovered a judgment against the defendant in her capacity of administratrix; that after the judgment was so recovered, the defendant, having discovered that large demands existed against the estate of the intestate, which would render it absolutely insolvent, did thereupon represent the same as insolvent; that commissioners were appointed *January* 22, 1822, who made their report to the Judge of Probate, *January* 21, 1823. It further appears that the plaintiff took out execution on his judgment, soon after it was rendered; *and* delivered it to an officer, who, after demand on the defendant, made a return of *nulla bona* on the same, in due form; and thereupon the present writ of *scire facias* was sued out, in the month of *October* 1822, containing a suggestion of waste. The plaintiff claims to maintain this action in virtue of a provision in *Stat.* 1821, *ch.* 51, *sec.* 28. The provision is in these

words: "And whenever any executor of the last will, or administrator upon the estate of any person deceased, shall neglect to exhibit and settle his account of administration with the Judge of Probate, where the estate has been represented insolvent, and commissioners have reported to the Judge a list of claims, within six months after such report shall be made to the Judge, or within such further time as the Judge of Probate shall think proper to allow therefor under his hand and seal; any creditor to such estate may commence and prosecute any action, or may prosecute any action then depending, for his demand against such executor or administrator; and the court before whom such action may be depending, shall proceed to hear and determine the same, and give judgment therein, and award execution thereon, in the same manner as if such estate had not been represented insolvent; and upon the return of such execution, duly made, that the executor or administrator refused or neglected upon due request to satisfy the same, such refusal or neglect shall be deemed waste, and upon *scire facias* brought, judgment shall be rendered in favor of such creditor, to recover his debt with costs; and execution shall be awarded against the proper goods or estate of such executor or administrator; and for want thereof, against his body." We have thus stated the express language of the section, so that its several provisions may all be presented at one view. They may be properly said to be penal, because a non-compliance on the part of executor, or administrator, may subject him to incalculable liabilities in his private capacity.

By the above mentioned provisions, a creditor may, in a certain specified case, commence and prosecute to judgment an original action against an executor or administrator, though the estate of the deceased may then be under a commission of insolvency; and also in a specified case, may maintain a *scire facias* against such executor or administrator, and obtain judgment and have execution against his own proper goods and estate. It will be perceived at once, that, according to the strict letter of the section cited, such original action is to be commenced or prosecuted to judgment after the default or negligence on the part of the executor or administrator has taken place; and that the return of *nulla bona*, which shall

be deemed proof of waste, is a return on an execution issued on a judgment so recovered. This is the strict and literal construction of the section we are considering. But we apprehend that it is neither proper or necessary to adopt so narrow a construction. The advantages contemplated by the law, may all be obtained by a more liberal application of its principles and provisions. It is evident that the legislature, in enacting the section in question, had no respect to those cases where the executor or administrator had not been guilty of a violation of duty, and official negligence. The existence of such violation and negligence, being established by the return of *nulla bona*, constituted the waste by which the executor or administrator should be liable, on *scire facias*, to a judgment and execution against his own proper goods and estate. For these reasons, we are satisfied that, in order to lay the foundation of this personal liability, it is not necessary that the original action should be commenced after the fault and negligence specified had taken place; but that if before that time the original action had proceeded to judgment, a return of *nulla bona* on an execution issued on such judgment would entitle a creditor to all legal advantages of such a return, to be obtained on a *scire facias*. We adopt this opinion, because it seems unnecessary that a creditor, whose demand has been reduced to a judgment before a commission of insolvency has issued, should be obliged to commence a new action on such judgment, for the purpose of obtaining a return of *nulla bona*, and a judgment on *scire facias* against the executor or administrator *de bonis propriis*.

Nor will this construction in any manner prejudice the rights of an honest executor or administrator, who has been guilty of no official negligence or violation of duty; because he cannot be subjected to personal liability, in virtue of the return of *nulla bona*, and suggestion of waste, unless the facts of the case shew that he has been guilty of those acts, or that official negligence, which constitute waste; and if those facts which go to prove that he has not been guilty of such negligence and violation of official duty, have taken place after the rendition of judgment in the original action, he may plead the same in bar, upon the *scire facias*, as the defendant has done in the present case, and the bar will be good; such facts

not having been pleadable in bar of the original action. Having given the above construction to that part of the section which relates to the commencement and prosecution of the original action, we now proceed to the examination of that which relates to the *scire facias*, applying the principles of law to the facts before us. In this case, the original action was commenced, and judgment was recovered against the defendant, before the estate was represented insolvent; or such representation was deemed necessary. The plaintiff pursued his action in the usual manner, and with the usual motives; that is, to obtain payment of the demand; not because the defendant was in any special manner in fault, but because he found it prudent to use compulsory measures to effect his object. It does not appear that the defendant, at the time such judgment was recovered, had been guilty of any official negligence which could subject her to any personal liabilities; nor was it the object of the plaintiff, in pursuing his action and obtaining his judgment against the defendant, to subject her to any such. Up to the time of the commission of insolvency, every thing seems to have been conducted in common form, and without any reference to the particular provisions of the section above mentioned.

This leads us to inquire whether the defendant was in the wrong, in not satisfying the execution which issued on said judgment, and on which the officer made the return of *nulla bona*. We have seen that, before the execution issued, the commission of insolvency had issued; and it would certainly seem the duty of the defendant to conduct the settlement of the estate in the usual manner, by waiting to ascertain the amount of demands against it, and the value of the estate itself; so that the whole should be settled according to the provisions of law in cases of absolute insolvency. The defendant, therefore, appears to have declined paying the judgment, upon just and proper grounds; and no good reason can be assigned, why she should have paid that particular demand, any more than others; or why a refusal to satisfy it should be considered by this court as an instance of official neglect, any more than a refusal to satisfy any other claims, in similar circumstances. On this ground, the return of *nulla bona* is no proof of misconduct, and furnishes no basis for the suggestion of waste.

To sustain this action, therefore, on the principles contained in the 28th section, seems to be legally impossible; it is a case not contemplated by its provisions. To sustain it, would be to subject the defendant to personal liabilities, and actual losses, for doing that which prudence and official duty required. The absolute insolvency of the estate is not denied or doubted; and the present experiment of the plaintiff to obtain payment in full of his demand, while other creditors must be content with their dividends, as the Judge of Probate may decree, seems consistent neither with justice nor law.

In this view of the cause, it becomes unnecessary to examine the question, how far the settlement of an administration account by the defendant, soon after the commissioners made their report, and within six months next following, would exempt her from the penal consequences of her long delay, before an extension of the time was allowed by the Judge of Probate, if this was a case within the design and range of the 28th section. Accordingly, we do not mean to intimate any opinion as to that point, or decide whether it is necessary that the extending order of the Judge should be made under his hand and seal before the expiration of the six months; or a second extending order should be so made before the end of the first term allowed, in order to prevent the creditors right of action, given by that section, from attaching. We would only remark, that this seems to be the most prudent course, and best adapted to hasten the final settlement of an estate under administration. The case before us, does not require more to be said on that point. Neither is it necessary that we should particularly examine the merits of the replication, or the plea; because, on demurrer, it is our duty to go back to the first fault; supposing, therefore, that the replication and plea were both insufficient, still, if the declaration is bad, the action is not sustainable. We are all clear, however, that upon the facts disclosed in the declaration and plea in bar, none of which, of any importance, are denied in the replication, the case is not within the language or the reason and meaning of the section abovementioned; and the counsel for the plaintiff does not pretend that the action can be maintained, independently of that section. At the time the commission of insolvency was issued, the plaintiff was a judgment creditor; and like other

creditors, he should have presented his claim, founded on that judgment, to the commissioners for allowance; and, not having done so, he must not blame others for his own omission. We adjudge the plea in bar good and sufficient.

As to costs, the counsel for the plaintiff contends that they ought not to be allowed to the defendant; and in support of his objection, he has cited *Hunt v. Whitney, ad.* 4. *Mass.* 620. On examining that case, it is found to differ from this; in that, costs were denied, because the action was rightly commenced, and was defeated by the subsequent representation of insolvency, which proved to be an absolute insolvency. But the present action was not rightly commenced, because the estate had been previously represented insolvent, and is absolutely so. For these reasons, we are of opinion that the defendant is to be fairly considered as the party prevailing, and entitled to her costs.

QUIMBY *vs.* WHITNEY & ALS.

Where *B.* and *W.* lent their names each to the other, as indorsers of accommodation notes, negotiated at a bank, and also had mutual dealings; and a third person contracted to settle the account of *B.* with *W.* "if there should be any thing due *W.* from him, as well for any notes *W.* held of his on" —"as also for certain notes which are in the bank, which *W.* is responsible for, by reason of lending or exchanging each others names as security for the other";—it was held that *W.* by the terms of this contract, could not claim the *amount* of his liabilities for *B.*; but only the balance of them, after deducting the amount of *B's* liabilities for him.

THIS was *assumpsit* by the payee of an order drawn by one *John Boynton* on the defendants, composing the house of *Whitney, Sewall & Co.* of which *Abiel Wood* was one, and by them accepted. The order was in the following terms:—"Messrs. *Whitney, Sewall & Co.* Please pay the order of *David Quimby*, Esq. whatever balance there may be due me on the account current we have this day signed and exchanged, agreeably thereto, when you receive pay from

the Insurance office in *Portland*, for insurance of the ship *Washington*. *Wiscasset, January* 25, 1816. *John Boynton.*" It was accepted on the same day, " to pay agreeably to its tenor."

It was admitted that the insurance money had been received on the 7th of *February* 1816; but the controversy arose upon an item of debit against *Boynton*, who was made debtor in the account current referred to in the order; and upon a memorandum at the foot of the same account, entitled—" Explanation of some of the entries above."

The item was in these words:—" To amount of *Abiel Wood's* account, if there is any balance due him from Capt. *Boynton*, together with the balance that may be due Mr. *Wood* from him on account of any notes which he may hold or be concerned in against Capt. *Boynton*; amount to be hereafter ascertained." To this item no specific sum was annexed.

The memorandum, so far as relates to this action, was thus:—"The charge for a demand against him by *A. Wood*, is correct; and it is understood that they are to account with him for the balance of Capt. *B's* account with him, if there should be any thing due from him, as well as for any notes Mr. *Wood* held of his on the 9th *Dec.* 1814; as also for certain notes which are in the bank; which Mr. *Wood* is responsible for, by reason of lending or exchanging each others names there as security for the other."

It appeared at the trial, before the Chief Justice, at the sittings after *May* term 1825, that *Wood* and *Boynton* had indorsed for each other at the *Wiscasset* bank; that *Wood's* liabilities for *Boynton* on the 9th *Dec.* 1814, arose upon two notes indorsed by him, amounting to $774,77; and that *Boynton*, at the same time, stood liable as the indorser of *Wood* on a note of $900; neither of which notes were yet paid. It further appeared that the amount of the order was demanded of the defendants *March* 13, 1823; who replied that they were ready to pay it to the person to whom it belonged, but that Mr. *Wood* had requested that it should not be paid to the plaintiff, or his agent. It seemed also to be conceded in the argument, that the defence was conducted by the directors of the bank; who claimed the money to the amount of Mr. *Wood's* liability to the bank on

Boynton's account, either as principal or surety, without reference to any balance of liabilities; contending that the memorandum, by a fair construction, did not admit any such adjustment of balance. They also denied the plaintiff's claim to interest on the money from the time it was received by the defendants.

But the Chief Justice directed the jury that as the balance of liabilities to the bank was against Mr. *Wood*, the defendants were holden to pay the amount of their acceptance to the plaintiff; and that Mr. *Wood*, by virtue of the contract, had no right to claim it of them. He also directed them to cast interest from the time the defendants received the money, in 1816. They accordingly returned a verdict for the plaintiff; which was taken, subject to the opinion of the Court upon the meaning of the contract.

Orr and *Bailey* argued for the plaintiff.

Allen and *R. Williams* for the defendants.

MELLEN C. J. delivered the opinion of the Court.

The decision of this cause must depend upon the construction of the last clause in the memorandum or agreement, at the foot of the account. The whole sentence is in these words, "And it is understood that they (the defendants) are to account with him *(Wood)* for the balance of *B's* account with him, if there should be anything due Mr. *Wood* from him, as well as for any notes Mr. *Wood* held of his on the 9th *Dec.* 1814, *as also for certain notes which are in the bank, which* Mr. Wood *is responsible for, by reason of lending or exchanging each others names there as security for the other.*" No claim is made by the defendant for *Wood's* benefit, for any balance on account, or any notes held by him on the 9th *Dec.* 1814, as abovementioned; but on the last part of the sentence relating to certain notes in the bank. The memorandum states that "the charge for a demand against him by *A. Wood*, is correct." That charge against *Boynton* is in these words: viz. "To amount of *Abiel Wood's* account, if there is any balance due him from Capt. *Boynton*, together with the balance that may be due Mr. *Wood* from him on account of any notes which he may hold or be concerned in against Capt. *Boynton*, amount to be hereafter ascertained." At the head of the memorandum, these words are written: "Explanation of some of the entries

above." So that we now perceive that the clause of the agreement above quoted, is an explanation of the charge also copied from the account. In the charge, the notes are described to be such as *Wood* may hold or be concerned in; in the explanatory agreement or memorandum, they are described as notes which *Wood* "held on the 9th *Dec.* 1814;" and also "certain notes which are in the bank, which Mr. *Wood* is responsible for," &c. In the above quoted item of the account, the charge against *Boynton* is for the balance that may be due *Wood* on account of such notes. This comparison may aid in construing the agreement. It appears that as early as 1813, *Wood* and *Boynton* were in the habit of obtaining money from the Wiscasset bank, by exchanging their names and indorsing for each other; and though the report states the amount due to the bank on the three notes therein mentioned, yet it is evident that the state of the balance was not known at the time the account was made out and the agreement signed. It was to be ascertained afterwards. It was admitted in the argument, though not stated in the report, that at that time *Boynton* was in embarrassed circumstances, though at the time the notes in question were endorsed, he was solvent and in business. This being the case, it has been urged by the defendant's counsel that it would be unjust to give to the agreement the construction which the Judge gave at the trial, because, by so doing, the consequence will be that *Wood* must pay not only his own notes which were endorsed by *Boynton*, but also the notes of *Boynton* indorsed by *Wood*; and that such a consequence is not consistent with the principle adopted by the court at the trial, respecting the balance of liability.

Before attempting to answer this objection and argument, let us see what would have been the situation of *Wood* and *Boynton*, if the agreement of *January* 25th 1816 had never been made. In such case, surely each must have performed his engagement; and the failure of *Boynton* would not have relieved *Wood* from any part of his responsibility as indorser of *Boynton's* paper; and unless the agreement above mentioned has been so formed as to change the principle and effectually protect *Wood* from the consequences of his well known legal liability, then those consequences

must follow, although they may ultimately prove prejudicial to the interests of *Wood*. In a word the agreement must be construed according to the intention of the parties, and that intention must be gathered from the agreement itself, in connection with the account to which it is subjoined as an explanation. What then was this intention? The agreement refers to certain notes then in the bank for which *Wood* was responsible. If it had stopped here, the defendant's construction would then be admissible. It might then be considered that the object of the parties was to afford *Wood* a complete indemnity for the amount for which he stood answerable as surety or indorser for *Boynton*, which has proved to be the sum of $774,77. But if this was the real meaning of the agreement, for what purpose were the other words added, viz. "by reason of lending or exchanging each others' names there as security for the other?" The responsibility of *Wood*, against which the agreement was intended to furnish a guard and indemnity, was a responsibility "by reason of lending or exchanging each others' names as security for the other:" that is, not an accountability to the banks for the whole sum for which he had indorsed, and stood answerable, as the surety of *Boynton*, but for the amount to which he had indorsed for *Boynton* more than *Boynton* had indorsed for him; that is, as the Judge expressed it, the balance of liability. As we have before observed, this clause in the memorandum is a professed explanation of the charge in the account for *Wood* against *Boynton;* and that charge speaks only of a balance due *Wood* on account of certain notes he held or was concerned in against *Boynton;* and we do not discover that there were any notes holden by him, except those which he held in 1814, (about which there is no dispute) or that he was concerned in any other notes than those in the bank; in some of which he was concerned as maker and *Boynton* as indorser; in others as indorser and *Boynton* as maker. Against the above mentioned balance *Boynton* was bound, by every principle of honor and justice, to indemnify *Wood*, though *Wood* then had no right of action against him, not having been called on as indorser nor having made payment to the bank: nor does it appear that he has even to this day been called on, or in any way injured by his suretyship for *Boynton*. Still, the agreement

was designed to give, and did give to the defendants a right to retain so much of the fund in their hands as would be sufficient for the purpose. On a careful examination of the agreement, the account, and the circumstances in which the parties and *Wood* were placed, it appears to have been the intention of all concerned, not to change the original liabilities and rights of *Wood* and *Boynton*, but to secure, out of the fundin the defendants' hands, so much as would completely indemnify *Wood* against eventual loss, consequent upon, or growing out of the original implied contract between him and *Boynton*, at the time of this exchange of indorsements and liabilities, in the same manner as if the amount of the notes indorsed by each for the other had been known, offset against each other, and the balance of implied debt or actual liability had been struck. After a close examination of this cause and repeated reviews of it, we have not been able to arrive at any conclusion satisfactory to our own minds, except that which we have now stated. The case finds the balance of liability to be against *Wood*.

If any objection exists as to the instruction of the Judge respecting the calculation of interest, it is done away by a fact, appearing on the argument, viz. that interest was in truth cast only from the time of demand made on the 13th of *March*, 1823. On the whole we do not perceive any good reason for sustaining the motion for a new trial, and accordingly there must be

Judgment on the verdict.

Weston J. being interested on the side of the defendants, did not sit in this cause.

CHAPMAN & AL. *vs.* SHAW.

Where a note, payable in twelve months, was given as the consideration for a written engagement of the payee to convey certain goods to the maker at a future day, and the payee forthwith indorsed and sold the note for its amount in money, after which the original contract was rescinded;—it was held that the maker of the note might recover the amount of the payee, though the twelve months had not elapsed.

This was a general *indebitatus assumpsit* for the balance of an account annexed to the writ, being $2415,59. It was commenced *Feb.* 7, 1825, and was tried at the last *September* term, before the Chief Justice, upon the general issue. The only item disputed, on the debit-side of the account, was in these words:—"*Oct.* 23, 1824. Our note *Oct.* 12, 1824, at 12 months, with interest, on account of new brig *Patten*, as per receipt in day-book, $2400." The receipt ran thus:—"*Boston*, *Oct.* 22, 1824. Received of *H. Chapman & Co.* their note of this date, at 12 months and grace, for twenty-four hundred dollars, with interest, being on account of new brig *Robert Patten*, and in consideration of which I agree to give them a bill of sale of said vessel as soon as her register is issued." This was signed by the defendant.

There was no evidence that a bill of sale of the brig had ever been given to the plaintiffs; but, on the contrary, it appeared that the plaintiffs had waived their claim to any conveyance of the vessel, which had ever remained in the possession and control of the defendant. It also appeared, that the account in suit had been previously exhibited to the defendant, who had declared it correct, and requested the plaintiff's counsel not to summon witnesses to prove it, saying he should not contest it. It was further proved, that the note was made for the purpose of enabling the defendant to raise ready cash upon it, which he did, to the full amount, soon after receiving it.

The defendant objected that the action should not have been

brought before the twelve months had expired; and that the amount of the note could not be recovered in this manner; the plaintiffs' remedy being by a special action on the contract contained in the receipt.

The jury were instructed by the Chief Justice that the charge of the note, unexplained, and not accompanied by other circumstances, could not be allowed; but that if, from all the evidence, they should be satisfied that the note was made to enable the defendant to raise cash immediately, by throwing it into the market, by the consent of all parties; which he had accordingly done, to its full amount; that this advance of their note was charged by the plaintiffs at the time by mutual agreement; that the account containing this charge had been seen and admitted by the defendant to be correct; that the plaintiffs' claim for a bill of sale had previously been waived by consent; and that they had received no consideration for the note; the jury might fairly presume, that the indorsee had regularly called on the plaintiffs, who had paid the note at its maturity; and they might thereupon allow the plaintiffs the amount of the sum charged. And they accordingly found for the plaintiffs; and the points raised at the trial were reserved for the consideration of the Court.

Bailey and *Allen*, for the defendant, contended that the plaintiffs had no legal claim against him. When they gave him their note, they became his debtors for the sum mentioned in it. The consideration for the note was the written contract of the defendant to do a specified act. If he failed to do this, the plaintiffs had their remedy on the contract, but were bound, at all events, to pay the note. The written contract, and that alone can be resorted to.

But if it is not the only basis of their remedy, yet they cannot recover on the general money counts, even if they were in the case. For to support them, it must be shewn that money of the plaintiffs had come to the defendant's hands. In 5. *Burr.* 2589, a transfer of India-stock would not support a count for money had and received, because it was not money. So in *Anthon's Nisi Prius*, 81. 120. *Taylor v. Higgins*, 2. *East*, 169. 8. *Johns.* 202. *Chitty on bills*, 252. But here the plaintiffs had merely lent their names for the defendant's accommodation. If, at its maturity, they

had been obliged to take up the note, then, and not before, they might resort to an action for money lent. But not having produced it at the trial, nor offered proof of its payment, the presumption is, that it has not been paid.

Nor have they any equitable claim. The note went into the market on the credit of both names, the indorser's as well as the maker's. It was created for the benefit of the defendant. But the principle contended for by the plaintiffs, enables them to take from his pocket the money designed for him, and apply it to their own use long before the note becomes payable by them; and still exposes him to further liability as their indorser.

Orr and *Sheppard*, on the other side, admitted the doctrine stated by the defendant, but insisted that by the evidence it was manifest, that the original contract was rescinded by mutual consent, and the defendant liable, upon his implied promise to refund to the plaintiffs the money he had received for their note. At this period, in the absence of proof from him to the contrary, the presumption is that his liability has never become absolute, for want of seasonable notice.

Weston J. delivered the opinion of the Court.

No objection being made to the evidence received at the time of the trial, and none being reserved in the case, it is now too late to raise a question upon that ground.

Prior to the commencement of the action, the defendant had received the amount of the item in controversy, upon the credit of the plaintiffs. By the terms of this credit, they could not be called upon under twelve months; but it would not necessarily follow, that they had agreed to allow the same period to the defendant. When he received their money, he immediately became their debtor to the amount; and we cannot perceive that he has any legal defence, arising from the special circumstances of the case. The note, which forms the basis of this charge, was originally given in consideration of a written promise from the defendant, to give the plaintiffs a bill of sale of a certain brig. The bargain with regard to the brig was, by the consent of all parties, waived and rescinded. This it was

perfectly competent for them to do; and the defendant, having received his pay for the brig, would thereupon be legally bound to refund it. It does not appear that he imposed it, as a condition of the waiver on his part, that he should not be holden to refund to the plaintiffs, until their term of credit expired; but before the commencement of this action, he repeatedly admitted that this amount was a fair item of charge against him. His acknowledgment that this charge was just, and that he should not contest it, is an admission that it was then due, and is evidence of a promise to pay it, for which his previous receipt of the plaintiffs' money constituted a sufficient consideration. *Judgment on the verdict.*

THOMPSON & ALS. *vs. The proprietors of* ANDROSCOGGIN BRIDGE.

A recovery in a writ of right does not affect any claim of the tenant to an easement in the land.

The grant of a saw-mill, "with a convenient privilege to pile logs, boards, and other lumber," conveys only an easement in the land used for piling.

The private statute of Massachusetts of *Feb.* 26, 1796, incorporating the proprietors of *Androscoggin* bridge, gives them no right to erect a toll house on the side of the bridge; nor does it transfer to the proprietors any thing more than an easement in the land over which it authorizes them to build a bridge.

THIS was a writ of right, brought by the heirs at law of *Samuel Thompson*, to recover a small parcel of island and rock, being that part of the island on which the tenants' toll-house stands, and adjacent to the same; and was tried before the Chief Justice, upon the issue of the mere right. The tenants set up no title in themselves, but relied on a disseisin of the demandants' ancestor, before the thirty years mentioned in the writ; which was sued out in *July* 1825. The proprietors were incorporated in *February* 1796, with the powers usually granted to such corporations; and erected their toll house in the summer of that year. But for proof of the issue on their part

they chiefly relied on a deed from the demandants' ancestor, dated *May* 25, 1793, whereby he conveyed to one *Blanchard* one sixteenth part of a saw-mill, standing on the island a little above the place where the toll-house now stands, being one fourth part of the stream saw, "with the rocks at the tail of said saw, running as the mill stands, to the water; with the right in common of using the negro appertaining to said mill, with the chain and every other appurtenant; with a convenient privilege on the aforesaid Great island to pile logs, boards and other lumber sawed in said mill; and with the privilege of rolling logs through said mill to the said fourth saw; with every other privilege and appurtenant thereto belonging or any way appertaining." Similar deeds were shewn, from the same grantor, to Messrs. *King* and *Porter*, of an adjoining mill, with similar privileges. It was admitted that the land or rock particularly described as conveyed in fee at the tail of each mill, did not include any part of the demanded premises; but it was contended that by each deed a fee simple was conveyed, by the general language describing the privilege of a piling place for boards and other lumber. But the Chief Justice was of opinion, and so instructed the jury, that only an easement was conveyed, and that not exclusive; the fee remaining in the grantor.

The tenants then contended that as it was proved that the grantees occupied and used as a piling place, under their deed, the piece of land or rock now covered by the toll-house, from the time of their purchase until the toll-house was erected, this occupation and improvement amounted to a disseisin of the demandants' ancestor, and so disproved the seisin on which they counted. But the Chief Justice instructed the jury that such occupancy was not adverse to the title of *Thompson*, nor inconsistent with his seisin in fee; and that as only the fee simple was in question, the defence failed. A verdict was thereupon returned for the demandants; subject to the opinion of the Court upon the correctness of the instructions given to the jury.

Hasey and *Allen*, for the tenants, said that the piling place described in the deed was an interest in real estate, and therefore pas-

sed only by deed. A mere right of passing is such; *Clap v. Neal* 4. *Mass.* 589; because it is a vested interest in land. But this is more, being an exclusive right. *Chandler v. Perley* 6. *Mass.* 454. *Doane v. Badger* 12. *Mass.* 65. *Bigelow v. Battle & al.* 15. *Mass.* 313. *Cook v. Stearns* 11. *Mass.* 533. It is such an interest in land as that ejectment will lie for it. *Runnington on eject.* 130. 131. And if it is a vested interest, then the grantor, and those claiming under him, are estopped by the grant. 2. *Johns.* 298. 1. *D. & E.* 35. 4. *D. & E.* 671. If they are not, but may recover in this suit, the tenants will be barred of all the island, forever.

It is enough for the defence of this action, that the rock has been occupied for any purpose, under the grantees. If the use for any other purpose than a piling-place, was a forfeiture, the grantor should have entered for condition broken, in order to revest the estate in himself; until which he could not have a writ of entry. *Lincoln bank v. Drummond* 5. *Mass.* 324.

But the private act of *Feb.* 26th 1796, incorporating the tenants, affords them sufficient protection. It prescribes the place of landing at each end of the bridge, and of crossing the rock; and by limiting the width to twenty-eight feet, it necessarily gives the right to build a toll-house outside of those limits, as incident to the right to erect the bridge, and to receive tolls. By a conveyance of the bridge, the toll-house would pass. The rights of the owners of the land were amply secured by the provisions of the act, which gave them a particular and summary mode of redress. If they neglected to resort to this, they ought to be barred.

Orr, for the demandants, contended that the interest of the tenants, and of the grantees in the deeds from *Thompson*, amounted to nothing more than an easment; and this could never be affected by a judgment against them in a writ of right. On the contrary such a recovery is often necessary, for their protection against an intruder.

Mellen C. J. delivered the opinion of the Court.

The question upon the issue in this case is, whether the tenants have more right to hold the demanded premises in fee, than the de-

mandants have to recover them. The seisin of *Samuel Thompson* was proved; and the demandants are his heirs at law, and are entitled to maintain this action, unless, by the act incorporating the proprietors, or by the conveyances made to *Blanchard*, and to *King* and *Porter*, by the ancestor, *Samuel Thompson*, that right has been taken away. With respect to the act of incorporation, it passes no fee simple estate to the tenants, but merely authorizes them to erect a bridge in a certain direction across the river. But, even if the fee passed, in the land or rock over which the bridge extends, that would not convey the fee simple in the land or rock on either side; nor is it necessary that a toll-house should be on the bridge, or adjoining it on one side. It may stand on either shore. The right, therefore, whatever it is, to erect a toll-house, adjoining the side of the bridge, is not incidental to the grant to erect the bridge. It has been contended, that an estate in fee passed by the deeds, in the premises demanded, which disproves the seisin of the ancestor as alleged; but this cannot be admitted. The portions of the mill conveyed, and of the rock or land under or adjoining them, are described by distinct boundaries, which do not include the demanded premises. This point was not much relied on; but it has been seriously contended that the easement, conveyed by the deeds, will be destroyed by a recovery in this action; and that an absolute judgment, rendered in favor of the demandants, will place them in a situation to hold the premises at once relieved from the easement. The first answer to this argument is, that if such would be the legal consequence, the tenants need not give themselves any trouble about it; because they have no interest in the easement. But such would not be the legal result. The easement would remain; and those entitled to it, might maintain an action against the demandants, or their assignees, for any disturbance in the enjoyment of it. The judgment and verdict in this case would be no evidence in such action on the case for disturbance. Surely the rights of *Blanchard*, and *King* and *Porter*, are not impaired or affected by the judgment against the tenants, between whom and *Thompson's* assignees there is no kind of privity. This argument therefore fails. Besides, if

we should give it all the importance which the counsel has given, still it has no tendency to prove the issue on the part of the tenants.

The remaining question is whether the evidence offered by the tenants, disproves the seisin of the ancestor within the time alleged. On this point we are all clear that the rise of the easement by *Thompson's* grantees, or in other words, the occupation by piling lumber, was not inconsistent with the estate remaining in *Thompson*. It was a lawful user, and under their deeds; and of course in no degree partakes of the character of a disseisin. On every ground we think the defence has failed, and accordingly there must be

Judgment on the verdict.

The inhabitants of LEWISTON *vs. The inhabitants of* N. YARMOUTH.

The Resolve of *March* 19, 1821, rendering valid a certain class of marriages, so far as it has a bearing upon questions of settlement under the pauper-laws, for expenses incurred subsequent to its passage, is constitutional.

The wives and children of men who had been married *de facto* by the persons described in the Resolve of *March* 19, 1821, follow the settlement of the husband.

THIS action, which came before the Court upon a case stated by the parties, was *assumpsit* for the support of two paupers; in which the principal question was whether the Resolve of *March* 19, 1821, legalizing certain marriages, was constitutional, so far as it affected the settlements of the parties and their issue.

It was agreed that *Peter Hammond*, the grandfather of the paupers, had his legal settlement in *North Yarmouth* prior to the year 1767; and that the settlement of *Patience Hammond*, their mother, was originally derived from him. She was married in 1802, if the marriage was legal, to *Joseph Wright*, then dwelling and having his legal settlement in *Lewiston*. The marriage was solemnized by *Benjamin Cole*, an elder of the Baptist communion; who was ordained *August* 30, 1798, at *Lisbon*, in the county of *Lincoln*, where he then resided,

as an itinerant minister, without parochial charge, but " to travel or settle in any part of God's vineyard, abroad or at home, as duty shall call;" which was the usual form of ordination in that communion. In the autumn following, elder *Cole* removed to *Greene*, where he dwelt two or three years; thence he went to *Lewiston*, where he performed divine service for a society of his denomination, the principal part of the time for eighteen months; after which he preached there about half the time, and at various other places in the State during the other half; but he never was under any parochial engagement for any specified term of time.

The parents of the paupers cohabited together as man and wife, until her death, which was in 1818; in a year or two after which, the father finally abandoned his family of children. They were furnished with supplies as paupers, by *Lewiston*, within a year prior to the passage of the *Stat.* 1821, *ch.* 122, and also subsequent to the passage of the Resolve before mentioned.

Allen, for the plaintiffs, upon these facts, contended that the marriage having been solemnized by one not legally qualified, was merely void. No settlement was affected by it. Any construction of the Resolve, therefore, which should extend its operation to render the marriage valid to all intents, would be retrospective and void. The day before it was passed, the children were illegitimate, having the settlement of their mother, in *North Yarmouth*. Had she then died, her estate must have gone immediately to her heirs at law, without the intervention of a tenancy by the curtesy; and her children would not be liable on her covenants. Yet the day after, upon the construction contended for by the defendants, the husband would be tenant by the curtesy, and the children become burthened with new liabilities. And if one had entered into contract with *Lewiston* to support all their poor for a year, he would, by the operation of the same principle, be liable to support an indefinite number, whose settlement was not in that town when the contract was made.

But if the Resolve can have this operation, it is only in those cases where both the parties were living when it was passed, and continued afterwards to dwell together as man and wife. But here, one party was then dead, and so could not assent. If the doctrine of the de-

fendants prevails, a mariage contract will be created between two persons, with the assent of only one of them; and a principle be thus sanctioned which will be dangerous, in the extreme.

Orr, for the defendants. The resolve can have no such effect as is apprehended. The legislature has a right to prescribe touching all future cases of settlement; and wherever an act has a prospective view, it is so far constitutional. In *Brunswick v. Litchfield* 2. *Greenl.* 28, the plaintiffs went for monies expended prior to the Resolve; which could not operate on rights vested, and liabilities already fixed. But as to future liabilities, the legislature has a right to distribute them at its pleasure.

The Resolve makes no provision for the assent of parties. It declares all marriages of a certain description to be legal. Children of marriages reputed legal are never illegitimate while the parent lives; nor are they heirs, during the life of the father. The only exception made by the legislature, is of persons who have separated, and one of the parties has married again. It means a voluntary separation, and not one by death; and it excludes only the case of a subsequent marriage.

Preble J. delivered the opinion of the Court.

It appears from the facts in the case that the mother of the paupers, prior to the passage of the Resolve of *March* 19, 1821, had her legal settlement in *North Yarmouth;* that the mother was married in 1802, supposed by the parties legally, but the person who performed the marriage ceremony was not legally authorized to solemnize marriages; that the mother continued ever after to live with her husband, until his decease, and that the paupers whose settlement is contested were the fruit of their union. It further appears that the father of the paupers, the husband *de facto*, had his settlement in *Lewiston*. The question therefore presented in this case, for the decision of the Court, is whether the Resolve already mentioned is constitutional and valid, so far as to render the marriage a valid marriage, for all the purposes of the settlement act.

Every statute and resolve passed by the legislature is presumed to be constitutional. To justify a court in declaring an act to be

unconstitutional, its provisions must be clearly and manifestly repugnant to the provisions of the constitutton. The legislature has no power to disturb vested rights; but rules for the settlement of paupers have always been regarded by the courts as matters of mere positive or arbitrary regulation, in establishing which the legislature is limited in its power only by its own perception of what is proper and expedient. Thus by the act of *March* 21, 1821, *ch.* 122. the settlement of many persons was *ipso facto* transferred from the towns where they had, before the passage of the act, their settlement, to the town where, at the time of the passage of the act, they dwelt and had their home; and yet no person ever questioned the constitutionality of the measure. The legislature, in their discretion, might have adopted a different or an additional rule. They might have said that the offspring of all persons living together as man and wife should follow and have the settlement of the supposed husband. Or they might have adopted the better rule they actually did in effect adopt, in the resolve under consideration, that the wives and children of men who had been married *de facto*, by the persons mentioned in the resolve, should follow and have the settlement of the husband. So far therefore as the resolve of *March* 19, 1821, has a bearing upon questions of settlement under our pauper laws for expenses incurred subsequently to its passage we cannot doubt its constitutionality.

GRAVES *vs.* FISHER & AL.

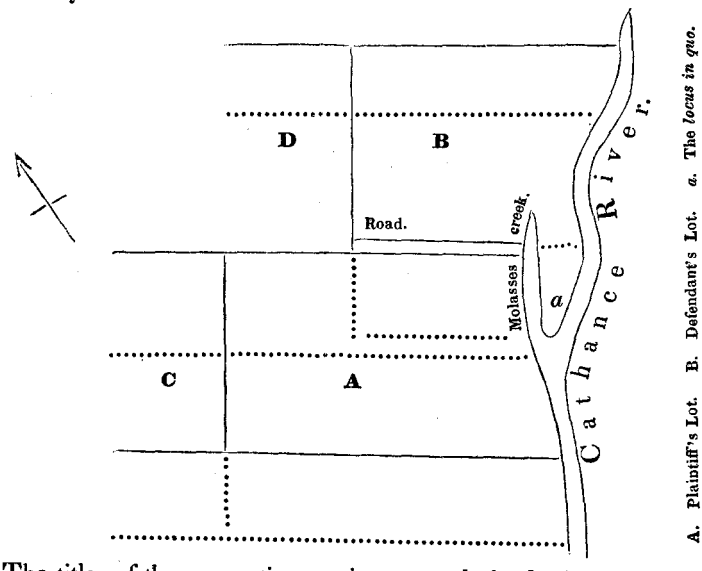
If a lot be granted fronting on, and bounded by a river, the side lines are to be continued to the main stream, though they thereby cross a point formed by the junction of one of its branches with the principal river.

It is no valid objection to a report of referees, that one of them had formed a previous opinion upon the case submitted to them, if his mind appears to have been still open to conviction, and no imputation of unfairness rests upon him.

THIS was an action of trespass *quare clausum* for entry upon the plaintiff's flats, being the point of land made by the junction of *Mo-*

lasses creek with *Cathance* river, and which he claimed as part of a lot called " letter A." It was originally commenced in the Court of Common Pleas, where it was referred to arbitrators, by a rule of court. Upon the coming in of their report, which was in favor of the plaintiff, it was contested by the defendant, and, on his motion, recommitted for further proof. After a second hearing, a report was again returned for the plaintiff, and again contested by the defendant.

It appeared from examination of the referees, that the principal controversy was whether the *locus in quo* was part of the lot called A., belonging to the plaintiff, or of B., belonging to the defendant. These lots in point of fact, upon actual survey, were situated as thus described by the continued lines :



The titles of the respective parties were derived, thorugh mesne conveyances, from *James Bowdoin*, Esq, who conveyed both the lots, by a deed dated *Sept.* 25, 1780, to *Abraham Preble*, under whom the defendants claimed, and to *Abraham Preble*, Jr. under whom the plaintiff claimed, by the following description :—" Two parcels of land in *Bowdoinham* aforesaid, fronting on *Cathance* river, and bounded easterly thereon, seventy-five rods on each side of a three rod road, running W. N. W. as originally laid out from said river; the southernmost of said lots being marked A. and the northernmost

marked B.; each containing one hundred and fifty acres, more or less; said lot A. being bounded southerly on said *Bowdoin's* land, westerly on a lot marked C., northerly on said intended road, and easterly on said river, seventy-five rods;—and the said lot marked B., bounded southerly on said road, westerly seventy-five rods on lot D., granted by me to *Abia Cobb*, northerly on said *Bowdoin's* land, and easterly seventy-five rods on said river; the said intended road from said river running W. N. W. between said lots, as far as said lot D.—To have and to hold the said lot B. to the said *Abraham Preble* Esq. and his heirs, and the said lot A. to the said *Abraham Preble, Jun.* and his heirs;" &c.

It appeared further, before the referees, that a plan of these lots, with others, was made by *John Merrill*, in 1772; the part representing these lots purporting to be copied from *McKecknie's* plan; by which the lots were represented as lying farther down the river, and the road between the two lots as touching the river below the *locus in quo*, as appears by the dotted lines on the diagram above.

The plaintiff hereupon contended that the lot A. extended across the creek, to *Cathance* river, on which it was bounded by the deed; and further proved that in low tides the water wholly flowed out of the creek, at low water, in the part contiguous to his lot. But the defendants insisted that no more land would pass by the grant of lot A. than was delineated on the plan; by which the flats in question were evidently a part of lot B. But the referees, intending, as they said, to decide according to law, as well as equity, were of opinion that as the side lines of the lots and of the road, as far as the creek, were undisputed and unquestionable, the division line must be taken to extend, by the same course, to the river; the creek not being mentioned as a boundary in the deed; and thereupon decided for the plaintiff.

The defendant, as a further ground of contesting the report, proved that one of the referees, on the day of the final hearing before them, and previous to its commencement, being asked if he had formed an opinion upon the merits of the case, admitted that before he ever acted as a referee upon this question, having seen the deed from Mr. *Bowdoin*, and being acquainted with the situation of the

land, he was well persuaded that the parcel in controversy belonged to the plaintiff; but observed that his mind was open to conviction, that he entertained no prejudice against the defendants or their cause; and was prepared to give proper weight to the evidence to be produced. The defendants thereupon objected to his acting as a referee; but he did not withdraw, deeming it his duty to sit with the others.

It further appeared that the lot B. was conveyed to the defendants' father, by *Abraham Preble*, by deed dated *Nov.* 4, and recorded *Dec.* 6, 1792;—bounding the lot on three sides, by the monuments before stated;—"thence S. S. E. to *Cathance* river, and thence up said river, to the first mentioned bounds, as is delineated on Esq. *Bowdoin's* plan." The deed to the plaintiff was from *Abraham Preble Jun.* and was made *Dec.* 11, 1823.

Upon proof these facts, before *Smith J.* in the Court below, the defendants opposed the acceptance of the report; but he overruled the objection; and they brought the cause into this Court, by summary exceptions, filed pursuant to the statute.

Allen, in support of the exceptions, argued that from the language of Mr. *Bowdoin's* deed, and the designation of the lots by letter, it was evident that the grant was made with reference to a plan; and this was no other than *Merrill's* or *McKecknie's*. This is confirmed by the declaration of *Preble*, in his deed to the defendant's father, in 1792. If such was the fact, the deed must be so construed, in connection with the plan, as to make the *locus in quo* a part of lot B.

But if not, yet this action cannot be maintained; the plaintiff's grantor having been disseised at the time of his grant in 1823, by the prior deed of 1792, to the defendant's father, of the lot B., including the land in dispute; and so nothing passed by the deed to the plaintiff.

To the point that the referee was disqualified, having formed an opinion on the question, before he heard the cause, he cited 1. *Johns.* 316. 17. *Johns.* 410. *Walker v. Frobisher* 6. *Ves.* 70.

Orr, on the other side, was stopped by the Court; whose opinion was afterwards delivered by

Weston J. There being no question about the side lines of the lots A. or B. the flats in controversy belong to the plaintiff, as the

owner of A. if that lot extends to the river. The title of both the parties to their respective lots, is derived from a conveyance by *James Bowdoin* of lot A., to *Abraham Preble. Jun.*, and of lot B. to *Abraham Preble.* By that conveyance, lot A. is bounded easterly on *Cathance* river. Lot A. then very clearly embraced these flats. It is contended, however, that this plain and necessary result is to be controlled and modified by a certain plan, made by *John Merrill*, in 1772, upon which these lots were delineated. No plan is referred to, or mentioned in *Bowdoin's* deed; but it is urged, that the designation of the lots by letters implies and supposes a plan. This does not necessarily follow. A survey might be made, and the lots now owned by the parties, and the rear lots upon which they were bounded, might receive the names of A. B. C. and D. without making a plan. And if a plan was made, and A. did not, as laid down upon it, go to the river; if the owner did not refer to the plan, and thought proper distinctly and expressly to extend it to the river, in his conveyance, he had a perfect right so to do; and the grantee would hold accordingly. But if the plan exhibited to the referees, and now produced to the court, had been referred to, the limits of A. would not thereby be curtailed. By that plan, the whole easterly line of A. is bounded on *Cathance* river. It is true, Molasses creek is there represented as entering upon the south side of B., and extending northerly thereon; whereas, in fact, it enters upon A. But this mistake in the location of the creek, does not change the rights of the parties. The creek is not given as a boundary in the deed; but each lot is expressly bounded on the river; both in the deed and on the plan. When the survey was made, the waters of the river might have been so high, that the mouth of the creek might appear to the eye to be on B., and this may account for its having been thus delineated; but, however occasioned, this error in a part of the plan, altogether immaterial in fixing the location of the lots, can have no legal influence in the decision of the cause.

As to the objection to one of the referees, it appeared that prior to the hearing, being acquainted with the premises, he had a strong impression in regard to the merits of the case in controversy; but he insisted that his mind was open to conviction; that he had no

prejudice against the defendants, and that he was prepared to give due weight to whatever might be offered or urged in their favor. Referees are chosen and selected by the parties; and not unfrequently from the knowledge they are supposed to possess of the facts and principles, which should influence their decision. If, at the time of their award, they should avow that the opinion they then gave was one which they had entertained prior to the hearing, and that nothing had appeared to change it, although their minds were open to conviction, and no imputation of unfairness could otherwise rest upon them, the court might, in the exercise of their discretion, accept their report. In this case, it is apparent, from facts which are undisputed, that the decision of the referees was in accordance with law, and that they could not, without violating law, have decided otherwise.

The exceptions are overruled; and the judgment of the court below affirmed.

HATHORNE, *plaintiff in error*, *vs* CATE.

If in *assumpsit* the defendant files his account in offset, in consequence of which the plaintiff's damages are reduced below twenty dollars, the plaintiff is still entitled to full costs; this case not being within the intent of *Stat.* 1821, *ch.* 59. *sec.* 30.

IN an action of *indebitatus assumpsit* between these parties, the original plaintiff, now defendant in error, sued for $2262,77, being the amount of sundries charged in his account annexed to the writ, during a period of about two years. The original defendant filed his account in offset, pursuant to the statute, claiming an allowance of $2347,46. The accounts having been sent to an auditor, he reported a balance of $15,50 due to the original plaintiff; for which sum the defendant consented to a judgment by default, saving his right to be heard in the taxation of costs, in the same manner as if the balance had been found by the jury; and insisted that the plaintiff should

take no more than one quarter as much in costs as he had in damages, pursuant to *Stat.* 1821, *ch.* 59, *sec.* 30, the judgment being for less than twenty dollars. And the court below having allowed full costs, the defendant brought this writ of error to reverse the judgment.

Allen, for the plaintiff in error, relied on the express provision of the statute, that in all personal actions, where judgment shall be rendered for less than twenty dollars debt or damage, the plaintiff shall recover no more costs than one quarter part of the debt or damage so recovered. The only exception is in favor of judgments on reports of referees, and this being an express exception, necessarily excludes all implication.

The *Stat.* 1786, *ch.* 52, allowed full costs, in similar cases, only where, in the opinion of the court, the plaintiff had a reasonable expectation of recovering more than £4. Appeals to the discretion of the court, under this provision, having become very frequent and troublesome, the *Stat.* 1807, *ch.* 123, was passed, from which our statute is copied. The statute of 1807 was not to affect any actions commenced on or before *June* 1, 1808. The practice of allowing full costs under this exception might have continued for some years, in actions then pending ; and this was probably what the court had in view in *Barnard v. Curtis* 8. *Mass.* 535. If not, there can be but little weight attached to that case, the opinion on this point being altogether extrajudicial, without argument, or reasons assigned. And it is overruled by *Godfrey v. Godfrey* 1. *Pick.* 236, in which the court consider the language of the statute as imperative and universal.

But if the language of the law afforded room for the exception claimed in this case, reason and sound policy forbid it ; since it tends to encourage remissness in the keeping of accounts ; and exposes the debtor to an excessive burthen in cost, when the dispute is peculiarly within the jurisdiction of the petty tribunals.

Sheppard, for the defendant in error, adverted to the practice under the last statute of Massachusetts, to allow full costs to the party prevailing, in all cases of mutual accounts ; and argued that where

any statute of that State, existing before the separation, has been adopted here, having already received a judicial construction, it was to be presumed that our legislature intended to adopt the construction, together with the statute. *Ellis v. Page* 1. *Pick.* 45.

THE COURT observed that the uniform practice under the statute of 1807, prior to the separation of Maine, had been to allow full costs in cases like the present; and that our legislature, as had been often decided, in adopting the statute, undoubtedly intended to adopt its well known and received construction. It is for the interest of the State that these minor questions, after they have been once, in any manner, judicially settled, should not again be disturbed. But there is an obvious reason for considering the cases of counter demands as not within the meaning of the statute, since they present the anomaly of a judgment in favor of the defendant for the balance of his account in damages, although it is the plaintiff that sues.

Judgment affirmed, with costs.

BARTER *vs.* MARTIN.

Whether, in an action upon a statute, the omission of the words *contra formam statuti*, can be supplied by any other words of equivalent import; *quære.*

In an action against a constable for the penalty given by *Stat.* 1821, *ch.* 92, *sec.* 9, for serving a Justice's execution and taking fees before he had given bond, it is necessary that the amount of the debt should be set forth, that it may appear that the precept was within his authority to serve.

THIS was an action of debt, for the penalty given by *Stat.* 1821, *ch.* 92, against the defendant, as constable of the town of *St. George*, for having on the 10th day of August 1825, served a certain writ of execution issued by *Joseph Sprague*, Esq. a Justice of the Peace for this county, in favor of one *Ira Gibbs*, against one *Henry Knox Murphy;* and for having on the 30th day of *July* 1825, served another writ of execution issued by the same magistrate in favor of one *John Barter* against one *William Marshall*, before he had given the

bond required by law; and alleging that he "did then and there ask for and receive fees for so doing, *contrary to an act* of this State entitled "an act defining the general powers and duties and regulating the office of Sheriffs and Constables;" whereby the said *Martin* hath forfeited, and an action hath accrued to the plaintiff, *according to the form of said act*, to sue for and recover of the said *Martin* a sum not less than twenty nor more than fifty dollars, *according to the statute* in that case made and provided." It was not alleged that the executions issued on judgments rendered by the Justice; nor was the amount stated, for which they were issued.

The defendant pleaded that on the 20th day of *August* 1825, and before the commencement of this action, he "executed in due form of law to the treasurer of said town of *St. George*," a sufficient bond with sureties, bearing date *May* 2d, 1825, conditioned for his faithful performance of all the trusts and duties relating to his office, "as to all processes by him served or to be served;" which he sets forth in *hæc verba;* but excuses the want of a *profert*, by saying that the bond remains in the hands of the treasurer.

The plaintiff hereupon demurred in law;—because the defendant had not alleged that the bond was delivered prior to the 20th day of *August* 1825, which was after the acts complained of;—and because no sufficient reason was assigned for want of a profert.

Allen, in support of the demurrer, relied on the first cause assigned, the bond taking effect from the time of delivery, and not from the date.

Ruggles, for the defendant, said that the object of the statute was to give security to the parties; and this was sufficiently attained by the terms of the bond, which extended to processes already served.

But if the plea is bad, so is the declaration, in that it does not allege that the amount of the debt was less than a hundred dollars. For this does not follow from the circumstance that the execution was issued by a Justice of the Peace; since they may issue executions on recognizances of debt, entered into between party and party before them, to any amount.

Nor does it allege that the offence was committed "against

the form of the statute;" which are material words, the omission of which no other form of expression can supply. *Heald v. Weston* 2. *Greenl.* 348. *Sears v. United States* 1. *Gal.* 257. *Lee v. Clark* 2 *East.* 333. 1. *Chitty on Pl.* 357. 358.

Further, the action is misconceived in its form. Debt does not lie in cases like this, where the amount of the penalty is uncertain; unless it can readily be fixed by some known rule. 1. *Chitty on Pl.* 105.

Allen, in reply, said that as the law did not authorise a Justice of the peace to direct to a constable any precept in which the debt demanded was more than a hundred dollars, it was to be presumed that the executions in this case were properly in the defendant's hands for service, and within the scope of his authority. If they were not, he could not avail himself of his own wrong in transcending the limits prescribed to him by the law.

As to the want of the allegation of *contra formam statuti*, he contended that the language of the declaration sufficiently imported it. And if it did not, the objection is not open to the defendant, the demurrer being general in its nature, so far as any thing beyond the plea is concerned.

WESTON J. delivered the opinon of the Court at the ensuing term in *Kennebec.*

The plea, not averring the execution of the bond before the service by the defendant of the processes set forth in the declaration, is clearly bad, affording to the defendant no justification or excuse. But his counsel insists, that the declaration also is substantially defective; if so, notwithstanding the badness of his plea, the defendant is entitled to judgment. The plaintiff sues for a penalty given by statute; he is bound, therefore, to present a case strictly within it, and to omit nothing which the law deems to be essential in the form of declaring. The first objection taken is, that the neglect or default charged, is not averred to be against the form of the statute, in such case made and provided. The use of this phrase has in so many cases been held to be matter of substance,

that it seems to be too late to question their authority. If it were *res integra*, it might be at least questionable whether much of the extreme nicety in relation to this averment, ought not rather to be regarded as form than substance. In one of the cases, cited from *Gallison*, it would seem that the omission of the usual technical language, cannot be supplied by other words of equivalent meaning, however precise and unequivocal. But the possibility of this is admitted by Justice *Jackson*, in delivering the opinion of the court in the *Commonwealth v. Stockbridge*, 11. *Mass.* 279, and it is urged that if this intimation is well founded, the omission is sufficiently supplied in the case before us. We are not, however, to be understood as admitting the truth of this position; but, upon this very nice and shadowy point, we do not feel ourselves constrained at this time to give an opinion; as we are satisfied the declaration is defective upon another ground, of a more substantial character.

By the revised laws, *ch.* 92. *sec.* 9, upon which this action is founded, any constable is authorized and empowered to serve upon any person or persons, in the town or plantation to which he may belong, any writ, summons, or execution in any personal action, where the damage sued for, or recovered, shall not exceed one hundred dollars, provided before he serve the same, he give bond to the treasurer of the town, in the sum of two hundred dollars, with two sureties, sufficient in the opinion of the selectmen and town clerk, for the faithful performance of his duties and trust, as to all processes by him served or executed. The processes last mentioned must be limited to such as are lawfully in his hands, and within his jurisdiction. The liabilities of his sureties could not, upon any sound construction, be extended farther; as they must be deemed to undertake only for the faithful performance of his duty, in relation to such processes as he might serve as constable. Were it otherwise, he might be held liable, in one process exceeding his jurisdiction, to an amount, which would absorb the whole penalty, leaving unprotected processes within his jurisdiction; although it was the faithful performance of his duty in regard to these, which the bond was manifestly intended to secure. It ought, therefore, clearly to appear, that the processes, set forth in the declaration,

were of this description. The process stated in the first count, is a writ of execution, in favor of one *Ira Gibbs*, against one *Henry Knox Murphy*, which said writ was issued by *Joseph Sprague*, Esqr. a Justice of the Peace for said county. The process in the second count, is averred to be a writ of execution, which was issued by the same justice, in favor of one *John Barter*, against one *William Marshall*. The amount of neither is stated; nor is either averred to have issued upon a judgment. It is insisted, however, that all processes, issuing from a justice, must necessarily be within a constable's jurisdiction; and these appearing to be of that description, the plaintiff was not bound to aver that they were such as a constable might serve. If this were true, it might be replied, that in a penal action, an essential fact ought to be directly averred, instead of being left to be gathered by argument and inference. But it is not true; for by the revised laws, *ch.* 77, providing a speedy method of recovering debts, a justice of the peace may take a recognizance, and issue an execution thereon, to an unlimited amount. There is nothing, then, in the declaration, from which we can infer that the processes therein described, were within the jurisdiction of a constable. They might have issued upon recognizances, and each have exceeded the sum of one hundred dollars.

It has been contended by the counsel for the plaintiff, that this objection is not open to the defendant, inasmuch as it would be taking advantage of his own wrong; being founded upon the suggestion, that these processes, which he is alleged to have served, might not have been within the limits of his authority. But he has a right to insist, when the validity of the declaration is drawn in question by demurrer, that it should contain every averment material to sustain the action; and that, unless this distinctly appear, he cannot be charged. The defendant relies that he is not legally called upon to answer; not upon the ground that he has done no wrong on his part, but because the plaintiff has not shewn with sufficient certainty, which he was bound to do, that the penalty attached.

The opinion of the Court is, that the declaration is bad; and that there must therefore be judgment for the defendant.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

MAY TERM,

1827.

DEARBORN, *treasurer &c. vs.* PARKS.

Where one undertakes to pay the debt of another, and by the same act also pays his own debt, which was the motive of the promise; this is not such an undertaking to pay the debt of another as is within the statute of frauds, and therefore it is not necessary that it should be in writing.

Though the consideration for such promise was land, yet the party to whom the debt was to be paid may recover the amount in an action for money had and received.

THIS action was for money had and received by the defendant, to the use of the plaintiff, as treasurer of *Monmouth* Academy. It was commenced in *October* 1823; and was tried before *Weston J.* upon the general issue, and the plea of the statute of limitations.

It appeared that in *December* 1813, one *Heald* purchased of the Trustees of the Academy a tract of land, for which he gave his promisory notes, payable in four successive years, with interest annually. A few months afterwards, he sold this land to the defendant, in whose hands as much of the purchase-money was retained as would pay off the notes to the trustees, which the defendant promised *Heald* that he would pay. This promise he repeated to *Heald*, as late as in *September* 1815, when the latter was about to depart for the State

of Ohio, where he died; but being interrogated in *November* 1822, he said he had paid *Heald* another way.

Upon this evidence, a verdict was taken for the plaintiff for the amount of the notes due to the corporation, with simple interest; subject to be amended or set aside, according to the opinion of the court upon the liability of the defendant.

Boutelle, for the defendant, contended, 1st—that here was no privity of contract between the parties to this suit. On the contrary, it appears that the defendant entered into a special agreement with *Heald* to do a specific act; to which, and to the consideration inducing it, the plaintiff is wholly a stranger.

2. If the plaintiff could once have claimed the benefit of the promise, he is now barred by the statute of limitations. For the engagement was, to take up the notes forthwith; of which the plaintiff could have availed himself in a reasonable time after it was made; and was not bound to wait till they fell due. But if money was left in the hands of the defendant, which the plaintiff can claim on the implied promise, as money had and received to his use, then also is he barred; for if it was the money of the plaintiff, he was entitled to it as soon as it was received by the defendant, which was more than ten years before the action was brought. *Miller v. Adams* 16. *Mass.* 456. *Bishop v. Little* 3. *Greenl.* 405.

3. But no action would lie for this plaintiff on the express undertaking, it being to pay the debt of another, and so void by the statute of frauds, for want of being written. It is also void at common law, there being no consideration between these parties. The plaintiff gave up no lien, sustained no damage, and forbore no suit; nor did the defendant derive, from him, any benefit whatever. 4. *Johns.* 422. *Skelton v. Brewster* 8. *Johns.* 376. *Leonard v. Vredenburg ib.* 29.

Sprague, for the plaintiff, supposed the point of privity, in cases like the present, to be too well settled to admit of argument; and referred to *Tho. Raym.* 302. *Dutton v. Poole Tho. Jo.* 102. *Arnold v. Lyman* 17. *Mass.* 400. *Hall v. Marston ib.* 579. *Freeman v. Otis* 9. *Mass.* 276. 1. *Cranch* 429. Nor was it necessary

that money should have been actually in the hands of the defendant. It was enough that he received any thing of value, for which he undertook to pay money. *Randall v. Rich* 11. *Mass.* 494. *Longchamp v Kenney* 1. *Doug.* 137.

As to the bar of the statute of limitations;—the contract was to pay the notes, which thus became part of the undertaking, by express reference, and so regulated the time of performance. And the last of the notes having become payable within six years next before the suit, the plaintiff is entitled to recover for at least that amount. If the money had been payable forthwith, then the defendant might have tendered it to the plaintiff, who would have been bound, contrary to established principles, to receive the money for the notes before the days of payment had arrived. But the plaintiff would be protected, by the settled law on this subject, against so great an absurdity. But if, as between the defendant and *Heald*, the contract was special, to take up all the notes; this was to be performed either as they fell due,—in which case the plaintiff is entitled to recover only the last note, that being the only one payable within six years before the suit,—or if to be performed by one act, then it was not to be performed till the last note was payable; in which case the plaintiff is entitled to retain the verdict as it stands. Upon any other principle, the defendant would be liable to an action by *Heald* within the four years, without the power to protect himself by compelling the plaintiff to accept the money.

Nor can the objection of the statute of frauds avail the defendant. His promise was to pay, not the debt of another, but his own debt. By receiving the land, he became debtor to pay the consideration, partly to his grantor, partly to the plaintiff, by his express stipulation. Such a case is not within the statute. 1. *Phil. Ev.* [362.] *Leonard v. Vredenburg* 8 *Johns* 38. 39. *Skelton v. Brewster ib.* 376. *Packard v. Richardson* 17. *Mass.* 140. *Gold & al. v. Phillips* 10. *Johns.* 412. *Myers v. Morse* 15. *Johns* 426. *Colt v. Root* 17. *Mass.* 236. *Roberts on Frauds* 232—237.

Weston J. delivered the opinion of the Court.

In *Leonard v. Vredenburg*, cited in the argument, *Kent C. J.* distinguishes three classes of cases, in which one person undertakes

to pay for another. 1. Where the principal and collateral promises are made at the same time, and are founded upon the same consideration. 2. Where the collateral promise is subsequently made, in which case, some further consideration must be shewn. 3. Cases in which the promise to pay the debt of another, arises from some new and original consideration of benefit or harm, moving between the newly contracting parties. The last class he holds not to be within the statute of frauds. And Serj. *Williams*, 1. *Saund.* 211, *note* 2, lays down the law to be, that where the promise is founded upon some new consideration, sufficient in law to support it, and is not merely for the debt of another, although, in effect, the undertaking be to answer for another person, it is considered as an original promise, and not within the statute. *Reed v. Nash*, 1. *Wils.* 305, and *Williams v. Leper*, 3. *Burr.* 1886, are authorities to the same point. This principle, also, was fully recognized in *Colt v. Root*, 17. *Mass.* 236, cited in the argument.

But it is urged that, admitting the correctness of the doctrine stated, the promissee should be privy to the new consideration, and that, in this case, he is a stranger to it. *Comyn* [*Dig. Assumpsit E.*] states that, upon a promise to *B*, to pay £20 to an infant at his full age, and to educate him in the mean time, the infant shall have the action. And that, if money be given to *A*, to deliver to *B*, *B* may have the action. *Rolle's* abridgment is cited by him as an authority. In *Dutton v. Pool*, the father of the plaintiff's wife, being seised of a wood, which he intended to sell to raise fortunes for younger children, the defendant, being his heir, in consideration that he would forbear to sell it, promised to pay his daughter, the plaintiff's wife, £1000 for which the action was brought; and it was held that the plaintiff might well maintain it. This decision was affirmed in the exchequer chamber. In *Martyn v. Hinde*, *Cowp.* 437, the plaintiff declared against the defendant, rector of *A*, upon an instrument in writing, whereby the defendant promised the plaintiff to retain him as curate, until, &c. and to allow him £50 per annum. The instrument produced in evidence, was a certificate addressed to the Bishop, whereby the defendant nominated the plaintiff his curate, and promised to allow him £50 per annum, un-

til otherwise provided. Upon this evidence, after argument, the plaintiff was held entitled to recover against the defendant. And in *Marchington v. Vernon* 1. *Bos.* & *Pul.* 101, *note b. Buller J.* says, "If one person makes a promise to another for the benefit of a third, the third may maintain an action upon it."

The same doctrine has been expressly adopted in New York. *Schermerhorn v. Vanderheyden* 1. *Johns.* 139. *Gold v. Phillips* 10. *Johns.* 412, cited in the argument. In *Arnold v. Lyman* 17. *Mass.* 400, cited by the counsel for the plaintiff, a promise to *A*, for the benefit of *B*, was holden to enure to *B*, who sustained an action thereupon in his own name. And in *Hall v. Marston*, also cited from the same volume, a party receiving money from the original debtor, with directions to pay it to his creditor, was holden liable to such creditor, although he made no express promise to any one, to pay him. In this case *Parker C. J.* states, that "it seems to have been well settled heretofore, that if *A* promises *B*, for a valuable consideration, to pay to *C*, the latter may maintain *assumpsit* for the money." And he further says, "the principle of this doctrine is reasonable, and consistent with the character of the action of *assumpsit* for money had and received."

In cases of this description, although the promissor undertakes to pay the debt of another, yet he thereby pays his own debt; and that constitutes the operative motive and inducement, by which he is actuated. To him it must be a matter of indifference, whether he pays directly to his creditor, or to his assignee. He pays no more; and he can be holden to pay but once. These are not cases within the meaning of the statute; which requires evidence, not susceptible of being easily perverted by fraud or perjury, before one man can be held obliged to pay the debt of another, and trust to his solvency for reimbursement. But if the original debtor has paid him an adequate consideration therefor, either by the discharge of a debt due to himself, or by depositing money with him for the express purpose, and the party thereupon promises to pay as directed, why should not the undertaking enure to him, for whose benefit it is intended? As this cannot operate to the injury of the promissor, there is no reason why the law should require evidence of a more

certain character, to prove the substitution, than to prove the promise directly to him from whom the consideration moved. We are therefore of opinion, that this is not a case within the statute of frauds; and that, according to the authorities, the alleged want of privity constitutes no sufficient objection to a recovery on the part of the plaintiff.

The defendant reserved, by the direction and consent of *Heald*, of whom he purchased, a sufficient portion of the purchase money to pay the notes in question. When therefore the plaintiff had a right to demand it, he might well declare for it as for so much money had and received to his use. If the defendant did not actually receive money, he received that for which he agreed to pay a certain sum in money, part of which was appropriated in his hands to pay the plaintiff.

For such part of the amount as had been due six years, prior to the commencement of the action, which was in *October* 1823, the plaintiff is barred by the statute of limitations. For such portion as become due within that period, he may recover. This rule being applied, all the notes are barred, except that which became due last; and as the interest was payable annually, the plaintiff cannot be allowed upon this note that part of the interest, which became due more than six years prior to the action.

The verdict being amended in conformity with this opinion, judgment is to be rendered thereon.

JEWETT, *petitioner*, *v.* BAILEY *& als.*

Where a deed of conveyance of lands, absolute in its terms, was made to three persons, to secure them against their liability as the sureties of the grantor for his debt; and they gave him a written promise, not under seal, to reconvey the land upon his payment of the debt; after which two of them were compelled to pay it, the grantor and the other surety being insolvent; it was held that an extent, by a creditor of the insolvent surety, upon his undivided portion of the land was valid, and conveyed to him the title to that portion, unaffected by any supposed equitable claims of the other sureties, who had paid the original debt.

IN this case, which was a petition for partition, the seisin of the petitioner was denied by the respondents. It appeared that one *Jermiah Smith*, who formerly owned the whole tract, conveyed it by an absolute deed, in fee, to *Colburn*, *Stevens*, and *Flitner*, his sureties, for their indemnity; and they mortgaged it to the *Gardiner* bank for money obtained for his use; which was afterwards paid by *Colburn* and *Stevens*, *Flitner* having become insolvent. *Smith* had no defeasance, but only a written promise from the grantees, to reconvey to him, on payment of the money for which they were liable, which he had never done. The petitioner, knowing the facts, attached and levied on *Flitner's* part of the land holden in common.

Many other facts were introduced into the case, which are here omitted, for the clearer understanding of the case as actually decided by the Court; all the material facts upon which the decision is founded, being stated by the Chief Justice. The verdict was for the petitioner.

Evans argued for the petitioner.

Allen, for the respondents.

MELLEN C. J. delivered the opinion of the Court.

The facts of this case, arranged and compressed, are these. Previous to *Oct.* 31, 1814, *Colburn*, *Stevens* and *Flitner*, had become the sureties of *Smith*, for sundry debts which he owed, to the amount of about $500; and on that day *Smith* conveyed to them the prem-

ises described in the petitition, by an absolute deed, in fee simple. The consideration named therein is $600. They paid him $100 in some other way, satisfactory to him. It appears from the testimony of *Smith*, who was introduced as a witness by the respondents, that the deed was made in good faith, and with honest intentions; that is, to indemnify them from all damage by reason of their suretiship, and advance of the $100; and at the same time, an agreement was signed (though there is no proof it was under seal) by the grantees, and delivered to *Smith*, whereby they engaged to reconvey the premises to him, upon his paying them said sum of $600, in a specified time. In 1815 this agreement was cancelled and a new and similar one was given to *Smith*. He has, however, never paid said sum, nor any part of it; and so has never entitled himself to a reconveyance, and has never received one from them. *Stevens* and *Colburn* have been obliged to pay the $500 for which they had become bound; and *Flitner*, having failed, has never paid any part of it. *Smith* has received the benefit of the whole sum of $600. In the view we take of the cause, the mortgage to the bank may be laid out of the case.

It has been urged that *Smith's* deed to *Colburn*, *Stevens* and *Flitner*, may and should be considered as a mortgage; but this is not the fact. There was no defeasance; but only a written promise, not under seal, to reconvey; of course the cases to this point do not apply. The absolute estate vested, in equal proportions, in the three grantees; and though *Flitner* did not pay any part of the demands for which they all became responsible, that circumstance had no effect on his vested title, or any tendency to impair it. The only remedy that *Colburn* and *Stevens* have, is an action against *Flitner* to compel him to reimburse them the sum they have advanced for him. If he is unable to pay them, it is his and their misfortune. There is no legal ground for the argument in favor of construing the estate in *Flitner*, as a trust estate. The language of the deed negatives this construction; and the authorities cited by the counsel for the petitioner, as well as many others, clearly shew this. The consequence is that when *Jewett* extended his execution on the one undivided sixth part of the premises, as there stated of *Flitner*, he was

in fact, the owner of one undivided third part. Having thus acquired a title and seisin to the part he claims, he is entitled to maintain his petition upon the issue tendered and joined ; the seisin having been acquired and having existed within twenty years next before filing the petition.

After having given this simple statement of the important facts of the case, and applied to them a few plain principles of law, it is unnecessary that we should advert to any other points which were discussed in the argument. We are all of opinion, that the defence fails ; and there must be *Judgment on the verdict.*

BEAN *vs.* MAYO & AL.

Where a fulling-mill and land were sold, and mortgaged back to the grantor to secure payment of the purchase money ; and by his bond of the same date he entered into certain stipulations respecting the liberties and immunities which the grantees should enjoy, in the use of the water and dam &c. ; and covenanted that he would forthwith build for them certain machinery for their mill ; and that he would not follow nor permit others to pursue the same business there, while it should be followed by the grantees ; and reserved to himself the use of a room in the premises for a limited term ;—it was held that these stipulations amounted to a covenant that the mortgagors should occupy the premises, so long as they continued to fulfill the conditions of their deed of mortgage ; and that they constituted a good bar to a writ of entry at common law, brought by the mortgagee.

THIS was a writ of entry, upon the seisin of the demandant, to recover possession of a piece of land with a fulling-mill thereon. The tenants, in their first plea, alleged that the premises were conveyed to them by the demandant, by deed dated *March* 17, 1819, for the sum of $4000 ; that they at the same time reconveyed the same estate to him in mortgage, to secure the payment of the purchase money, by ten equal annual instalments, for which they gave him their promissory notes without interest, this having been already

paid; that they had paid as many of the notes as had become due, being six in number; that at the time of making the mortgage, the demandant by deed demised the premises to them, to hold as long as the conditions of the mortgage deed should remain unbroken; under which lease they still hold the premises. The demandant traversed the lease; and issue was taken on the traverse.

In their third plea, the tenants relied on the same deeds, setting forth, in *hæc verba*, the deed last referred to; which was a bond from the demandant to them, conditioned that he should maintain the mill-dam and flumes in good repair, as long as the demanded premises should be occupied for manufacturing, carding and dressing woolen cloth; should save the tenants harmless from costs and damage upon any complaint for flowing the lands of other persons; and suffer them to work the water wheel then in the mill; and to put down a new flume of certain dimensions, and to dig and remove the gravel and stones for that purpose, at their own expense; and should not sell or convey to any other person any privilege for the establishment of a similar factory, nor engage in it himself, as long as the premises conveyed to the tenants should be occupied and used for the same business; and should suffer the tenants to use part of the wood-shed near the premises; and to draw a reasonable quantity of water for the uses of their fulling-mill and dye-house; and also that he should put into his own grist-mill, for their benefit, a breast-wheel of certain dimentions, in two years from the following *June*.

They also set forth another bond given by the demandant to them, *March* 2, 1820, conditioned, within one year from the next *June*, to build and hang for them, in their mill, a breast wheel, and certain iron wheels, particularly described, and to furnish all the materials; the tenants clearing away the old rubbish, and permitting the demandant to occupy a certain room in their factory one year, from the month of *June* then next, for a work and cook room, and there preparing certain parts of the machinery to be furnished. And thereupon they averred that the premises described in the bonds, were the same which had been conveyed to them by the demandant; into which they had entered by virtue of his deed, and of the intent and meaning of the bonds; and with his knowledge and consent had made

great and expensive repairs and improvements, such as were referred to and contemplated in the deeds, and upon the faith of the stipulations of the demandant therein; and that they had hitherto performed the conditions mentioned in the mortgage deed, and were entitled to hold the premises in peaceable possession, so long as they shall continue to perform them.

To this plea the demandant replied, alleging a particular performance of each stipulation expressed on his part, following exactly the language of the two bonds. And the tenants demurred generally to the replication.

At the trial of the first issue, before *Weston J.* a verdict was by his direction returned for the demandant, subject to the opinion of the Court, upon the case presented by the pleadings.

The general question raised was, whether, taking the deeds and bonds together, the tenants were entitled to hold possession of the premises, against the demandant, so long as they continued punctually to pay the sums mentioned in the mortgage?

Allen, for the tenants, contended that they were. And he adverted to the various particulars stated in the bonds, all shewing that such was the intent of the parties, and all senseless and unmeaning, upon any other supposition.

And he further argued, to the same point, that if the agreement of the demandant is to be treated as a parol license, the case shews a part performance on the part of the tenants, who have not only been put into possession of the premises by him, but have done acts prejudicial and expensive to themselves, upon the faith of the agreement. Upon this ground, therefore, they are entitled to protection. *Sugden on Vend.* 73. 83. 84. 1. *Sch. & Lefr.* 32. *Davenport v. Mason* 15. *Mass.* 85. *Roberts on frauds* 145.

R. Williams, on the other side, resisted the effect sought to be given to the bonds; contending that the parties having made their own contract, in the form of a bond with a penalty, and provided their own remedy for the breach of it, by action of debt at common law; it was not competent for the court to make for them a new and different contract. In any view of the writings, they possessed none

of the attributes of a lease, as they shewed no certain beginning, ending, nor term of duration; and without these a lease is void. 3. *Cruise* 115. *tit. Deed, ch.* 7. *Co. Lit.* 45 *b.* *Cook v. Stearns* 11. *Mass.* 533.

WESTON J. delivered the opinion of the Court.

It appears from the pleadings that the title of the demandant arises from a deed made by the tenants to him, on the 19th of *June* 1819, conveying the premises in fee and in mortgage. It further appears, that there has been no breach of the condition of that deed, on the part of the tenants. The demandant, therefore, has no right to the possession of the land for condition broken; but as the owner of the legal estate, he has a right to recover it at common law; unless, from the deed itself, or from some other instrument in writing executed by him, it has been agreed that the tenants shall retain the possession, until there has been a breach of the condition. And we are of opinion that, from the condition of the bond executed by the demandant to the tenants, on the day the mortgage deed was given, and by that of the second of *March* following, it does appear, by necessary implication, that the tenants were to keep possession of the premises, until they failed to perform the condition. By the condition of the first bond, the tenants were to have the privilege of drawing water, to work the fulling-mill and carding-machine, as long as the same should be occupied for the purpose of carding and manufacturing wool; the demandant was to keep the dam and flumes in such repair, as to be reasonably tight to save the water; they were to have the privilege of putting down an additional flume; he was not to lease or convey any other privilege near his mills, for the same purposes, or carry on the same business himself, while the premises in question were used for the carding and manufacturing of wool; and the tenants were to have the privilege, at all times, to draw a reasonable quantity of water, using it prudently, into their full stocks, to enable them to rinse cloth, and fill their dye kettles, tubs and vats.

By the condition of the bond executed by the demandant to the tenants on the second of *March* 1820, he was to make certain wheels, and to perform other services, in and about the premises, for their

use, and was to have the use and improvement of the story over the carding-machine, for one year from the month of *June* following, for certain purposes.

From these instruments, it is apparent that it was the understanding and agreement of the parties, that the tenants should occupy the premises, so long as they continued to fulfil the condition of their deed of mortgage. The stipulations of the demandant imply this; and it is impossible to give effect to them, unless they are thus understood. If he is permitted to take possession, the design of their purchase and of his agreement, is altogether defeated. It is very clear that the premises were intended to be used for the purposes, for which they were originally erected. They were thus to be used by the tenants, to whom certain facilities in aid of the object were secured, so long as the business should be pursued. The demandant was not to engage in the same employment himself, or to suffer any other person to do so, in or about his mills. Either the tenants or their assigns must continue the business of carding and manufacturing wool; or it cannot be pursued at all, without a forfeiture of the demandant's bond.

The stipulation, which the demandant made for the special enjoyment of a part of the premises for a definite period, was entirely unnecessary, if he could at any time command the the whole. There is no objection to the evidence by which this agreement is proved; it is in writing, and signed by the party to be charged. It is impossible to mistake the intention of the parties. That intention is a lawful one. And yet by this action, the demandant claims to resume the possession of the premises, while the condition in the tenant's deed remains unbroken; and thus defeat their object in purchasing; throw them out of the business, in which they had engaged in the faith of his agreement; and render useless and unproductive the expense, they have been induced to incur.

In the case of *Newall v. Wright*, 3 *Mass.* 138, *Parsons C. J.* delivering the opinion of the court, after stating it as a general principle of law that the mortgagee may demand and recover possession before condition broken, says, "But there may be an agreement that the mortgagor shall retain the possession, until the condition be

broken, which shall bind the mortgagee. And upon the same principle, we are satisfied that the mortgagee, if he consent to take a lease from the mortgagor, and covenant to pay him rent until the condition be broken, shall be bound by his covenant, and shall not be admitted to set up his mortgage against the lease." The agreement in that case, that the mortgagee should not take possession under his mortgage, although not express, was necessarily implied by his becoming lessee of the premises, and engaging to pay rent. There is the same implication in the case before us; and the demandant cannot be admitted to set up his mortgage to defeat stipulations, which he has bound himself to perform.

The verdict is set aside; the replication to the third plea in bar is adjudged bad; and this plea being a good and sufficient bar, judgment is to be rendered for the tenants.

BEAN *vs.* MAYO & AL.

A covenant in a deed that the land is free from incumbrance, is broken by the existence of a mortgage previously given by the grantor to the grantee.

But in such case, the condition of the mortgage not being broken, nor the mortgage discharged, the damages are but nominal.

THE defendants in this case, having purchased of the plaintiff a tract of land, and mortgaged it back to him to secure the payment of the purchase money; they afterwards conveyed to him in fee a small parcel of the same premises, by deed of general warranty, with the usual covenants. The plaintiff thereupon brought this action of covenant broken, against them, alleging that they had covenanted that the land was free from all incumbrances, when in fact it was incumbered by their mortgage to himself. The tenants had oyer of the mortgage, which is the same deed mentioned in the preceding case, and demurred generally to the declaration.

Allen, in support of the demurrer, contended that the covenant of

freedom from incumbrances must be taken to relate to titles in third persons, adverse to the grantee ; and was analogous to the covenant of seisin in fee, which is never held to be broken by an existing seisin *de facto* in the grantee. These covenants relate to such incumbrances or seisins as may defeat the estate granted, operating on the grantee by compulsion ; and are inserted only for his protection. *Fitch v. Baldwin* 17. *Johns.* 161. There is always an implied exception of titles and claims already existing in him. *Leland v. Stone* 10. *Mass.* 469.

R. Williams, for the plaintiff, said that he was justly entitled both to his debt secured by the mortgage, and to the money he had paid for the title in fee. But if it should take all the land to pay the debt, he would be remediless, unless he could recover in this action. The knowledge of the grantee that there is an outstanding title or incumbrance, does not take away his right to recover damages. He relies on his covenants for protection. *Townsend v. Weld* 8. *Mass.* 146. *Ingersol v. Jackson* 9. *Mass.* 495.

Weston J. delivered the opinion of the Court.

At the time the defendants entered into the covenant to the plaintiff declared upon, that the premises were free of all incumbrances, they were in fact incumbered by an existing mortgage to the plaintiff. It has been contended that the operation of this covenant must be limited to incumbrances made to third persons, and cannot be held to embrace such as may have been made to the plaintiff; but we cannot admit the soundness of this distinction. The covenant was general and unqualified. The plaintiff did not purchase the mere equity of redemption. The mortgage was not extinguished, as it respects the land to which the covenant attached. The plaintiff chose to retain his title as mortgagee, under the former conveyance. He might have assigned the mortgage, and his assignee would have had a lien upon the land, to the extent of the debt due. The covenant then was in strictness broken; and the plaintiff had thereupon a right of action. The next question which arises is, for what amount of damages is he to have judgment? The condition in the deed, creating the incumbrance, has not been broken. It is not

certain that it ever will be. The defendants are entitled to the benefit of the term limited, within which they may perform the condition. The plaintiff has no right to demand or to enforce payment at an earlier period. It is not pretended that he has removed, released, or extinguished the incumbrance; but it still remains as it existed on the day the deed declared upon was executed. Upon these facts we are very clear that the damages to which he is entitled can be only nominal.

The plea in bar is adjudged bad; and judgment is to be rendered for the plaintiff for one dollar damages.

REED *vs.* JEWETT.

Where both parties proved that a bill of sale, though absolute in its terms, was intended only as collateral security for a debt due, and this done with good faith; the transfer was holden valid as a mortgage.

Whether such proof is open to the vendee, if objected to, in a question between him and an attaching creditor of the vendor—*quære.*

If a bill of sale absolute on its face, was in truth made for collateral security only;—or if the possession of a chattel remains in the vendor, after sale;—neither of these circumstances is conclusive evidence of fraud, *per se*; but is only a fact to be considered by the jury in determining the question of fraud.

THIS was an action of replevin for a carding machine. The defendant pleaded that it was the property of one *Solomon Bangs*; and that he, as a deputy sheriff, attached it *Oct.* 25, 1824, on a writ in favor of one *Cyrus Bangs* against said *Solomon*. The plaintiff traversed this allegation of property, affirming it to be in himself, on which issue was taken.

The plaintiff, to prove his title to the property, produced at the trial before *Weston J.* a bill of parcels, dated *Sept.* 26, 1824, and

receipted, by which *Solomon Bangs* professed to sell him the machine for two hundred and forty dollars. It was then standing in the shop occupied by the vendor, from which it was never removed.

It appeared from the testimony of witnesses, introduced by both parties, without objection from either, that the machine was worth two hundred and fifty dollars; and that it was built for *Solomon Bangs*, but was not his property till the day on which he conveyed it to the plaintiff. On this day, the plaintiff having lent and advanced 80 dollars to *Bangs*, it was agreed that the machine should be conveyed to him to secure the repayment of that sum; which was accordingly done, by the bill of parcels above mentioned, with the consent of the person who made it, and who at the same time transferred the property to *Bangs*, by charging him, on book, with the machine. The vendor, at that time, was in good business and credit; but on the 20th of *September* he suddenly absconded, to avoid a criminal prosecution. On the day previous to his leaving the State, he caused the writ to be made against himself, on which the property was attached, in favor of his brother *Cyrus Bangs*, to secure a debt justly due him; and delivered it to the defendant for service, with a schedule of the property to be attached; omitting the machine in question, which he informed a witness was already conveyed to the present plaintiff. *Cyrus Bangs* at this time was in a distant State, ignorant of these proceedings. On his arrival, several days afterwards, at *Gardiner*, where these transactions took place, he was informed of the facts; but being advised that the plaintiff's title was invalid, he caused the machine to be attached. The officer never removed it, nor placed it in the care or custody of any person, but simply returned it on the writ as attached. It continued to stand in the apartment where it was originally set up, which was in the same building in which it was made, formerly occupied by *Solomon Bangs*, and afterwards by his successor in the same business. The plaintiff once took away some parts of the machine, intending to remove it; but returned them before the attachment, it being very cumbrous and expensive to remove. He applied to the tenant of the building, to suffer the machine to remain there; who declined on account of the inconvenience it would occasion, and desired him to remove it. In

consequence of the sacrifices of the property of *Solomon Bangs*, by sheriffs' sales, he proved to be insolvent.

Upon this evidence it was contended for the defendant, that the bill of sale was invalid, against the creditors of the vendor; because it purported to be an absolute transfer of the property, when in fact it was not so; or, if it was, the price was grossly inadequate, and for this cause it was void. It also was urged that the plaintiff ought not to be permitted, by parol proof, to contradict the written evidence of title, under which he claimed to hold the property; and that, in any view of the case, the transfer was incomplete, for want of delivery of the property intended to be sold.

But the Judge instructed the jury that, although a bill of sale, under circumstances like these, might be regarded as strong evidence of fraudulent intention in the parties to it; yet it was not conclusive. If they were satisfied that the object and intent of the parties was only to secure the plaintiff for the money by him advanced on the faith of the instrument, and not to prevent an attachment of the machine by the creditors of the vendor, nor to delay or defraud them; nor to secure to him the excess of value, beyond the amount due to the plaintiff; then their verdict ought to be for the plaintiff. But if they belived that the intent of the parties was to secure this excess of value, by any secret trust or confidence, to *Bangs*, they ought to find for the defendant. And they returned a verdict for the plaintiff; which was taken subject to the opinion of the court upon the instructions given them by the Judge.

Allen, for the defendant. The money actually paid by the plaintiff being less than one third of the real value of the machine, the transfer was a legal fraud, for inadequacy of price; and the jury ought so to have been instructed. There was no question of intent. Whatever might be the moral character of the transaction, if its direct and inevitable tendency was to place the property of the debtor out of the reach of his creditors, without a full and fair equivalent, it is void in law, as against them. There being no facts in dispute, the question of intent did not arise; the office of the jury was merely to return a verdict under the direction of the judge with whom the de-

cision of the cause rested, as a matter of law. *Sturtevant v. Ballard* 9. *Johns.* 342. *Hamilton v. Russell* 1. *Cranch* 309.

It is also void for its falshood; as it purports to be an absolute sale, for 240 dollars, when in truth it was a pretended pledge for eighty.

Nor was there any delivery of the machine to the plaintiff. The general rule on this subject is well settled, that without delivery of possession to the vendee, the transfer is incomplete. *Edwards v. Harbin* 2. *D. & E.* 587. 1. *Esp.* 205. 1. *Campb.* 332. 1. *Cranch* 309. *Putnam v. Dutch* 8. *Mass.* 287. *Lamb v. Durant* 12. *Mass.* 54. *Davis v. Cope* 4. *Binn.* 258. This rule has been relaxed only in cases of necessity, where the property is incapable of any other than a symbolical delivery; but never in a case of the sale of goods, however ponderous, which, though capable of removal, still remained in the possession of the vendor, and for which less than one third of the value had been paid. The only case which seems an exception is *Brooks v. Powers* 15. *Mass.* 246; but there, it should be observed, a full consideration was paid; and it was part of the original agreement that the property sold should remain for a limited time, and for a particular purpose, in the possession of the vendor.

As a pledge, the transaction is void, for the same want of possession delivered. But the plaintiff has no right to have it thus regarded. If the instrument offered by him in evidence speaks the truth, it was no pledge. If it does not, the whole is void, being an attempt to deceive and defraud.

Evans, for the plaintiff. The law does not vacate a sale of goods for want of technical precision in its formalities. It regards solely their intent; which it carries into effect, if it was honest and fair. And this question of intent is always submitted to the jury. In the present case the jury have found it to be such as the law approves; and the objection of the defendant is therefore reduced to a mere question of form, in the transfer of goods, where every thing substantial has been complied with. *Jewett v. Warren* 12. *Mass.* 300. *New Eng. Mar. Ins. Co. v. Chandler* 16 *Mass.* 275. *Wheeler v. Train* 3. *Pick.* 257.

In this view of the case, the inadequacy of price forms no bar At most, in cases of absolute sale, it is only one of the signs of fraud,

which in this instance the jury have negatived. But if the transaction is viewed in its true character, as a pledge, the objection does not apply. 2. *Pow. on Contr.* 152.

If possession was not actually given to the vendee, or pawnee, it is not, *per se*, conclusive evidence of fraud. It is merely a fact to be considered by the jury; and from which they may infer fraud, if it is left wholly unexplained. *Brooks v. Powers* 15. *Mass.* 246. *Bartlett v. Williams* 1. *Pick.* 288. *Badlam v. Tucker* 1. *Pick.* 389. *Haskell & al. v. Greely* 3. *Greenl.* 425. *Leonard v. Baker* 1. *Maule & Selw.* 251. *Beals v. Guersny* 8. *Johns.* 446. 7. *Taunt.* 148. *Ludlow v. Hurd* 19. *Johns.* 220. 15. *Johns.* 583. 4. *Mass.* 663. 12 *Mass.* 378. 9. *Johns.* 135. But here was all the possession given which the article admitted. It was cumbrous, designed for sale, and in a fit place for that purpose; and so left by the defendant himself, which is conclusive against him, that no other possession was convenient or necessary. *Allen v. Smith* 10. *Mass.* 308. *Rice v. Austin* 17. *Mass.* 204. The plaintiff certainly had all the possession which his vendor had before him; which ought to be sufficient, since it was not such as to enable him to acquire a false credit. By sustaining the transaction, ample justice will be done to all; the plaintiff being repaid his money, and the surplus being within the reach of creditors by the process of foreign attachment. *Burlingham v. Bell* 16. *Mass.* 320. *Badlam v. Tucker* 1. *Pick.* 389. 16. *Mass.* 278.

Mellen C. J. delivered the opinion of the Court at the ensuing term in *Penobscot.*

This is an action of replevin for a carding machine; and the question upon the issue joined is, whether, at the time it was taken by the defendant, it was the property of the plaintiff. His title is under a bill of sale from *Solomon Bangs*, who was the undisputed owner at the time the bill was given, viz. *September* 6, 1824. By this it appears that the value of the machine was $240, and by the report it appears that *Bangs* then owed the plaintiff $80, and no more; and that the machine was worth $250. Though the bill of sale is absolute in form, yet by the report of the evidence intro-

duced by both parties without any objection from either, it is apparent that the conveyance to the plaintiff was intended as his security for the $80 advanced to *Bangs;* and that the plaintiff claimed nothing more than the amount of his demand against *Bangs.* The alleged inadequacy of the price is relied on to shew that the transaction cannot be sanctioned as a sale; and that the bill of sale being absolute on the face of it, the plaintiff cannot be permitted to claim under it as a mortgage or a pledge; and it is further contended that, as possession did not accompany the conveyance, whatever it was, it must be deemed fraudulent and void. The jury, however, under the instructions they received, upon view of all the evidence, have found that the conveyance was not fraudulent, but fair, honest and *bona fide.* The only inquiry, then, is whether the instructions given by the presiding judge were correct and proper. He stated to them that although a bill of sale, under the circumstances disclosed on the trial, might be regarded as strong evidence of fraudulent intention in the parties to it; yet that it was not conclusive; and that if they should be satisfied that the object of the parties was only to secure the plaintiff for the money he had advanced, and not to prevent an attachment of the machine by the creditors of *Bangs*, or in any manner to delay or defraud them, they ought to return a verdict for defendant, as they did. If the instruction was correct as to their considering the bill of sale conditional, and intended merely as security, then the objection as to inadequacy of price is of no importance. To the principal point several cases have been cited in the argument. In *New Eng. Mar. Ins. Co. v. Chandler* 16. *Mass.* 275, the defendant had assigned and transferred, by an unconditional conveyance, certain shares of insurance stock to *Burroughs*, the trustee; but on his disclosure it appeared that the transfer was as collateral security for a debt due to the *Union Bank*, of which he was cashier, and for no other purpose; and though it was contended that the transfer was fraudulent as against creditors, on account of the absolute form, yet, as the whole transaction was fair and honest, the court sanctioned it; and adjudged *Burroughs'* trustee only for the balance remaining in his hands, after payment of the debt to the bank. To this point see also the opinion of the court in *Harrison & al. v.*

Trustees of Phillips Academy 12. *Mass.* 456, as to the intention of parties to make a conveyance merely a mortgage, though absolute in its form. To the same point also may be cited *Jewett v. Warren* 12. *Mass.* 300. *Bartlett v. Williams* 1. *Pick.* 295, and *Badlam v. Tucker ib.* 389. We would again observe that in the present case, both parties have proved that the bill of sale, though absolute on its face, was intended merely as security; and why should their intention be defeated?

With respect to the question of possession, it is not necessary particularly to examine the facts detailed in the report. If there was not as distinct a change of possession as there might have been after the conveyance, it would seem that the machine was in such a place, and under such circumstances, as not to deceive others. But be that as it may, it is too late to question those principles of law which have so long and so uniformly been acknowledged and adhered to by the courts of the parent State; and by this court since its organization, upon this subject. For although English cases and those of the courts of the United States appear to have decided, that when possession of a chattel is continued by a vendor, after sale, and such possession is inconsistent with the terms of the bill of sale, it is fraud *per se;* still that has never been received as law in Massachusetts, or this State. It is only evidence of fraud to be submitted to a jury. It is often of a very decisive character; and from such evidence the jury may infer fraud, and pronounce the sale void. To this point we will only cite *Brooks v. Powers* 15. *Mass.* 247; the cases before cited from 1. *Pick.* 295. 389. and *Haskell v. Greely* 3. *Greenl.* 425.

We perceive no error in the instruction to the jury. The defendant may be summoned as the trustee of *Solomon Bangs;* and in this manner the difference between the plaintiff's demand and the value of the machine may be secured for the use of any creditor who may incline to adopt this mode of proceeding, as was done in the above case of *N. E. Mar. Ins. Co. v. Chandler.* There must be

Judgment on the verdict.

STEWARD *vs.* ALLEN.

If a creditor extend his execution on land mortgaged for more than its value, he not in fact knowing the existence of the mortgage, though it had been long on record; he may have an *alias* execution, and satisfaction out of other estate of the debtor; the case being within the meaning of *Stat.* 1823, *ch.* 210.

Though a plea admit the registry of an adverse title deed, yet it may, in proper cases, well aver the want of actual knowledge of the existence of the deed; and the fact will be well pleaded.

Where a *scire facias* is brought to have a new execution upon a judgment of the Court of Common Pleas, the land extended upon not having belonged to the debtor; and judgment is rendered in this Court for the plaintiff; the Clerk issues an *alias* execution from the Court of Common Pleas to satisfy the former judgment in that Court; and an execution from this Court for the costs of the *scire facias*.

THE plaintiff having had judgment against the defendant in a former suit, caused his execution to be extended *Sept.* 20, 1819, on land which he supposed to be the unincumbered estate of the debtor. But finding afterwards that it was under mortgage for its full value, he sued out the present *scire facias*, pursuant to the statute, alleging that the land extended upon was not the debtor's, and requiring him to shew cause why the creditor should not have a new execution.

The defendant pleaded in bar that the land belonged to him at the time of the extent. To this the plaintiff replied that on the 23d day of *July* 1818, by a deed registered *Oct.* 30, 1818, the defendant mortgaged the same land to one *Farrar*, for a sum exceeding its true value; which sum then was and still is justly due, and wholly unpaid; the existence of which mortgage, at the time of the extent, was in fact not known, either to himself, or to the appraisers. The defendant hereupon demurred in law.

Cutler, in support of the demurrer, said that the statute of 1823, *ch.* 210, gave this remedy only in cases where the land extended upon did not belong to the debtor. But the title to mortgaged lands

is in the mortgagor, as against all the world but the mortgagee. *Wellington v. Gale* 7. *Mass.* 139. *Goodwin v. Richardson* 11. *Mass.* 473. The mortgagee has nothing in the land which his creditors can seize, until he has entered for condition broken; which, in this case, has never been done. *Blanchard v. Coburn* 16. *Mass.* 345.

By the extent, the creditor acquired all the estate of the mortgagor, as effectually as if his right in equity of redemption had been seized and sold on execution, pursuant to the statute. *White v. Bond* 16. *Mass.* 400. The plaintiff, therefore, has now the right to redeem the land; and he alone can sustain, in his own name, a bill in equity for that purpose. He has divested the debtor of his estate.

The averment that the mortgage was in fact unknown to the plaintiff at the time of the extent, is not well pleaded. He did know to all legal intents, because he was bound to know, that the land was mortgaged, the deed having been registered nearly a year. He therefore elected to take the right in equity of redemption by extent, without deduction for the incumbrance, which he had a right to do; and his execution is satisfied. *Putnam & al. v. Pratt* 13. *Mass.* 363. Whether he acted wisely or not, is not now the question.

W. W. Fuller, for the plaintiff, insisted that the land did not belong to the debtor, within the meaning of the statute. The whole estate passed to the mortgagee, as between him and the mortgagor, whom the plaintiff represents; and the latter had nothing but a bare right remaining, without an interest; the land being mortgaged for more than its value. The intent of the legislature was to provide a remedy for cases where the judgment creditor acquired nothing, by his extent, but the shadow of satisfaction; the debtor having nothing more than the semblance of title to the land. And such was the present case. The mortgagor remained in possession; but his possession, at best, was but calculated to deceive. He knew the facts. The creditor did not. And his silence was a fraud, of which he ought not to take advantage. The case of *White v. Bond*, cited on the other side, turned on the election of the creditor to take the land subject to the mortgage, knowing its existence. In *Warren v. Childs* 11. *Mass.* 222. the levy was not held good as a levy on an equity of redemption.

As to the want of notice in fact; the record is only presumptive notice, by which neither party is estopped, in equity. And this is, in effect, a proceeding in equity, analogous to a bill and subpœna. The *scire facias* calls on the debtor to shew cause why the debt should not be paid, out of his own property; and no such cause is shewn. The defence amounts to this, that the plaintiff not having yet received the fruit of his judgment, shall be held satisfied with the shadow.

But this remedy exists at common law, independent of the statute. The *Stat.* 32. *Hen.* 8 *ch.* 5. which was in force, and applicable to the wants of this country, at the time of its first settlement, and so became part of its common law, authorizes the issuing of a *scire facias* and execution against other lands of the debtor, where those originally taken are recovered, divested, &c. It lies in all cases to reanimate a judgment supposed to be satisfied; and its only object is to carry the original suit into effect. 2. *Tidd's Pr.* 950. 2. *Sellon's Pr.* 187.

MELLEN C. J. delivered the opinion of the Court.

From the pleadings in this case, terminating in a general demurrer to the replication, it appears that the premises on which the plaintiff caused his execution to be extended in the usual form, and by virtue of which extent, he, at the time, supposed he had acquired a complete title thereto, had been several months prior to that time conveyed in fee and in mortgage to *Farrar* to secure the payment of a sum of money exceeding the true and just value of the same estate; which mortgage now remains in full force; the said debt being wholly unpaid. It further appears that at the time of the levy, though said mortgage deed was recorded soon after its date, the plaintiff had no actual knowledge of its existence, and of course no reference was had to it in the appraisement of the premises. Under these circumstances is the plaintiff entitled to an *alias* execution, on the ground of failure or want of title in the defendant, at the time of the levy?

The provision of the statute of 1823, *ch.* 210, is in these words: "That whenever any execution has been or may be extended and

levied upon real estate, for the purpose of satisfying the same; and after such levy it shall appear that the real estate thus levied upon did not belong to the debtor, upon application to the court that issued the execution, they are authorised to issue an *alias* execution." The above mentioned act is a transcript of the statute of Massachusetts of 1798, *ch.* 77, *sec.* 4. It is true, that as between the mortgagor and strangers, or third persons, he is considered as owner of the fee; though as between him and the mortgagee, the fee is considered to be in the latter; still, in estimating the value of the mortgagor's estate or interest, it can only be viewed in the light of an equity of redemption; and such was the defendant's interest at the time of the levy. By the act of 1821, *ch.* 60, *sec.* 17, (which is a transcript of the statute of Massachusetts on the same subject) an equity of redemption is to be sold at auction like personal estate. It is true, it seems to be settled by the cases of *Warren v. Childs* and *White v. Bond*, cited in the argument, that lands under mortgage may be taken by appraisement, where no deduction is made on account of such incumbrance, and the levy be effectual. In both the cases above mentioned the court proceed upon the ground that the creditor knew of the existence of the mortgage. In *Warren v. Childs*, the Chief Justice speaks of the effect of the levy, "supposing the judgment creditor willing to lose the value of the incumbrance, and to take the estate as absolute in the debtor;" and in *White v. Bond*, the Chief Justice observes that "if under such circumstances the creditor chooses to proceed in this manner" the levy may be good and operate as an assignment to him of the equity of redemption. As before observed, actual knowledge of the incumbrance is presupposed; or else the expressions "willing to lose" and "choosing to proceed," were improperly used by the Court, and this we can by no means presume.

But it has been urged that inasmuch as it appears by the replication that the mortgage was on record many months before the levy, it was not competent for the plaintiff to aver his actual ignorance of its existence; and so, not being well pleaded, this fact is not admitted by the demurrer. Generally speaking, the constructive knowledge of a deed, resulting from the record of it, is equivalent to actual knowledge, in its effects upon subsequent conveyances; but to some

purposes there is a material difference between them. We therefore think the want of actual knowledge is well pleaded, although the same replication discloses the existence of the record furnishing the evidence of constructive knowledge. A levy on lands under mortgage cannot be effectual, unless voluntarily made with actual knowledge of the incumbrance, and without any deduction on account of it.

We now proceed to another point, and that is whether, according to the facts admitted by the demurrer, the defendant had such an interest and title in and to the premises, as that they could be said to "belong to him," according to the true intent and meaning of the statute; which, being a remedial one, is entitled to a liberal construction for the advancement of right and justice. It is expressly averred and admitted that the lands were mortgaged to *Farrar* for more than their just and true value; of course the right in equity of redeeming them was of no value whatever; and could not have been, whether sold at auction or taken by appraisement. Under such circumstances the land could not be said to belong to the defendant, in such a sense as the statute intended; for the plaintiff could not by any possibility avail himself of it, or derive any advantage from it; because he could not remove the incumbrance of the mortgage, except by paying more than its value. The only rational and consistent construction of the statute, and which will answer the purposes of justice as contemplated by the legislature, seems to be that which we have given.

It has been said that the plaintiff has made his election; and afterwards, having discovered that he had made an injudicious bargain, now wishes to correct his own miscalculations at the expense, and to the injury, of the defendant, whose right of redemption he has taken away. But all foundation for this argument vanishes, when we advert to the fact that the plaintiff was ignorant of the existence of the mortgage, and therefore was incapable of making an election, as the argument supposes. It seems by the two cases cited from the 12 and 14 *Mass.* that in such a case as this, an action of debt would lie on the judgment, by reason of the failure of the supposed title; and why should not the plaintiff have the remedy he now seeks? No part of the judgment has been satisfied by the defendant; and justice demands

that he should satify it. We therefore adjudge the replication to be good and sufficient in law. The plaintiff is entitled to an *alias* execution, as prayed for, for the sum due on the judgment; and the clerk, as clerk of the Court of Common Pleas, is authorized and directed to issue such *alias* execution; and the plaintiff is also entitled to his costs in this process, for which judgment is to be entered; and for such costs, a writ of execution will issue from this court.

MANSON *vs.* GARDINER, *Adm'r.*

The receipt of money for an outstanding debt, by an administrator, after the lapse of four years from the grant of administration, does not revive any creditor's right of action which had been previously barred.

Where a vessel, on a voyage to *Trinidad*, and back to her port of discharge in the United States, was captured in the year 1797, by the cruisers of the king of Spain, and condemned; and a sum of money was allowed and paid to the owners in 1824, under the Spanish treaty, for the loss of the vessel and freight;—it was held that the receipt of the money, by the owners, did not revive the claim of a seaman for his wages for the homeward voyage, even up to the time of the capture.

THIS was an action for money received by the defendant, as administrator *de bonis non*, of the estate of *William Howard*, to the use of the plaintiff; and also upon an *indebitatus assumpsit* by the defendant, in the same capacity.

The defendant pleaded, *first*, that the cause of action did not accrue to the plaintiff within six years next before the suit.

To this the plaintiff replied that his action was for wages as a mariner on board the brig *Venus*, in the year 1797, on a voyage from *Bath* to the island of *Trinidad*, and thence back to the United States, of which brig the house of *James Davidson* and Company,

were owners, and the defendant's intestate *William Howard* was surviving partner of the firm ;—that the brig was captured during the voyage, and condemned by authority of the King of Spain ; so that no freight was earned, and the plaintiff's remedy was suspended ; that by the provisions of the late treaty with Spain, the defendant, in his capacity of administrator, preferred his claim for the wrongful capture and condemnation of the brig, to the commissioners appointed for that purpose ; which was allowed, to the amount of 8000 dollars, and was paid by the United States to the defendant, *July* 1, 1824, for and on account of the detention and condemnation of the brig, and the loss of her freight ;—whereby the plaintiff's claim to his wages revived, and the defendant, in his said capacity, promised to pay.

The defendant rejoined that the brig was not captured on her outward, but on her homeward voyage, and that the plaintiff returned to his home in this State, *Sept.* 10, 1797 ;—that for the portion of his wages accruing for the outward voyage and half the period of her stay at *Trinidad*, the plaintiff's cause of action, if he had any, existed against the owners of the brig on that day, and might have been prosecuted against them at any time within six years next following ; and as to the portion of wages for the rest of the period till her capture, protesting that none were due, he denied that he received of the United States any compensation whatever for or on account of the same, or any money designed or intended by the government to be appropriated by the defendant, in his said capacity, to the use of the plaintiff.

The plaintiff surrejoined that the sum allowed and paid by the government of the United States, was a compensation to the owners of the brig, as well for the loss of freight, as for the wrongful capture and condemnation ; and that the defendant received that sum, so allowed and paid, and still retains it, not administered.

To this surrejoinder there was a general demurrer.

Secondly, the defendant pleaded that *William Howard*, his intestate, died *April* 10, 1810 ;—that on the 20th day of *August*, in the same year, *Samuel Howard* was duly appointed administrator on his estate, and gave bonds and published notice thereof, as the

law directs, specially setting forth the proceedings; but that the plaintiff did not commence his action within four years after the acceptance of the trust by the administrator, though he continued in that office during the whole term.

To this the plaintiff replied, stating the nature of his demand, and the capture and condemnation of the brig, as before, whereby his remedy was suspended, and could not be enforced during the life time of *Samuel Howard*, the administrator.

The defendant rejoined, that the brig was captured on her homeward voyage; that for all wages accruing on the outward voyage, the plaintiff might have had his remedy against the owners, on his return to the United States, in *September*, 1797;—and that, as to wages accruing from and after the lapse of half the period of her stay at *Trinidad*, protesting that none were due, the plaintiff did not, at any time within three years, or within the term of four years after the original grant of administration to *Samuel Howard*, file his claim in the Probate office in the county of *Kennebec*, where the administration was granted, to the end that the Judge of Probate might have directed the administrator to retain in his hands sufficient assets to answer the demand at its maturity, according to the statute in that case provided.

The plaintiff surjoined that for the term of four years after the original grant of administration, his claim was suspended by reason of the capture and condemnation of the brig, and did not revive until after the expiration of that period.

To this also the defendant answered by a general demurrer.

Allen, in support of the demurrers, insisted that the replication to the second plea was bad, as it neither denied that the term of four years had elapsed, nor did it confess and avoid it. This limitation of suits against administrators is introduced, not merely for their benefit, but for that of heirs and creditors, and it is a peremptory bar. The administrator cannot avoid it, and bind the estate by a new promise. *Parkman v. Osgood* 3. *Greenl.* 17. *Brown v. Anderson* 13. *Mass.* 201. *Thompson v. Brown* 16. *Mass.* 172. *Emerson v. Brown ib.* 429. *Ex parte Allen* 15. *Mass.* 58. *Ex parte Richmond* 2. *Pick.* 567.

The suspension of the claim did not prevent the plaintiff from filing it in the Probate office; in which case he might have pursued the remedy given by the statute; not against the administrator, but against heirs and devisees, to whom the money may have been paid over.

The question probably intended to be presented, does not arise in the case; since the plaintiff has chosen to sue the defendant in his capacity of administrator. Against him he can have no other remedy than such as existed against the intestate. But as the intestate never received any money for the claim, no action, by the plaintiff's concession, could have been sustained against him; or, if any ever existed, it is now barred by the statute. The defendant received no money but such as belonged to the estate. Had he preferred a claim for all persons concerned, and received the money as their trustee, the case would have presented a different question. But it is not in that character that he is now sought to be charged.

R. Williams, on the other side. The plaintiff had two remedies for his wages; and but one of them is lost. The present suit is not an attempt to revive the personal claim against the owners; but is in the nature of a process *in rem.* It was suspended on the disappearance of the vessel; and revived again, and attached itself to the fund which was awarded in the vessel's stead, and which is the vessel itself, as to all substantial purposes of the lien for seamens' wages. The administrator, therefore, received the money in trust for all who were interested in the property it represented; and he is bound to distribute it accordingly. *Appleton v. Crowningshield* 8. *Mass.* 340. *Heard v. Bradford* 4. *Mass.* 326. *Brooks v. Dorr & als.* 2. *Mass.* 39. *Spafford & als. v. Dodge* & *als.* 14. *Mass.* 66. *Hooper v. Perley* 11. *Mass.* 545.

No action lies against the heirs; for they have received no money. Nor will the Judge of Probate ever require the administrator to distribute to them the money claimed by the plaintiff. It is not a subject of Probate jurisdiction, for it does not belong to the estate. And for the same reason it cannot be retained by the administrator, under *Stat.* 1821, *ch.* 52, *sec.* 27; which speaks only of demands created by express contract, which fall due on a day certain, and

this not till after four years from the grant of administration. But here was no treaty in existence when that period expired; nor any reason for authorizing the administrator to retain the money, nor for requiring the heirs to give bond.

But if the case were one which might, under certain circumstances come within the statute, and give a remedy against heirs; yet that remedy is not matured. For no action lies against an heir, during an open administration. While the administrator officially exists, he represents the estate, and he alone is responsible. 12. *Mass.* 395. 1. *Dane's Abr. ch.* 29. *art.* 4. *sec.* 12. It was in that capacity that he received the money, and now insists on retaining it; but it was in trust for the plaintiff, and he is liable *de bonis propriis. White v. Swain* 3. *Pick.* 365. *Moody v. Webster ib.* 424. Or, for the purposes of justice, the intestate may be presumed to have promised that whenever freight should be recovered, he would pay the seamen their wages. 1. *Dane's Abr. ch.* 29. *art.* 17. 2. *Dane's Abr. ch.* 57. *art.* 2.

The opinion of the Court was read at the ensuing *October* term, as drawn up by

Mellen C. J. Notwithstanding the extent of the pleadings and arguments in this case, upon a careful examination we find that the decision of it depends on plain and well settled principles, some of which appear to have received little consideration from the counsel. When all unimportant facts are laid out of view, those remaining have nothing new or perplexing about them. We will, however, give a brief statement of them all; and the following are the facts appearing upon the face of the pleadings, or, by distinct implication, admitted by them.

In the year 1797, the firm of *James Davidson & Company*, of which *William Howard* the intestate was the surviving partner, were owners of the brig *Venus*. In that year she sailed from *Bath* on a voyage to *Trinidad*, and back to the United States. She was captured on her homeward voyage, and condemned by authority of the King of Spain. The plaintiff was a seaman on board said brig during said voyage, until the time of her capture. Immediately af-

ter the capture he returned to *Georgetown*, in this State, in *September* of that year. *Howard* died on the 10th of *April* 1810. On the 20th of *August*, in the same year, *Samuel Howard* was duly appointed administrator on his estate, and then accepted the trust; giving bond and notice of his appointment and qualification, within three months, according to law. The plaintiff did not commence his action for the recovery of the sum now demanded, or any other sum, against the firm, or against *William Howard*, or the administrator, at any time within four years next after his acceptance of the trust; though during all that time, and ever since the capture, there was no legal impediment to such action. The present defendant is the administrator *de bonis non* on the estate of *William Howard;* and on the 1st day of *July* 1824, in that capacity, he received from the government of the United States 8000 dollars for and on account of the capture and condemnation of the brig, and loss of her freight.

As nothing appears to the contrary, we are to consider the estate of *William Howard* as sufficient to pay all debts for which he stood answerable at the time of his decease.

Such being the facts, the plaintiff, since the receipt of the above sum by the defendant, has commenced this action, in which he declares against the defendant on his promise to pay the money by him owed as administrator. The defendant pleads, first, that no cause of action accrued to the plaintiff within six years next before the commencement of the action; and secondly, that no action was commenced against the first administrator, within four years next after his acceptance of his appointment. The subsequent pleadings, disclosing the several facts before stated, terminate in general demurrers to the surrejoinders. The replications to both pleas, and the rejoinders to both replications, are substantially the same, though there is some difference in the surrejoinders, to be noticed hereafter.

As to the first plea in bar;—whatever right of action the plaintiff had for his wages on the outward voyage, accrued to him certainly as early as his return to this State in *Sept.* 1797, where the owners then esided, and where *William Howard* continued to reside until his

death in 1810. On this principle the plaintiff's action was barred by the statute of limitations, as early at least as *October* 1803; for no reason is assigned why an action was not commenced within six years after the right of action accrued, and no new promise is alleged, or fact disclosed, in the replication, shewing a revival of the right of action. The only circumstance relied on is the receipt of the 8000 dollars by the defendant, in his official capacity, in 1824; twenty one years after the statute had attached. Now of what importance is this fact, shewing this addition to the funds in the hands of the administrator, belonging to the creditors or heirs? There were sufficient funds before in his hands to pay the plaintiff's demand, if any thing was due, and had not been barred by law before any administration was ever granted. The principle contended for would be dangerous and unjust in its operation; for if adopted, the consequence would be that any payments made to an administrator after a debt was barred by the statute, would at once revive the right of action as effectually as a new promise;—a consequence which no one can seriously anticipate. In this view of the subject, it is evident that the replication is totally insufficient, and in no respect answers or avoids the plea in bar; and this being the first fault, it is unnecessary to examine the merits of the rejoinder or surrejoinder. The plea being good, bars this action against the defendant as administrator.

As to the second plea in bar;—here again it appears that the plaintiff's action against the first administrator was barred, because no action was commenced against him within four years next after his appointment, qualification, and giving notice of the same; and this is a good plea in bar in a suit against the administrator *de bonis non*. *Heard v. Meader, adm'r.* 1. *Greenl.* 156. Does the replication to this plea in any legal manner answer or avoid it? If any thing, it seems more exceptionable than the replication to the first plea. The plea itself contains matter constituting a good bar to the action against the defendant as administrator. The act relied on by the plaintiff, as obviating the bar, is the receipt of the 8000 dollars. It is contended that by implication it has the effect. We cannot admit this doctrine; for when an action is barred by the statute limiting actions against executors and administrators, it is not in the power of

an executor or administrator, by his express promise to pay the debt, to revive the action so as by means thereof to render the estate chargeable with its amount. *Dawes v. Shed & al. ex'rs.* 15. *Mass.* 6. That it is a much stronger case than the one under consideration. If this plea can be avoided by such a replication, the same new and strange consequences will follow that we have before noticed; that is to say, the receipt by the administrator, of an outstanding debt, after the expiration of the four years, will at once remove the statute bar, and revive the rights of action in favor of those who, by their negligence, have lost them; and thus, in fact, virtually repeal the wise provisions of a salutary statute. The replication being bad, we say nothing of the rejoinder or surrejoinder; but only adjudge the plea a good bar to the plaintiff's action against the defendant in his official capacity. In the view we have thus far taken of the cause, we consider all the facts in relation to the treaty with Spain, and the payment of the sum awarded by the commissioners, into the hands of the defendant as administrator, to be wholly irrelevant; in no degree changing the aspect of the cause in respect to either of the parties.

But as the action is attempted to be supported, not on any promise made by the intestate *William Howard*, but by the defendant himself in consideration of his being indebted as administrator; we will consider the merits of the plaintiff's claim in this point of view. It is not pretended that any express promise was made; the declaration itself shews that an implied promise only is relied on; as it is alleged to have been made in consideration of his having received a sum of money, as stated in one count, and of being indebted, as stated in the other count. Besides, the replication shews most distinctly that the plaintiff rests his cause upon those facts therein stated, from which it is contended that the law raises a promise of payment. Considering the plaintiff's action as founded on the promise of the defendant, and considering that promise as binding on him personally, it would follow of course that neither of the pleas in bar would be good. The first would not be, because the receipt of the 8000 dollars which is relied on as furnishing the right of action, was in 1824; and on this ground the cause of action accrued within

six years before the commencement of the action; and the second would not be, because it does not profess to bar the action by any limitation protecting him in his private capacity, but only in his character of administrator. In this view of the cause then, the pleas being insufficient, we must go back to the declaration, and examine whether, upon the facts disclosed by the pleadings, that is good and sufficient in law to maintain the action; and we must look to those pleadings, inasmuch as those facts, which the plaintiff relies on, are not noticed in the declaration, but are spread at large in the replication. In the circumstances of this case, does the law imply a promise, on the part of the defendant, to pay the plaintiff the sum he demands? In answering this question several particulars are to be considered. 1. The plaintiff's claim for his wages on the outward voyage, if ever well founded, was barred and irrecoverable many years before the money was received by the defendant from the United States. He had then no legal rights whatever; and therefore there is no more ground for implying a promise in favor of the plaintiff than of any other person. 2. The 8000 dollars when received by the defendant, was the property of the heirs of *William Howard*, subject to the existing legal claims of creditors; and to these heirs and creditors the defendant, as administrator is accountable for the amount; *White v. Swain* 3. *Pick.* 365; and being thus accountable on his administration bond, it would be unjust and unreasonable to imply a promise directly inconsistent with that express obligation, and thus render the defendant twice liable for the same sum. 3. There is no privity between the plaintiff and the defendant. In this respect they are strangers to each other. 4. Neither is there any consideration to raise and support the supposed promise. No benefit has been, or can be received by the defendant for such a promise; on the contrary, to hold him bound by an implied promise, would subject him to certain injury. Neither has the plaintiff parted with any rights or benefits, which can be deemed a consideration; and it is surely a well settled principle that there must be a loss on one side, or a benefit on the other, to constitute a consideration. And here we must again repeat the remark, that it would be a species of judicial heresy to decide that a right of action once barred by the

general statute of limitations as against a defendant in his capacity of administrator, should by a subsequent receipt of an outstanding debt, be *ipso facto*, revived as against such defendant in his private and personal capacity so as to render him personally liable.

It is true, as the court observe in the case of *Brown & al. v. Anderson & al.* 13. *Mass.* 201, that the general statute of limitations has always been considered as furnishing to debtors *prima facie* evidence of payment; and therefore an acknowledgment of the debt by an executor or administrator, as well as by the original debtor, has been holden to avoid the statute; so, *a fortiori*, has a new promise; but such new promise or acknowledgment must be express and unambiguous. *Perley v. Little* 3. *Greenl.* 97, and cases there cited, and *Bangs v. Hall* 2. *Pick.* 368.

But we may safely go one step further, and say that if the defendant, when he received the 8000 dollars, had expressly promised the plaintiff to pay his demand, it would not avail him in this cause. We have before cited the case of *Dawes v. Shed* to shew that such a promise could not avoid the special statute of limitations, and again bind the estate; and to the same point we again cite the case of *Brown v. Anderson.* Nor would it bind the administrator personally, unless under special circumstances. Thus, in the case of *Scott v. Hancock & al.* 13. *Mass.* 162. *Jackson J.* in delivering the opinion of the court, observes, when speaking of the effect of a promise of an executor or administrator to pay a debt barred by the special statute of limitations of 1791, that if the executrix alone was interested to dispute the claim, her promise to pay it might prevent her from successfully pleading the statute; but he observes, "the heirs, out of whose estate the money is to come, if lawfully recovered by the creditor, have a right to deny that fact; they may also dispute its legal effect and operation; unless the promise has been made in writing and for a valuable consideration, so as to bind the administratrix personally; in which case the estate in their hands would be exonerated." But this idea need not be pursued any further on this occasion, as we have no evidence of any express promise, in writing, or by parol; or of any valuable consideration.

As we have before observed, the defendant, in his official capac-

ty, is answerable for the sum received of the United States; and he must render an account of it in the usual manner to the Judge of Probate, as the defendant was holden to do, in *White v. Swain.* If the estate of *William Howard* had been represented and found to be insolvent, and the plaintiff had duly filed and proved his claim for the wages earned before the commissioners, he might have applied to the Judge of Probate to cite the defendant before him, to render an account of the property received under the treaty; and on his refusal or neglect, he might have commenced an action on the probate bond and thus obtained justice. Or, as the estate of Howard is solvent, he might, within the four years by law allowed him, have commenced his action for such wages, and recovered judgment; and if such judgment had not before been satisfied, he might have availed himself, in such case, of the benefit of the probate bond, according to the provisions of our statute regulating proceedings on probate bonds. But as the plaintiff, by his own negligence, suffered his claim to become barred by law, these are principles and proceedings, in which he now can have no interest or concern. He, long since, voluntarily abandoned whatever demand he could once have asserted against the firm of *James Davidson & Company*, or against *William Howard*, the surviving partner, or against *Samuel Howard*, the first administrator; and nothing has since transpired, which has revived it.

But, according to the argument of the plaintiff's counsel, even if no remedy exists for the recovery of the wages earned on the outward voyage, the claim is well founded in law, for the wages on the homeward voyage, up to the time of the capture of the brig. This leads us to notice the difference between the surrejoinders, to which allusion was made in the former part of this opinion. The first surrejoinder states that the sum awarded by the commissioners, and received by the defendant, was allowed for the wrongful capture, detention and condemnation of the brig, including the loss of her freight. This fact the demurrer admits, and, as has been before stated, the defendant is accountable to the Judge of Probate for the 8000 dollars; it belongs to the heirs at law of the intestate, subject to the payment of those debts which he owed at the time of his de-

cease, and which are now existing as *legal* claims against the estate; and of those only. Such was the debt in the before cited case of *White v. Swain.*

The second surrejoinder avers that the plaintiff's right of action was suspended by reason of the capture and condemnation of the said brig, and did not revive until after the lapse of four years, next following the defendant's appointment as administrator. But it appears that there was no suspension of right as to the sum sued for as wages, as is alleged in the surrejoinder. No claim for wages on the homeward voyage ever existed, against the firm, or against the intestate, at the time of his decease; because such wages were never earned; and they were never earned, because the capture and condemnation prevented it. The award of the commissioners, and their allowance of the 8000 dollars, and the payment of it to the defendant, could not legally create an obligation after the dissolution of the firm by the death of the intestate, or create a right of action against the defendant in favor of a man who had none before; though it might undoubtedly operate legally by way of indemnification to those whose pre-existing rights had been violated by the capture and condemnation, and which rights remained unimpaired at the time of the award and payment. There is a clear distinction between the two cases, which requires the application of different principles. On this point the counsel for the plaintiff has cited the cases of *Heard* assignee of *Geyer & son v. Bradford* 4 *Mass.* 324, and *Appleton v. Crowninshield* 8 *Mass.* 340, as decided on principles which will sustain the present action. We apprehend they differ from it in some essential particulars. In the former case *Geyer & son* had chartered a vessel of the defendant; on her voyage she was captured by admiral *Jarvis;* and upon demand made on them by the defendant, *Geyer & son* paid him the stipulated hire up to the time of the capture. Afterwards the commissioners under Mr. *Jay's* treaty awarded to the defendant the sum of 1500 dollars for the freight of the vessel; being the same amount which *Geyer & son* had paid him. The action was brought for the first instalment of the sum which the defendant had received, and it was sustained. The court observed that the defendant was not entitled to both sums on the same account. It will be observed that the defendant was a party to the

original transaction, and the man who had himself received the money; and having received it twice over, there was no justice in his retaining more than one satisfaction. This was the ground and spirit of the decision. The defendant might well be considered as having received the instalment as the agent and for the use of *Geyer & son*, because it was allowed for the benefit of those whose rights had been invaded, and *Geyer & son* came within that description; and because the defendant had received of them a complete satisfaction for the hire of the vessel, which the award was intended to satisfy. Or it may be considered that the receipt of the sum awarded, implied a promise to repay to *Geyer & son*, what they had paid him.

In the case of *Appleton v. Crowninshield*, the facts were shortly these. *Appleton* loaned a sum of money to *Crowninshield*, upon a bottomry bond on the schooner *Charming Sally*. The bond was conditioned for the payment of the sum borrowed and interest, within twenty days after her return to *Salem*, or a port of discharge in the United States; and that if the schooner should be lost by the perils of the sea, or by fire, or the enemies of the United States, while performing her voyage, the bond was to be void.

The vessel never did return to any port in the United States, but was captured by the British and condemned; but on appeal the decree of condemnation was reversed and restoration ordered; but, for some reason, she was never restored. The commissioners, under the treaty of 1794, awarded to the defendant full compensation for the vessel and freight; and the amount had been paid to him. The action was brought to recover this sum; and a majority of the court sustained it. An action had been previously brought on the bond, but as the schooner never arrived according to the condition, judgment was rendered against the plaintiff. Here again we find that the parties to the original contract were the parties in the suit; and the defendant himself had received the sum awarded, in his own right, and in that right claimed it. One of the justices who argued in sustaining the action seems to have grounded his opinion in a good measure on the principle that the plaintiff had an interest in the vessel at the time of the capture, to the amount of the bottomry bond,

because he had advanced that sum on loan to the defendant. It was a vested interest, subject however to be defeated and destroyed by certain subsequent events and conditions; and having been destroyed, the same amount of interest was considered as vesting in the plaintiff, in the compensation allowed by the commissioners. The other justice was of the same opinion as to the appropriation to the plaintiff's use of a proportion of the sum awarded to the defendant; and though he admitted that the "plaintiff's title was derived from the original contract and loan, and the events which determined it," yet he goes on to observe that "the defendant's liability in this action does not depend upon the circumstance that he was a party to the former contract; but he is liable, as any other person would be, who holds money which he is not entitled to retain, and which belongs to the party demanding it." He speaks of the plaintiff as "a partner in the loss," and of course that the compensation awarded must be considered "as including the plaintiff's share and concern in the loss." It would seem that by the terms "partner in the loss" the learned judge must have intended a vested right at the time of the capture, subject to be defeated and destroyed. Viewing the decision, however, as it stands, and without suggesting a doubt as to its soundness and accuracy, we apprehend that the case at bar presents a question, to which the principles of the two foregoing cases do not apply;—a question different in its nature from those we have been examining, and which has been so considered in several decided cases. When the brig was captured, the plaintiff, it is admitted, had earned and was entitled to his wages on the outward voyage, and during half the time the brig was in port; and those wages he has lost, by the operation of the statutes of limitation, as we have before stated. But as to any other or further sum, he had no claim whatever at the time of the capture. If there had been no capture, he would not have been entitled to any wages on the homeward voyage, until the arrival of the brig at her port of discharge. The capture, then, did not divest any of the plaintiff's rights, for he had none subject to be divested. The earning of freight was a condition precedent to the vesting of any right to wages on the homeward voyage; and freight was never earned. The wages of a sailor are not pay-

able, if the ship be captured and afterwards ransomed, and then proceed to her port of discharge and deliver her cargo. *Wiggins v. Ingleton*, 2. *Ld. Raym*, 1211. In the case of *The Friends*, 4. *Rob.* 116, the vessel was captured, and a seaman taken out and carried to France; and afterwards the vessel was recaptured, and proceeded to her port of destination. It was held that the seaman was not entitled to his wages, even up to the time of capture. So in the case of *M'Quirk v. Ship Penelope*, 2. *Pet.* 276, it was decided, that the ship having been captured and condemned, the libellant could not recover his wages, though the owner had recovered the freight from the underwriters. The court observed that the seaman was no party to the insurance; nor was the defendant, in the present case, a party to the treaty with Spain. But still, in both cases, a fund was placed in the hands of the defendant, as an equivalent for the freight, and yet the libellant was not allowed any part of it; the capture and condemnation disproving all legal right on his part. But we forbear to pursue the idea any further. In every view of this cause we are all satisfied that the present action cannot be maintained. And though our opinion, as to some of the grounds of defence, is founded on defects in the pleadings anterior to the surrejoinders, yet as these are demurred to, for form's sake we adjudge the surrejoinders insufficient. *Judgment for the defendant.*

The inhabitants of SIDNEY *vs. The inhabitants of* WINTHROP.

An illegitimate child does not gain a new derivative settlement under the mother; but retains that which the mother had at the time of the birth.

The illegitimate *non compos* child of a *non compos* mother is considered as emancipated, for all the purposes of the act concerning the settlement and support of the poor.

IN this action, which was *assumpsit*, and came before the court upon a case stated by the parties, the question was upon the settlement of one *Maritta Tribou*, an illegitimate daughter of one *Polly Snell*.

Polly Snell, the mother, was the daughter of *Elijah Snell*, who dwelt and had his settlement in *Bridgewater*, in Massachusetts. She was born in 1780, and was *non compos mentis*, as was also her daughter, the pauper. In 1802 her father removed to *Winthrop*, leaving *Polly* in the care of a married sister of hers in *Bridgewater*, to whom he paid about fifty dollars a year for her support and that of her first illegitimate child. In 1806, being pregnant with *Maritta*, the pauper, she came to her father's house in *Winthrop*, where she remained four or five months. He then entered into a written contract with his son *Calvin Snell*, of *Sidney*, to support *Polly* and her last mentioned child during their respective lives, for which he gave *Calvin* a farm in *Sidney*, worth seven hundred dollars. Under this contract they were supported by him in *Sidney*, till April 20, 1824, when the pauper became chargeable to that town. The grandfather of the pauper gained a settlement in *Winthrop*, in three years after his removal thither, and died in that town about the year 1810.

Boutelle, for the plaintiffs, argued that the mother, being *non compos* from her birth, was never emancipated; and therefore continued to follow the settlement of her father, which was in *Winthrop*, although she was more than twenty-one years old at the time of his removal to that town. *Upton v. Northbridge* 15. *Mass.* 237. *Wis-*

casset v. Waldoborough 3. *Greenl.* 388. And by *Stat.* 1793, *ch.* 34, the pauper, being illegitimate, has the settlement of her mother, until she acquires a new one by some act of her own. *Boylston v. Princeton* 13. *Mass.* 381.

The *Stat.* 1821, *ch.* 122, could not affect the case, because the mother was only at board in *Sidney;* and the pauper was then a minor, subject to the legal control of her mother, who was bound to support her, if of sufficient ability; and had the legal custody of her person, at least till a guardian was appointed.

A. Belcher, for the defendant, argued that the home, both of the mother and child, was in *Sidney* at the time of the passage of *Stat.* 1821, *ch.* 122; and that therefore they acquired settlements there, under its particular provisions. The father of *Polly Snell* had provided them a dwelling and support there, during their lives; and had thus emancipated his daughter, and given to her and the pauper a *jus domicilii* with his son. *St. George v. Deer Isle* 3. *Greenl.* 390. *Boothbay v. Wiscasset ib.* 354.

MELLEN C. J. delivered the opinion of the Court.

Maritta Snell, the pauper, was born in 1807. She is an illegitimate, *non compos* daughter of *Polly Snell*, who is also *non compos.* Admitting that at the time of the pauper's birth, the legal settlement of the mother was in *Winthrop*, and that in consequence, the derivative settlement of the pauper was also in that town, still it is contended that both mother and daughter gained a new settlement in the town of *Sidney* in virtue of the act of 1821, *ch.* 122; as they both, at that time, and for several years before, had a permanent home in that town in the family of *Calvin Snell.* Upon the facts of the case, there is no question that at the time of the passing of the act they both resided, dwelt and had their home in *Sidney*, within the true meaning of the law. The only question is, what effect the act had upon them, if any, in relation to their settlement, or the settlement of either of them.

As the Court observed in the case of *Lubec v. Eastport* 3. *Greenl.* 220, the act operated to fix the settlement of thousands without any

violation on their part ; and it seems clear that the want of understanding and power of volition furnishes no valid objection against the capacity of the mother to gain a settlement, or rather to be settled in *Sidney ;* nor do we see why the same consequences do not follow in respect to the pauper, in the peculiar circumstances of this case, according to the principles on which the decision in *Lubec v. Eastport* is founded. She was then about fourteen years of age. However it is contended that as there is no proof of emancipation, her settlement could not have been affected by the act above mentioned. But her mother had no family ; and both were maintained at the expense of *Snell.* The mother had not understanding and capacity sufficient to enable her to emancipate her daughter ; neither was the daughter under the superintendence, protection or control of the mother. As to all these purposes, she was in the situation of a destitute and helpless orphan ; and as completely so, as the pauper was in the case of *Lubec v. Eastport.* On these grounds it seems clear that no principle opposes the operation of the statute to fix her settlement in *Sidney* ; and by giving it this construction, her settlement and that of her mother are both established in the same town ; of course they cannot be legally separated. This is a circumstance always regarded, and is generally decisive in questions relative to the derivative settlement of minor children ; but the minor in the present instance being illegitimate, cannot gain a new derivative settlement under the mother, but must retain her settlement in the town where the mother's settlement was fixed at the time of the child's birth. Both these unfortunate beings are therefore settled in *Sidney ;* and a nonsuit must be entered. *Plaintiffs nonsuit.*

MURRAY, *plaintiff in review vs.* ULMER, *original plaintiff.*

An action of trespass *quare clausum fregit*, originally brought before a Justice of the peace, and tried upon review in the Court of Common Pleas, may be brought by appeal into this Court, though no plea of soil and freehold was filed before the magistrate, the defendant having been accidentally defaulted.

Ulmer brought, before a Justice of the peace, an action of trespass *quare clausum fregit* against *Murray*, who was defaulted by accident, and judgment entered against him for twenty dollars damages, with costs. *Murray* then applied to the Court of Common Pleas for a writ of review, which was granted; and upon trial of the review upon the plea of soil and freehold, judgment was rendered in that court for the original defendant; and thereupon *Ulmer* appealed to this court, and at the last *October* term became nonsuit. *Murray* moved for costs, which was opposed by a motion on the part of *Ulmer* to set aside the nonsuit, and dismiss the action, as having been improperly brought into this court.

Sprague, for the original plantiff, contended that no appeal would lie, in a case like the present. The statute gave the right of appeal only in cases originally commenced in the Court of Common Pleas. But a single exception is made, which is of actions of tresspass *quare clausum*, commenced before a Justice of the peace, where the plea of soil and freehold is filed with the magistrate, and the case brought up by recognizance. But this case is neither within the rule, nor the exception.

THE COURT overruled this motion, and sustained the appeal, rendering judgment for the original defendant, for costs.

Little, for the original defendant.

Dingley *vs.* Robinson.

One having fraudulently obtained goods under pretence of a purchase, the creditor pursued him for satisfaction; and a compromise was so far effected, as that, for a valuable consideration, the creditor affirmed the sale from himself, and agreed that the debtor might sell the goods to A. Afterwards, the original term of credit having expired, the creditor sued the debtor, and attached the same goods as his property; and in an action of tresspass, brougnt by A against the sheriff for taking these goods, it was held that the terms of the agreement did not estop the creditor from impeaching the sale to A as fraudulent.

This was an action of trespass against the sheriff of this county, for taking certain goods, claimed by the plaintiff.

At the trial before *Weston J.* it appeared that one *John Reed Jr.* had fraudulently obtained, under pretence of fair purchase, a large quantity of goods from divers persons in *Portland*, the particulars of which are stated in the case of *Seaver v. Dingley*, 4. *Greenl.* 306. Among these were certain goods, to the value of about 450 dollars obtained from *Bartels & Baker*. The goods having arrived in a vessel at *Gardiner*, on the way to *Clinton*, where *Reed* resided, were conveyed by him to *Dingley*, the plaintiff, *Aug.* 20 1824, who landed and stored them there. *Bartels & Baker*, having discovered the fraud of *Reed*, in falsely representing his character and circumstances, pursued him, to obtain payment or indemnity; and on the 24th of *August* 1824, entered into a compromise, by which *Reed*, and *Dingley*, the plaintiff, give them quitclaim deeds of certain real estate, and of a patent clapboard machine, for the nominal consideration of a thousand dollars; but of the real value of about three hundred; and they signed a memorandum on the back of *Reed's* original bill of parcels of the goods, of the following tenor:—"We hereby agree with *Nathaniel Dingley*, that he may purchase of the within named *Reed* the within described goods; and that we have no claim on the same, but have sold the same to said *Reed*, and expect to look to him for the pay for the same." It did not appear that at this time *Bartels & Baker* had any knowledge of the previous conveyance to *Dingley*. After

this, when the original credit agreed upon had expired, they sued *Reed* for the price of the goods, and attached the parcel conveyed to *Dingley*, as *Reed's* property, on the ground that the conveyance was fraudulent.

The plaintiff contended that the defendant, acting for *Bartels & Baker*, could not impeach the transfer as fraudulent against them, by reason of the transactions of the 24th of *August*. But the Judge ruled otherwise, reserving the point, however, for the consideration of the court; and instructed the jury that if they were satisfied, from the evidence, that the sale from *Reed* to *Dingley* was fraudulent, to find for the defendant; which they did.

R. Williams and *Boutelle*, for the plaintiff, contended that the creditors were estopped to impeach the sale to him, having waived their right for a valuable consideration, by their agreement on the back of the bill of parcels. And this agreement amounts to a ratification of the sale previously made by *Reed* to the plaintiff, and a stipulation to resort to him alone for the payment. 1. *Pick.* 164. *Steele v. Brown* 1. *Taunt.* 382.

But if not, yet they have no right to impeach the sale, until they have reconveyed the property which the plaintiff conveyed to them.

Allen and *Sprague*, for the defendant, argued that the agreement meant nothing more than an affirmance of the original purchase by *Reed*, and a consent that *Dingley* might purchase the goods of him, for a valuable consideration; not that he might take them by fraud, and without payment.

To the point that the transaction was not an estoppel, they cited 15. *Mass.* 106. *Black v. Tyler* 1. *Pick.* 150. 1. *Str.* 79. *Thurbane's case*, *Hardr.* 323. 5. *Dane* 383, *ch.* 160, *art.* 1, *sec.* 22. *Bayley on bills* 66. 14. *Mass.* 437.

Weston J. delivered the opinion of the Court, at the ensuing *June* term in *Penobscot*.

John Reed obtained on credit of *Bartels & Baker*, merchants in *Portland*, the goods, for the taking of which this action is brought; but under circumstances of fraud on the part of *Reed*, which gave to

them a right to vacate the sale. This fact appeared at the trial; has been assumed in the argument; and is implied from the certificate making a part of this case, introduced and relied upon by the plaintiff; although it is not distinctly stated in the report.

On the part of the plaintiff it is urged that, as between *Reed* and himself, the sale to him was good, and that *Bartels & Baker* having agreed, for a valuable consideration, not to interfere with it, ought not to be permitted so to do. Or that, if their agreement was intended as a waiver of their right to reclaim the goods, by reason of the circumstances under which they were procured from them, it is a virtual and substantial violation of that agreement to attempt to take them from the plaintiff, by attaching them as the property of *Reed.* But upon consideration, we cannot understand from the certificate, that any thing more was intended or implied, than that *Bartels & Baker* hereby affirmed the sale to *Reed*, as it was competent for them to do; and agreed to look to him for payment therefor, and not to reclaim the goods, by replevin or otherwise, as their property, upon the ground that a fraud had been practised upon them by *Reed.* They cannot be considered as having agreed that the plaintiff might fraudulently, under the form and pretence of a sale, take possession of these goods, and defeat their right to attach them as the property of *Reed.* They agreed that the plaintiff might purchase the goods, and that for this purpose they might be considered as belonging to *Reed;* but by a purchase, we must understand a *bona fide* purchase, not one infected with fraud. It has been insisted that this construction is too narrow and limited; inasmuch as the plaintiff might have purchased the property of *Reed* for a valuable consideration and held it, without obtaining the permission and assent of *Bartels & Baker.* This is true, provided he was ignorant of the circumstances under which *Reed* procured them. But it is sufficiently apparent, from the solicitude he discovered to induce them to affirm their sale, and the valuable consideration he paid them therefor, that he knew that they had a right at their election to vacate the sale, and to reclaim the goods.

The opinion of the court is, that *Bartels & Baker*, by reason of

the said certificate, were not restrained from attaching the goods in question, as the property of *Reed;* and that there must therefore be *Judgment on the verdict.*

The PRESIDENT *&c. of the* KENNEBEC BANK *vs.* TUCKERMAN.

Where the payee of a note, after having been requested by the surety to collect the money of the principal, gave further time to the principal, in pursuance of a new agreement with him to that effect, it was held that the surety was discharged.

Assumpsit by the plaintiffs as payees of a promissory note, against the defendant as maker. The note was dated *Oct.* 27, 1817, in the usual form of a joint and several note, payable in fifty-seven days with grace, signed by *Benjamin Adams*, with the names of two persons underneath, as sureties, payable to the plaintiffs, and discounted at their bank. Before it was offered for discount the defendant wrote his name across the back of it.

At the trial before *Weston J.* the defendant contended that the note did not support the declaration. But this objection was overruled. The jury, being requested to determine certain facts, found that the defendant requested the plaintiffs to collect the note of the principal; that afterwards the plaintiffs did verbally agree with the principal to allow him further time; that the interest was paid in advance by the principal debtor, every sixty days, up to *July* 1825; the last payment having been in *May* of that year; and that the plaintiffs, if they had used all the means in their power, after the request made to them by the defendant, might have collected of the principal debtor more money than they did, by the sum of $226,83.

The judge directed the jury to return a verdict for the plaintiffs, upon this evidence, reserving its legal effect for the consideration of the court; the parties consenting that the verdict might be amended accordingly, or set aside, and a nonsuit entered.

Sprague, for the defendant, contended that his undertaking was

evidently not of the nature of an original promise; for if so, his name would have been placed with those of the other sureties. Having placed it on the back of the note, the necessary inference is that he stipulated only in the character of indorser. *Herrick v. Carman* 12. *Johns.* 159. *Nelson v. Dubois* 13. *Johns.* 175. *Campbell v. Butler* 14. *Johns.* 439. *Tillman v. Wheeler* 17. *Johns.* 326. The cases where the party has been holden as an original promissor, have turned on his apparent agreement to be responsible at all events. *Joslyn v. Ames* 3. *Mass.* 274. *Carver v. Warren* 5. *Mass.* 546. *White v. Howland* 9. *Mass.* 314. *Moies v. Bird* 11. *Mass.* 426.

But whatever may have been the form of his original liability, the defendant is now absolved; both by the neglect of the plaintiffs to enforce their remedy against the principal, and by their having given him new and further credit. *Ludlow v. Simond* 2. *Caines' Ca.* 1. 7. *Johns.* 332. *Boynton v. Hubbard* 7. *Mass.* 118. *Rathbone v. Warren* 10. *Johns.* 587. *Reeves v. Barrington* 2. *Ves.* 540. *Duval v. Trask* 12. *Mass.* 156. *Aylett v. Hartford* 2. *W. Bl.* 1317. *Paine v. Packard* 13. *Johns.* 174. *King v. Baldwin* 17 *Johns.* 384.

E. T. Warren, for the plaintiffs, replied that the case showed nothing more, on their part, than merely delay in the collection of the note. And this was for the benefit of the sureties. No indulgence to the principal can discharge sureties or indorsers, unless it is such as to affect the contract itself, and impair their remedy over. *White v. Howland* 9. *Mass.* 314. *Hunt v. Bridgham* 2. *Pick.* 581. *Crane v. Newhall ib.* 612. 3. *Stark. Ev.* 1389. *note.* But here could have been no agreement, because a corporation cannot contract by parol.

Mellen C. J. delivered the opinion of the Court, at the ensuing *November* term, in Cumberland.

The defendant having signed his name in blank, on the back of the note in question, has made himself answerable in the same manner as though he had signed it in the usual form, as the other promissors did. All the four persons are to be considered as having promis-

ed jointly and severally. The only question is, whether the defendant, who, it is admitted, was only a surety, with others, for *Benjamin Adams* the principal, has been discharged from his original liability, by reason of the transactions which took place between the bank and the principal. This original liability of the defendant as a copromissor, seems established by the cases of *Carver v. Warren*, 5. *Mass.* 545. *White v. Howland*, 9. *Mass.* 314, and *Moies v. Bird*, 11. *Mass.* 436.

As to the main question, the facts are few and simple. The note continued to lie in the bank, from the time it was discounted, until *May*, 1825—nearly eight years—not renewed in form; but the plaintiffs agreed with the principal, to allow him further time, and the principal, every sixty days, paid the interest on the note in advance, during the above period. This course of proceeding was pursued, probably, for convenience; and as between the bank and the principal, at least, was equivalent to a renewal of the note every sixty days; and the receipt of interest, in advance, for sixty days, was an agreement to give credit for that term. The transaction can admit of no other construction, consistently with honesty and fairness; and it could not have been considered in any other manner, by the parties immediately concerned. It has been said that parol agreements cannot be made by a corporation; but they may be, and usually are by bank directors, in relation to subjects of this nature; we, therefore, do not deem this a valid objection. By the report it does not appear that this long delay and course of proceeding, were even known to the defendant; it is stated to have taken place after he had requested the plaintiffs to collect the note of the principal. It remains for us only to apply the law to these facts. A mere delay to sue the principal, and collect the money of him, does not discharge the surety; as is admitted by the defendant's counsel, and is established by *Locke v. The United States*, 3. *Mason*, 446; and by numerous other decisions, which are collected in the case of *Hunt, executor, v. Bridgham, & als.* 2. *Pick.* 581; provided such delay be unaccompanied by fraud, or an agreement not to prosecute the principal. But in the same case, and those therein cited, it is also settled that such an agreement does discharge the surety;

and in *Pain v. Packard*, 13. *Johns.* 174, and *King v. Baldwin*, 17. *Johns.* 384, in each of which there was a request by the surety to proceed against the principal, and a prolongation of credit to him, though there was no contract for delay; it was decided that the surety was discharged. In the case at bar, all three of the circumstances which have been considered as tending to the discharge of a surety are found to exist; there was long delay and repeated credit given to the principal; there was a request by the surety to collect the note of him; and there was an agreement on the part of the plaintiff, to give further time; pursuant to which, all proceedings against the principal have been delayed. On these facts, the action cannot be maintained. *Verdict set aside and nonsuit entered.*

The GARDINER COTTON AND WOOLEN FACTORY COMPANY *vs. The inhabitants of* GARDINER.

The capital employed in manufactures, within the meaning of *Stat.* 1825. *ch* 288, includes whatever is essential to the prosecution of the business, whether it be fixed or circulating capital. And it is immaterial whether it is derived from assessments, or loans, or otherwise.

The merchandize of a manufacturing corporation, employed in trade in a store, is not taxable to the corporation, in the town where the store is situated; but to the individual holders of the stock; the provision usually inserted in the annual tax acts being intended to apply only to individuals, having their domicil in towns other than the place of their business.

THIS action, which was *assumpsit* for money had and received, came before the court upon a case stated by the parties, containing the following facts.

The assessors of the town of *Gardiner*, for the year 1825, assessed the property of the plaintiffs, for State, county, town and school taxes, in the sum of $104,67; which was their due proportion, if their property was liable to taxation. This sum was levied by distress.

The property assessed consisted of their factory house, valued at 3000 dollars; a dwelling house and lot valued at 650 dollars, which was used as a boarding house for their workmen; a store and lot valued at 750 dollars; stock and other personal property in the factory house, valued at 5580 dollars; and goods and merchandize in the store, valued at 2500 dollars. The machinery in the factory was not assessed. The assessors had given seasonable notice to the plaintiffs to bring in a true list of their taxable property; which they declined to do, on the ground that the corporation was exempted from taxation, by the provisions of *Stat.* 1825, *ch.* 288, having, as they said, thirty thousand dollars "employed in the manufacturing of cotton."

The corporation was erected *March* 1, 1810, and was organized in the same year; from which time, to the time of the assessment, it had been employed in the business of manufacturing cotton. The stock of the company was originally divided into one hundred shares; the original price of which, with the assessments thereon, amounted on the 28th of *August* 1820, to 17,000 dollars; the whole of which was paid to their treasurer, and expended in the erection of buildings, the purchase of machinery, and other business of the corporation.

In *January* 1823, the plaintiffs enlarged their business, by creating 100 new shares; and in order to determine at what sum the new shares should be sold, the whole property and estate of the corporation was carefully appraised, and found to be worth 12,500 dollars; in conformity to which the new shares were valued at 125 dollars each, and sold for the same sum, thus increasing the property of the corporation to 25,000 dollars. Of the 12,500 dollars received for the price of the new stock, 3000 dollars was appropriated for enlarging and repairing the factory house, and 8000 dollars for the purchase of new machinery.

In the autumn of 1823, the agent of the corporation purchased a lot of land in *Gardiner*, with a store upon it, for 1200 dollars; which was paid for by money borrowed of the *Gardiner* bank, being part of a loan of 4500 dollars mentioned hereafter. The residue of this loan was applied to the payment of debts due for goods, with which the agent stocked the store. The business of this store, which con-

tained such goods as were usually sold in other retail variety stores, was conducted by clerks, and was not confined to the manufacturing business of the corporation. In the autumn of 1825, the business of the store was discontinued; and the land, buildings and goods, sold by auction.

On the 15th of *March*, 1824, the plaintiffs borrowed of the *Gardiner* bank 5000 dollars, and of the *Kennebec* bank 5000 dollars; no part of which has ever been repaid. Of these sums 8500 dollars was expended in cotton, and 1500 dollars in machinery. On the 21st of *February*, 1825, they borrowed of the *Gardiner* bank the above sum of 4500 dollars; of which 1100 dollars were repaid prior to the assessment of the tax in question, and the residue is still due.

At the time of making the assessment complained of, there were fifty-four shares of the corporate stock owned by persons resident in *Gardiner*, and one hundred and forty-six shares owned by persons not resident in that town; of which nineteen were owned by citizens of Massachusetts.

Upon these facts, the whole case was referred to the court, for the entry of such judgment as they should deem the law to require.

Allen, for the plaintiffs, shewed that, by taking the 10,000 dollars borrowed of the two banks in *March*, 1824, and actually invested in manufacturing capital, with the amount of the new stock actually paid in 1823; and adding to these sums, either the original cost of the old stock, or the appraised value of the property in *March*, 1824; the capital of the corporation exceeded thirty thousand dollars. And hereupon he contended that the corporation was exempted from taxation, within the meaning of *Stat.* 1825, *ch.* 288. It was not material from what sources the capital was derived; nor whether it was actively or profitably employed, or otherwise; if it was invested in the business of the establishment, within the limits of their corporate powers.

But, independant of the provisions of that statute, the tax was illegal; because the shares owned by persons not living in *Gardiner* were not taxable in that town; and because the stock owned by inhabitants of that town should have been assessed to them, and not to

the corporation. *Salem Iron Factory Co. v. Danvers*, 10. *Mass.* 514. *Amesbury W. & C. Man. Co. v. Amesbury*, 17. *Mass.* 461.

Evans, for the defendants, considered it as undisputed, that the plaintiffs were liable to be taxed as a corporation, for their real estate; and he argued from this, that they were also liable to be taxed in the same manner for their personal estate, in the town where the corporation was located. The decisions in Massachusetts to the contrary, were made to avoid the flagrant injustice of assessing the same property twice; the shares being then taxable in the towns where the holders of them resided. But he insisted that it was not so now, in this State, the tax act of 1825, *sec.* 5, having provided that stock employed in manufactories should be taxed in the town where the same may be used. This construction is aided by recurrence to *Stat.* 1825, *ch.* 288, cited on the other side; which exempts such property from taxation in those towns, only on condition of its amounting to 30,000 dollars. If it were not, in the contemplation of the legislature, taxable in those towns, the exemption would be superfluous. In that State, the general rule is followed, of taxing all personal property to the person. But, in this, an exception is introduced in the case of stock in a manufacturing corporation; and upon good reason; for, if such property were not taxed to the corporation, the holders of stock, residing out of the State, would pay nothing; and the State would be deprived of the aid of a large portion of its capital, in sustaining the public burdens.

He further contended that the plaintiffs were not within the exemption provided by *Stat.* 1825, *ch.* 288; the words "employed in the manufacturing," being applicable only to circulating capital. The object of the law was to encourage active enterprize. Hence, in the second section, the assessors are required not to include, in their valuation of taxable property, works established, and "put in operation." So that whatever capital may be invested in works, it continued to be taxable, until it not only amounted to the sum mentioned, but was put into actual operation. The policy of the legislature was to increase the amount of capital actively employed in manufactures;—but not to favor dormant and unproductive investments. And of such capital the case does not shew a sufficiency, to bring the plain-

tiffs within the exemption claimed. For if, from the amount of property as disclosed, is deducted the value of the real estate, machinery and debts due to the corporation, the remainder will fall far short of the amount required by the statute. Upon no principle ought the borrowed monies to be taken into the account, because of the abuses to which such a rule would be open, from the temptation it would create to borrow funds just before the day to which all assessments have relation, upon the condition of returning them as soon as that object should be effected.

He contended, lastly, that upon any view of the case, it was merely a case of over taxation; and that therefore the remedy was misconceived. The plaintiffs should have furnished the assessors with a list of their property, and, if aggrieved by the assessment, might have appealed to the Court of Sessions, as the statute provides. For here was property unquestionably liable to be taxed, because having no relation to manufactures.

Allen, in reply, said that the remedy by appeal to the Court of Sessions for over taxation, applied only to cases where property, liable to assessment, is valued at too high a rate; but not to cases where one is taxed for property which is not liable to any assessment. For upon the defendants' principle, the trial of all questions of this sort would be drawn away from this Court, and the constitutional privilege of trial by jury be deeply invaded. If, however, the Sessions have any jurisdiction over such cases, it is only concurrently with the remedy by action in the courts of common law.

Weston J. delivered the opinion of the Court, at the ensuing *June* term, in *Penobscot*.

The counsel for the plaintiffs insists, first, that they are exempted from the whole tax, in virtue of the statute of 1825, *ch.* 288, to exempt from taxation manufacturing companies of cotton, wool, iron and steel, by which the individual shares, property or stock, both real and personal, of such companies, thereafter to be incorporated, were exempted from taxation for six years, and such companies then existing for five years, which might be appropriated for the purchase

of sites, erection of works, buildings, machinery, raw material, and capital in whatever shape, necessary for the full and complete use and operation of those works: Provided, that a sum, not less than thirty thousand dollars, shall be employed by such incorporation in the manufacturing of the articles in said act mentioned. Secondly, that, by virtue of the tax act of 1825, the personal property could not be taxed to the factory, and that the shares of those who lived out of *Gardiner* could not be taxed in that town, and that the shares of such as lived there, could be taxed only to the individual holders of the stock. To this the counsel for the defendants replied, that the plaintiffs have not brought themselves within the provisions of the act first cited; not having employed the sum of thirty thousand dollars in manufacturing; and that they have a right to tax the personal property of the factory to the plaintiffs, in virtue of the fifth section of the tax act of 1825, which provides that all goods, wares, or merchandize, or other stock in trade, including stock employed in manufactories, ships or vessels, shall be taxed in the town, plantation or other place, where they are sold, used or improved, notwithstanding the owner or owners may reside in some other place: Provided, such person or persons do occupy a shop, store or wharf in such town, plantation or other place, and not where they may dwell and have their home.

It is conceded that if, in making out the thirty thousand dollars, it is competent for the company to estimate their building and the ten thousand dollars they procured on loan, their property, except the store and goods, is exempted from taxation, in virtue of the act of 1825, *ch.* 288. But it is contended, that the best writers upon this subject make a distinction between fixed and circulating capital; and that it is the latter only, which in this case can be fairly said to be employed in manufacturing; and that therefore the value of the factory building ought to be deducted from the estimate which would reduce it below thirty thousand dollars. Or, secondly, that the ten thousand dollars obtained on loan, which may be offset by debts due to the plaintiffs, should be deducted, which would also bring the amount below that which would entitle the plaintiffs to the exemption they claim. But we are not satisfied that either of these views is

well founded. The capital employed in manufacturing, or in a manufacturing establishment, embraces whatever is essential to the prosecution of the business. To this purpose, the factory building is as necessary as the machinery, or the raw material. As well might it be urged that the money invested in a saw mill, is not capital employed in the manufacturing of boards. If the amount prescribed by the statute is actually employed in manufacturing, it is entirely immaterial from what sources derived; whether from assessments paid by the stockholders, or from loan, or partly from both.

We are therefore of opinion, that all the property valued by the assessors, except the store and lot, and the merchandize therein, was exempted from taxation, in virtue of the act first cited. And we are further of opinion, that the personal property of the plaintiffs could not be taxed to the company, under the fifth section of the tax act; as by that section it was intended only to tax individuals having their domicil in other towns, for stock of this description, and other personal property, in the town where they transact their business. This construction was expressly given to a similar section in the tax act of Massachusetts, in the case of the *Amesbury Woolen & Cotton Manufacturing Company v. The inhabitants of Amesbury* 17. *Mass.* 461. If therefore the merchandize in the store is not exempted from taxation by the act of 1825, *ch.* 288, and it does not appear to us that it is; yet as personal property, according to the tax act, and the principles decided in the case of the *Salem Iron Factory Company v. The inhabitants of Danvers* 10. *Mass.* 514, it cannot be taxed to the corporation, but to the several holders of the stock. It results that the plaintiffs were not liable to be assessed for any part of their property, included in the valuation, except the store and the lot upon which it stands. According to the agreement of the parties, the defendants are to be defaulted, and the plaintiffs to have judgment for the sum by them paid, deducting therefrom the amount of the taxes assessed on the store and lot; with interest on the balance, from the time of payment to the time of entering up judgment.

GARDINER *vs.* NUTTING & AL.

An acknowledgment of the debt, or a new promise, by the maker of a promissory note, takes it out of the statute of limitations only so far as he is concerned; but does not affect the rights or obligations of collateral parties.

Where the maker of a promissory note, of more than six years standing, died insolvent, and a collateral guarantor of the note was appointed a commissioner on his estate; the allowance of the note by the commissioner, as a valid claim against the estate, being an official act, was held not to amount to a new promise on his part to pay the debt.

If a case is referred to the decision of the court, upon a statement of facts agreed, without special limitation, the course is to enter judgment for the defendant, if the facts would verify any plea which would support the action.

IN this action, which was *assumpsit* against the defendants as collateral guarantors of a promissory note, and came before the court upon a case agreed by the parties, all the facts are clearly stated in the following opinion of the court.

Allen, for the plaintiff, to the point that the remedy was not lost by any laches of the plaintiff, cited *Hunt v. Bridgham* 2. *Pick.* 581. *Pain v. Packard* 13. *Johns.* 174. And to shew that the allowance of the note by one of the defendants, as a commissioner on the estate of the insolvent maker, took it out of the operation of the statute of limitations, he cited *Jackson v. Fairbanks* 2. *H. Bl.* 340. *Chandler v Winship* 6. *Mass.* 310. 3. *Stark. Ev.* 1389. But he denied that this point was open to the defendants, as it was not expressly reserved in the statement of facts.

Evans, for the defendants, to shew that the plaintiff had lost his remedy by neglecting to enforce payment against the principal debtors, cited *Chitty on bills* 264. *Warrington v. Furber* 8. *East.* 242. *Phillips v. Astling* 2. *Taunt.* 206. 3. *Wheat.* 154. *Cobb & al.*

v. Little 2. *Greenl.* 261. To the point that the action was barred by the statute of limitations, and that the admissions of the principal debtor did not bind collateral stipulators, he referred to 2. *Stark. Ev.* 893. 896. 897. *White v. Hale* 2. *Pick.* 291. *Bangs v. Hall ib.* 368. *Danforth v. Culver* 11. *Johns.* 146. *Lawrence v. Hopkins* 13. *Johns.* 288. *Clementson v. Williams* 8. *Cranch* 74. *Rowcroft v. Lomas* 4. *M. & S.* 458. *Hillings v. Shaw* 7. *Taunt.* 608. *Perley v. Little* 3. *Greenl.* 96. *Pittam v. Foster* 2. *Dowl. & Ryl.* 363. 1. *Barn. & Cresw.* 248.

Weston J. delivered the opinion of the Court, at the ensuing *June* term, in *Penobscot.*

This is an action of *assumpsit* against the defendants, as guarantors of a note of hand. Under leave to plead double, they pleaded first, the general issue,—secondly, the statute of limitations; subsequently to which the parties have submitted the cause to the determination of the court, upon an agreed statement of facts. From this it appears that on the ninth of *July* 1819, the firm of *George* and *Ira Getchell* gave their negotiable note to the defendants, for seventy-five dollars, payable in five months. On the twenty-ninth of *September* 1819, the defendants transferred said note to the plaintiff, and subscribed the following words written thereon, "we hereby guarantee the payment of the within." The *Getchells*, the makers, were copartners. In the summer of 1822, *Ira* deceased. His estate was represented insolvent; and the defendant, *Nutting*, appointed one of the commissioners, to receive and examine the claims of creditors. The note in question was laid before them by the plaintiff; allowed, and a dividend received by him of thirty-nine dollars and fifty cents. At the time of presenting the note for allowance, the defendant, *Nutting*, expressed to the plaintiff's agent his surprise that it had not been collected, and inquired from whom he expected to collect the balance, which *Ira's* estate might not pay; and was told in reply, that the plaintiff would look to the defendants; whereupon *Nutting* denied their liability. *Ira Getchell* was solvent for more than two years after the note became due; and *George*,

after that period, was employed by the plaintiff upon several important contracts, and received from him, from time to time, considerable sums of money. The plaintiff never applied to the *Getchells* for the payment of this note, or made any demand upon the defendants therefor, until since the commencement of the last year.

The counsel for the defendants rests their defence upon two grounds; first, that the plaintiff, by his negligence and remissness, has lost his remedy against them as guarantors,—secondly, that he is barred by the statute of limitations. The counsel for the plaintiff contends that the latter point is not open to the defendants; inasmuch that it was not expressly reserved to them, in the case presented to the court. To this it may be replied that, being pleaded and the facts agreed, it may be considered as one of the questions directly submitted, whether the defence is sustained upon this ground. But independent of the plea; in an agreed state of facts, the principle is, if there be no special limitation in the statement, that the defendant is to have judgment, if the facts would verify any plea, which would be a bar to the action.

The note became due, and the action accrued against the defendants, on the ninth of *December* 1819. The present action was commenced in *March*, 1826; more than six years thereafterwards. The action was then barred; unless it appear to have been taken out of the statute by a new promise. And it is insisted that the claim made before the commissioners and its allowance, is tantamount to a new promise, both on the part of the makers, and of the defendants. Several authorities have been cited to show that it has this effect as it respects the makers; and it is contended that an admission and promise, by one of several persons jointly and severally liable, defeats the operation of the statute as it respects the whole. But in this case, the makers and the defendants were never jointly liable to the plaintiff. The undertaking of the defendants was independent of, and collateral to, that of the makers. Neither of these collateral parties has a right to affect or vary the liability of the other. Each may rest upon any legal ground of defence, which no admission of the other can defeat. There can be no question that a party, attempted to be charged as the indorser of a negotiable note, may be

protected by the statute of limitations, notwithstanding the maker may have made a direct and positive promise to pay the same, within six years.

But it is further contended, that the allowance of this note by *Nutting* one of the defendants, as commissioner, ought by law to have the effect of a new promise on his part. There is certainly little foundation for this position; as the case finds that he made protestation at the time, that he was not liable. But independent of that, the allowance was a mere act of official duty, which he had undertaken to perform. The note, being perfect evidence of a debt against the estate of the deceased, he could not do other than allow it. The statute of limitations had not then attached, as it since has, by lapse of time; and we perceive nothing in the case, which can legally deprive the defendants of their right to insist upon it as a bar to the plaintiff's action. Being satisfied that the defence is supported upon this ground, it becomes unnecessary to consider the other point raised in this case by the counsel for the defendants.

According to the agreement of the parties, the plaintiff is to become nonsuit, and the defendants to be allowed their costs.

The inhabitants of HALLOWELL *vs. The inhabitants of* SACO.

The domicil is not affected by the forming of an intention to remove, unless such intention is carried into effect.

In order to have received supplies as a pauper, constructively, so as to prevent the operation of *Stat.* 1821, *ch.* 122, they must have been furnished to one under the care and protection of him whose settlement is in question, and for whose support he is by law responsible.

THE question in this case was upon the settlement of one *Clarissa Dearborn*, a pauper. She was the wife of *James Dearborn*, who once had his settlement in *Saco*. Prior to 1814, he had resided at

several places in *Gardiner*, *Pittston* and *Hallowell*; and in that year he enlisted as a soldier. In the autumn of 1818 he came into the service of *John Goodwin*, in *Hallowell*, where he continued as a laborer, till the autumn of 1819, when he went into the State of *Georgia*, to cut timber. In *April* 1820, he returned to the service of *Goodwin*, for whom he worked six months at wages; and in *November*, of that year, he engaged to work for him during the ensuing winter, or as long as the sledding season should last; and under this contract he was at work for *Goodwin*, in *Hallowell*, on the 21st of *March* 1821, when the settlement-law was enacted. He kept his chest and clothes at *Goodwin's* house, having no other home. He had been separated from his wife for seven years. On the 20th of *March* 1821, she came to *Pittston*, and information of this fact was sent to her husband in the afternoon of the following day. He immediatety informed *Goodwin* that he could not work for him any longer, but must go and provide for his wife; and the next day being the 22d, he went to *Pittston*, to make arrangements for procuring her a place of abode. He then lived with her a few months in *Pittston*, and removed with her to *Hallowell*, in *September* 1821. He had been assessed and paid his taxes in the latter town in 1819, and the three succeeding years.

In 1814 the pauper, being in distress in *Hallowell*, was relieved by that town; from which she was removed to *Saco*, by the overseers of the latter place, on notice regularly given to them; and she was supported in *Saco*, as a pauper, from *October* 1820, to *March* 1, 1821. Her husband knew of her residence at *Saco* in 1820; and previous to *October* in that year he was informed that she was supported in the town of *Saco*, with which he expressed himself satisfied.

Upon this evidence *Weston J.* before whom the cause was tried, directed a verdict for the defendants; and reserved the question of domicil for the consideration of the Court.

Sprague, for the plaintiffs, contended that the domicil depended on residence without an intention of removing. But here, the husband had formed and expressed such intention on the day of the

passage of the act. If on any part of that day he formed the intention to remove, his domicil was not then in *Hallowell*. *Kilham v. Ward* 2. *Mass.* 236. *Granby v. Amherst* 7. *Mass.* 1. *Abington v. Boston* 4. *Mass.* 312. *Parsonsfield v. Perkins* 2. *Greenl.* 411. *Knox v. Waldoborough* 3. *Greenl.* 457.

2. But if this view of the law is not sustained, yet the husband was not within the provisions of the statute, having received supplies as a pauper, within a year previous to its enactment. For the supplies furnished to the wife, were furnished with his knowledge and approbation, he being unable to support her; and he thus became a party to the transaction.

Allen, for the defendants, being stopped by the court as to the first point, referred to the rule recognized in *Green v. Buckfield*, 3 *Greenl.* 136, and in *Dixmont v. Biddeford*, *ib.* 205, as decisive of the question of constructive supplies, against the plaintiffs, even if the husband had knowledge of the fact of their being furnished to the wife. But, in the case at bar, no such knowledge appears, the testimony to this point having relation to a period anterior to the relief afforded.

PREBLE J. in delivering the opinion of the Court, adverted to the facts shewing that the residence of the husband was in *Hallowell*, up to the time of the passage of the statute; and observed that his domicil remained there, unless his conceiving an intention, on the evening previous, to leave that town and live with his wife, has changed it. But, he said, it was not sufficient merely to have formed such intention; it must be executed, and carried into effect by an actual removal, before the domicil is changed. In the case at bar, though the husband had formed an intention to remove, he had not carried it into execution; and his domicil therefore remained as before.

As to the second point, it has been decided that, notwithstanding the language of the statute, a man may receive supplies, so as to prevent its operation, which are not furnished personally to himself; in other words, may receive them constructively. In all such cases, however, the supplies must have been furnished to some person un-

der the care and protection of him whose settlement is to be affected; and for whose support he is by law responsible. But in the present case, the pauper was not under the care and protection of the husband. They had been separated, and lived apart, several years. The supplies, therefore, furnished by *Saco*, within a year previous to the passage of the statute, were not supplies to the husband, so as to bar its effect in fixing his settlement in *Hallowell*.

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1827.

Memorandum. The Chief Justice was not present at this term.

White *vs.* Philbrick.

A judgment in trover, if execution be sued out thereon, though without satisfaction, is a bar to an action of trespass afterwards brought by the same plaintiff, against another person, for taking the same goods.

Trespass *de bonis asportatis.* The defendant who was a coroner, had seized the goods in execution, at the suit of one *Benjamin Adams*, against one *Levi Barrett;* for which taking the plaintiff brought trover against *Adams*, and had judgment and execution. But not being able to obtain satisfaction against *Adams*, who had absconded, the plaintiff afterwards brought this action of trespass against the coroner, for the original taking. And upon these facts the question whether this action was maintainable, was referred to the decision of the court.

Boutelle, for the plaintiff, contended that the former judgment against *Adams*, for the value of the goods, was no bar to this action, it not having been satisfied. Before the case of *Broome v. Wooton*

Yelv. 67. *Cro. Jac.* 73, the law to this effect was well settled; and the authorities collected by the learned editor of the late edition of *Yelverton* clearly shew that the text of that case is not law. The judgment is only a security for the original debt, or cause of action. It is payment or satisfaction, and that alone, which changes the property. *Solutio pretii emptionis loco habetur.* If it were not so, then an accord, by one of several trespassers, without satisfaction, would be a good bar; contrary to all authority. *Bro. Abr. Judgment*, 98. *Livingston v. Bishop* 1 *Johns.* 290. *Campbell v. Phelps* 1. *Pick.* 62. *Rawson v. Turner* 4. *Johns.* 469. *Drake v. Mitchell* 3. *East*, 252.

Allen, for the defendant, relied on the authority of *Broome v. Wooton*, *Yelv.* 67, as conclusive in his favor; and said that the cases collected in the note by Mr. *Metcalf* went to shew, not that the judgment in that case could not be supported, but that the reasons given for it were unsound. In *Livingston v. Bishop* it is said that to constitute a perfect bar, an execution must be sued out; which may be considered as an election *de melioribus damnis;* and such was the fact here. And the rule that in trespass or trover for taking goods, a judgment for the plaintiff *ipso facto* changes the property, is founded in good reason; since otherwise one party might retain the goods, and another, however morally innocent, be compelled to pay their value.

Weston J. delivered the opinion of the Court in *Cumberland*, at *May* term 1828.

In regard to the principal question presented in this case, there is great want of clearness in the authorities. According to the case of *Brown*, or *Broome v. Wooton*, cited from *Yelverton*, the former judgment in trover by the plaintiff against *Adams*, execution being sued out thereon, although without satisfaction, is a good bar to the action. The reason for this decision, as there reported, is, that what was before uncertain, is by the judgment made certain; *transit in rem judicatam;* and so altered and changed into another nature than it was at first. Mr. *Metcalf*, the learned editor of *Yelverton*,

in his note upon this authority says, that he finds no case in which the point therein decided has been otherwise adjudged; but he shows very satisfactorily that the reason assigned, namely, uncertain damages having become certain by the first judgment, is not supported by the authorities. And there is as little foundation for the opinion, that merely because the original cause of action had passed into a judgment against one of the parties liable, no collateral remedies for the same cause could be pursued against others, who were also liable. In the case of joint and several obligors and promissors, against whom it is a very common practice to bring several actions, it never was pretended that a judgment in one was a bar to another. The case cited, is reported in *Cro. Jac.* 73, where the reason assigned by *Fenner J.* is, that in case of trespass, after the judgment given, the property of the goods is changed, so as he may not seize them again. *Mr. Metcalf* admits that if this principle be correct, the decision may be supported on that ground. In *Adam v. Broughton*, 2. *Stra.* 278, the court decided that a recovery in trover against one, vested the property in him, although he had obtained an injunction on the judgment; so that the plaintiff could not, in the second action, say that the goods were his. *Chitty*, in his treatise on pleading, 1. *Chitty*, 76, says, a recovery against one of several parties to a joint tort, frequently precludes the plaintiff from proceeding against any other party, not included in such action. And he cites *Broome v. Wooton* in support of this position. It is laid down in 3. *Dane*, *ch.* 77, *art.* 1, *sec.* 2, that when the plaintiff recovers damages in trover, for the value of the goods, the property of them rests in the defendant. So far as a change of property, consequent upon the judgment, constitutes a good defence to a second action against another party, it is limited to actions of trover, and of trespass, *de bonis asportatis*, and does not apply to other actions of trespass. *Parker C. J.* in the case of *Campbell v. Phelps*, cited in the argument, appears to admit that both in trover, and in trespass *de bonis asportatis*, the property rests in the defendant. This *Wilde J.* in the same action denies, unless upon satisfaction of the judgment. And he founds his opinion upon the principle, that payment of the value, and not the judgment, is that which operates a transfer of the

property; and this upon the maxim, *solutio pretii emptionis loco habetur*. The party injured has unquestionably a right to retake his goods peaceably, at any time before judgment. If, after that, this remedy be gone, it is in consequence of his voluntary election to have judgment in damages for the value of the goods, upon the assumption that the other party has carried them away, or converted them to his own use. For the injury sustained, in which the value of the goods lost constitutes the principal ingredient, he has process of execution against the property and the body of the defendant, which is the highest civil remedy known to the law. Upon this process, the property taken or converted, if still retained by the defendant, may be seized. From the nature of the remedy pursued, damages, and not the restoration of the property, is the indemnity sought. There are other modes of redress, at the election of the party, by which the law will aid him in reclaiming his property specifically. The authorities, therefore, which determine that the property in the goods passes, by the judgment, to the defendant, where it is taken for their value, do not seem to be hard or unreasonable. It is not so obvious how this change of property, which aggravates the damages on the part of the plaintiff, should defeat a collateral remedy against a cotrespasser. The reason assigned by *Parker C. J.* in the case last cited is, that as by the first judgment, "the property of the goods will vest in the defendant, and as no cotrespassers are entitled to contribution among each other, it would seem unjust that one should have all the property, and another pay all the damages." But the very rule adverted to, that the law will not enforce contribution among cotrespassers, shows that its decisions are not moulded with a view to the adjustment of any equities which may arise between them.

In the case of *Drake v. Mitchell*, 3. *East*, 252, Lord *Ellenborough* says, that "a judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and therefore, till then, it cannot operate to change any other collateral concurrent remedy, which the party may have." But the case of several securities for the same demand, was then under the consideration of the court.

and this opinion must be held to be limited to actions founded on contract; and it is so regarded by *Parker C. J.* in *Campbell v. Phelps.*

But notwithstanding the bearing of several cases to that effect, it must be held questionable whether a judgment merely, without satisfaction against one cotrespasser for goods carried away, or against one of several persons liable in trover, is a bar to an action against the others. There are, however, technical reasons, and legal authorities in support of the doctrine, that such judgment, if execution be taken out thereon, is to be regarded as a bar. And with this qualification, the cases, if not entirely reconciled, will be found more consistent with each other. It is certainly an established principle of law, that several actions may be brought for a joint trespass; and the authorities warrant their prosecution, at least, until the amount of damages is settled by verdict. But as the party injured can have but one satisfaction, he may make his election *de melioribus damnis;* and having made it, he is concluded by it. And herein this class of cases differs from collateral remedies on contract; as, for instance, against the maker and the several indorsers of a negotiable note of hand. The reason may be, that in the former, the several judgments may vary in amount, and as the damages depend upon opinion, and as there may be many just causes for a discrimination, such variance may be expected; but in the latter, each will be liable for the same amount, which is to be ascertained by calculation. Now when the plaintiff, in a several action of the former description, sues out execution, he makes his election.

In Sir *John Heydon's* case, 11. *Co.* 5, it was resolved, that where several juries assess different damages against several cotrespassers, the plaintiff may make his election *de melioribus damnis;* but that he can have but one execution. And although *Kent C. J.* in 1. *Johns.* 290, cited in the argument, questions the extent of the decision in *Broome v. Wooton,* he admits that as execution had been sued out on the judgment held to be a bar, this may be deemed an election *de melioribus damnis,* and thus be held sufficient to foreclose other collateral remedies.

Upon the whole, as the case of *Broome v. Wooton* is exactly in point; as it does not appear to have been overruled; and as it may be supported upon the ground last stated, although not for the reasons assigned in that decision, we are of opinion that the judgment and execution, obtained by the plaintiff against *Adams* for the same cause, is a bar to this action. *Plaintiff nonsuit.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

PENOBSCOT.

JUNE TERM,

1827.

BAYLIES & ALS. *petitioners*, *vs.* BUSSEY.

The equitable claims of a tenant in possession under the betterment act, are not affected by a judgment in a petition for partition, even though he has appeared as respondent, and pleaded to the process.

Where a mortgagor and mortgagee joined in making a second mortgage to another person, who entered for condition broken, and afterwards, before the mortgage was foreclosed by the lapse of the three years, executed and tendered to them a deed of release of the premises according to a previous stipulation, which they refused to receive till five years after the time of entry; it was held that the effect of the release was merely to replace the estate in them as they held it before the second mortgage, restoring them to the original relation of mortgagor and mortgagee.

THIS was a petition for partition, preferred at *June* term 1823, by the heirs of *Benjamin Lincoln*, claiming two undivided third parts of certain lands in *Hampden*. The respondent pleaded his own sole seisin of the lands described in the petition, which he claimed as the grantee of *Henry Knox*.

At the trial, before *Weston J.* at the sittings after *June* term 1825, the petitioners gave in evidence an indenture dated *Aug.* 25, 1801, between *Henry Knox*, *Benjamin Lincoln* and *Henry Jackson*, of the

one part, and *Thomas L. Winthrop* of the other part; by which the lands described in the petition were conveyed to Mr. *Winthrop*, upon condition that if *Knox*, *Jackson* and *Lincoln*, their heirs or assigns, or any of them, should elect to pay to *Winthrop* $5757.63 on or before *Sept.* 25, 1801, with interest from *March* preceding, the deed should be void.

And it was therein further covenanted that if, within one month after *Sept.* 25, 1804, *Winthrop* should convey the same lands in fee to *Knox*, *Jackson* and *Lincoln*, they should be bound, jointly and severally, to pay him on demand the same sum of $5757.63, with the interest before mentioned.

The petitioners further gave in evidence a deed duly executed and tendered by *Winthrop* to *Knox*, *Jackson* and *Lincoln*, *Oct.* 8, 1804, conveying to them the same lands in fee simple, and expressing his election to make the conveyance and demand the money mentioned in the indenture; which deed was not then accepted, nor the money paid.

It was further shewn by the petitioners that *Winthrop* entered into the lands *Feb.* 20, 1802, for condition broken; that the money due to him was paid by *Lincoln*, *April* 30, 1807; that *Jackson*, on the 14th of *August* 1807, released to *Lincoln* all his interest and estate in the lands in question; and that *Winthrop's* deed of reconveyance which had been refused, was accepted in *September* 1807.

On the part of the respondent, it appeared that the whole *Waldo* patent, of which the premises in question were a part, was mortgaged by *Knox* to *Lincoln* and *Jackson*, *Oct.* 17, 1798, to indemnify them against certain notes of hand which they had indorsed as his sureties, but not including the debt due to *Winthrop*. It also appeared that *Knox* conveyed the lands, of which partition was demanded, to the respondent, in fee, by deed dated *March* 4, 1805, and recorded *May* 6, 1806; under which deed he entered, and had ever since remained in possession. *Lincoln* died *May* 8, 1810; and there was no evidence of any entry by the petitioners.

It was also proved that *Jackson* and *Lincoln*, by deed dated *July* 5, 1806, assigned and transferred to *Thorndike*, *Sears* and *Prescott*, the mortgage of *Oct.* 17, 1798 given to them by *Knox*, with all the

lands therein described; except such parts thereof as had been sold by *Lincoln* and *Jackson;* who were empowered, by that mortgage, to sell and convey a fee simple estate in such parts of the mortgaged premises as they chose, and apply the proceeds to the payment of any notes which they had indorsed for *Knox*. By this assignment it appeared that *Lincoln* and *Jackson* had not been saved harmless against the notes mentioned in the mortgage. But it did not appear that they had ever conveyed any of the lands, except by their joint deed with *Knox* to *Winthrop*, before mentioned, and the assignment to *Thorndike*, *Sears* and *Prescott*.

Upon these facts the Judge directed the jury to return a verdict for the petitioners; upon which judgment was to be entered, if, in the opinion of the court, they were seised, as they had alleged in their petition. Otherwise, it was to be set aside.

Brown, for the petitioners, contended that the title became absolute in Mr. *Winthrop*, by the lapse of three years after his entry for condition broken in *February* 1802. His subsequent release, of *Oct.* 8, 1804, took effect from its delivery in *September* 1807, and enured to the benefit of *Lincoln*, as to the third part he had purchased of *Jackson*, as well as the other third; thus vesting in him the two third parts, of which partition is sought. When *Knox* conveyed to *Bussey*, in *March* 1805, he had no estate in the land, the whole title being then absolute in *Winthrop;* and therefore the grantee took nothing by that deed, except in the other lands described in it, which *Knox* might lawfully convey. He might then have entered under his deed; but this entry cannot be extended, by relation, beyond his legal rights; certainly not constructively to disseise the ancestor of the petitioners. And as the case does not find that there was any actual disseisin, it follows that they were lawfully seised of the lands described in their petition; and the plea of sole seisin in the respondent is not supported.

Orr, and *R. Williams*, for the respondent. It is not necessary to allege a lawful sole seisin, against all the world. The grantee of a disseisor, coming honestly to the estate, is as well entitled to this plea as if he had the whole estate. This mode of remedy was never

intended to apply, except where the fact of tenancy in common is clear; never to settle titles in the abstract, as mere rights; for if so, the plea of sole seisin would be wholly taken away.

The conveyance from *Knox*, *Jackson* and *Lincoln*, to *Winthrop*, was to be a mortgage or not, as the latter should elect. His election was shewn by his reconveyance of *Oct.* 8, 1804, which was intended to extinguish it, as a mortgage. In consequence of this election to treat it as a mortgage, the conveyance to the respondent might well operate as an assignment of the right in equity of redemption. Nor was the mortgage to *Winthrop* ever foreclosed; for though he entered in 1802, yet in 1804 he renounces all his claim to the land, electing to receive the money, and to rely on the personal security of the debtors. By this deed the parties were reseised of their prior estates; *Knox* as mortgagor, and *Lincoln* and *Jackson* as mortgagees; and the interest of the latter could never descend to their heirs, unless foreclosed. *Smith v. Dyer* 16. *Mass.* 18. The deed from *Jackson* to *Lincoln* in 1807, conveyed nothing, because the grantor and grantee were disseised by *Bussey*. Without an actual seisin in the petitioners, this process cannot be maintained. *Bonner v. The Proprietors of the Kennebec purchase* 7. *Mass.* 475. At least, the peculiar provisions of our statute, called the betterment act, require that such seisin shall have been continued till within six years next before the filing of the petition; since otherwise the respondent must lose the value of his improvements made on the land.

The argument was had at *June* term 1826; and the cause being continued under advisement, the opinion of the Court was delivered at the *June* term in this year, in *Hancock*, by

Mellen C. J. This case presents several facts and questions of law, which have been argued by counsel; and, though not necessary to a decision on the motion for a new trial, still we have examined them all, and shall deliver our opinion upon all, as the course most useful for the parties.

The first fact in point of time is, that *Henry Knox*, being seised of a large tract of land, called the *Waldo* patent, of which the premises described in the petition, are a part, on the 17th of *Octo-*

ber 1798, mortgaged the same to *Benjamin Lincoln* and *Henry Jackson* to indemnify and save them harmless from certain liabilities assumed by them as his sureties.

On the 4th of *March* 1805, *Knox* conveyed the lands which are described in the petition, to *Bussey*, the respondent, in fee simple; who thereupon entered and has ever since continued in possession of the same. His deed was registered *May* 6th 1806. The petition in the present case was presented in *June* 1823.

Before we state any more of the facts contained in the report, we shall examine and dispose of two objections of a preliminary character which have been urged by the counsel for the respondent.

It is contended that upon the facts stated, the petitioners cannot maintain this process, inasmuch as it appears that they were not actually seised of the premises whereof partition is prayed, at the time the process was commenced; but that, on the contrary, the report shews that they and their ancestor, *Benjamin Lincoln*, have been disseised ever since the year 1805. In support of this position they have cited the case of *Bonner v. The Proprietors of the Kennebec purchase* 7. *Mass.* 475. In that case, the petitioner had been disseised for about forty years; and the court observed, when speaking of the facts of that case, and giving their opinion, that a petitioner must be actually seised, in order to maintain a petition for partition. From the decision of the same court in a subsequent cause, it would seem that the generality of the language of the court in the case of *Bonner v. The Proprietors of the Kennebec purchase*, must be restricted to the facts of that case; because in *Wells v. Prince* 9. *Mass.* 508, the court expressly decided that if a petitioner for partition had a right of entry, at the time of presenting his petition, he could well maintain the process for the proportion of the estate to which he was legally entitled; and the same principle is stated in *Barnard v. Pope* 14. *Mass.* 434. See also 4. *Dane's Abr. ch.* 132. *art.* 8. *sect.* 12. In the case before us, even if *Bussey's* possession was of such a nature as to constitute a disseisin, (as to which we give no opinion) still the petitioner's right of entry was not taken away when the petition was filed. Considering, therefore, that such was the acknowl-

edged law of Massachusetts, at the time of our separation from that Commonwealth, no sound reason can be given why this court should adopt a different principle, unless some of the provisions of our statute entitled an "act for the settlement of certain equitable claims arising in real actions," furnish solid grounds for distinction. It has been contended that they do; that they go farther than the statutes of Massachusetts on this subject, and have more carefully guarded these "equitable claims" from violation or danger; and the court is called upon so to modify and regulate this process of partition, as in no degree to endanger or impair them. In other words, it is contended, that no petition for partition ought to be sustained in those cases where the premises have been in the actual possession and improvement of one or more persons, for more than six years next before the commencement of the process. We have examined this argument with care and attention; and will now proceed to give our reasons for not considering it as well founded.

The act before mentioned has relation only to real actions brought for the recovery of lands; that is, to writs of right and writs of entry; not to writs of partition at common law, or petitions for partition pursuant to the directions of our statute; and we apprehend that it would be a species of judicial legislation, if we should undertake to extend the various provisions of the act to processes of the latter kind, in which it seems impossible to apply those provisions to any good purpose. Nor do we feel at liberty to change those principles of law, which we have before stated, by which a tenant in common may maintain his petition for partition, if he has a right of entry, though not actually seised, and reduce the limitation of his right to make use of this species of process, from twenty years to six years. Besides, the establishment of such a principle, if in our power, is not necessary to guard the equitable rights of those for whose use and benefit the betterment law, so called, was enacted. The best mode of illustrating the subject, and rendering our meaning perfectly intelligible, is, by stating one or two cases by way of example. Suppose A and B are tenants in common of a lot of land; and that S has been in the exclusive possession and improvement of it for fifteen years. In this case, a petition for partition lies, and S is enti-

tled to the estimation and benefit of the valuable improvements made by him on the land. Suppose A brings his petition for partition, and gives due notice to B, and to S, the man in possession. Now, in the case put, S has no kind of interest in the question how the land shall be divided between A and B; and as his possession has continued only fifteen years, he could not bar the petition by a plea of sole seisin; in fact, he has no interest in the cause, if the judgment of partition does not destroy or impair his equitable claims and possessory rights, under the betterment law. So if A and B are tenants in common, and B has held the whole lot for fifteen years adversely, and excluded A; still A may maintain his petition for partition against B, who has made valuable improvements on the land. Now in this case, as B cannot defend himself on the plea of sole seisin, he has no interest in the cause, except as tenant in common; and as to the fairness of the division, if the judgment in partition does not destroy or impair his equitable claims and rights under the law, will such judgment destroy, impair or jeopard them in either of the cases above stated? If not, then the argument of the respondent's counsel, in the case at bar, falls to the ground. The case of *Motley & als. v. Blake*, 12. *Mass.* 280, is stronger than this, as it regards the legal effects of such a judgment. The heirs of *John Motley* petitioned for partition of the real estate of which he died seised; and his widow, who was entitled to have her dower assigned to her in the premises, appeared as respondent, and opposed the partition on that ground. The court in giving their opinion, say—"it is apparent she has no interest in the question, nor any right to interfere in this suit, or to object to the partition which is prayed for." Yet she had a legal right of dower; and not merely an equitable claim. It is well known that in cases of partition, no precept ever issues in the nature of an execution to put the petitioner into possession of the part assigned to him. The final judgment is considered as placing each one in possession of the part so assigned, and as giving him a several seisin; and on such seisin the assignee may maintain his writ of entry; and the judgment establishing the partition completely bars the legal possessory title of the respondent, and of all others who might have become respondents. *Cook v. Allen*, 2. *Mass.* 462.

Now let us suppose that S, in the case first put, and B in the other case, both refuse to surrender the actual possession, and quit the premises; in such circumstances, the remedy of A is a writ of entry against each, to amove him. In such an action, what principle of law forbids the application of the equitable provisions of the betterment act? The object of the petition for partition was, and always is, to effect a division of the legal estate between or among those who own it. The statute does not profess to interfere with any rights or claims of an equitable character, in making the partition. And the judgment in partition is considered as *instanter* putting an end to the legal possessory title, and also to the seisin and possession of the respondent, in common and ordinary cases, and as transferring such seisin to the petitioner in the part assigned him, and clothing him with the rights before mentioned. But it does not by any means follow, that it put an end to all, or to any, of the defendant's claims under the betterment law; more especially when, by such a construction, equities would be displaced and destroyed, and the anticipated relief, provided for him by the legislature, be forever removed from his reach. By adopting, as we do, the more favorable principle of construction, and supporting the distinction above stated, we are advancing the cause of justice, and protecting those peculiar interests, which it was the object of the act to secure to their owners. Besides, this construction is in perfect accordance with the spirit of that provision contained in the 5th section of the act in question, by which the true owner of land is rendered liable to pay to the person in possession and entitled to betterments, the full amount of their value, in case such owner should enter and amove him from the land. This provision clearly proves that the actual seisin and possession, though regained by the owner, are not incompatible with the equitable claims of the man entitled to them. In fact, these equitable interests are of such a peculiar character, and so perfectly unknown to the common law, that its rules and principles are not applicable to them. Certain are we, however, that in giving this construction, though we protect these interests from all danger, we do not, in so doing, violate any legal principle, or in any manner impair any legal titles. The objections, therefore, to the nature of the process before us, are not sustained.

We now proceed to an examination of the more important facts in the cause. And here we would again advert to the first fact stated in this opinion, and we do it for the sake of clearness. On the 17th of *October* 1798, *Knox* mortgaged the *Waldo* patent, including the premises in question, to *Lincoln* and *Jackson* in fee. For the present we pass by the mortgage to *Winthrop*, and the reconveyance from him; but shall notice them both in the sequel. On the 5th of *July*, 1806, *Jackson* and *Lincoln* assigned and transferred to *Thorndike*, *Sears* and *Prescott* the mortgage of *October* 17, 1798, given by *Knox*, with all the lands therein described, except such parts thereof as had been sold by *Lincoln* and *Jackson*, who were empowered by the mortgage deed to sell and give a fee simple estate of such parts of the lands described in the mortgage, as they chose, and apply the proceeds to the discharge of the notes which they had endorsed for *Knox*. By this assignment it appears that *Lincoln* and *Jackson* had not been saved harmless. Here we must inquire whether the lands described in the petition passed by the assignment to, and vested in *Thorndike*, *Sears* and *Prescott;* or whether they are embraced within the exception. The exception relates only to land sold; and the report states that it did not appear that there had been any conveyance of any of the lands, except the mortgage deed made by *Knox*, *Lincoln* and *Jackson*, to which we have alluded. Neither does it appear that there had not been any other. Unless some parts of the land had been sold, under the power given in *Knox's* mortgage deed, the exception would seem to be useless and unmeaning. It could not have been intended to embrace the mortgage to *Winthrop;* for that was not a sale; it was not made under the power from *Knox;* but was a mere mortgage, made by *Knox*, as well as by *Lincoln* and *Jackson;* all three joining in the deed. From this view of the assignment of the mortgage of *Oct.* 17, 1798, it is evident that the legal estate in the premises in question is now in *Thorndike*, *Prescott* and the heirs of *Sears*, and not in the petitioners; unless the transaction between *Knox*, *Lincoln* and *Jackson*, on the one part, and *Winthrop* on the other, and the deed of mortgage to *Winthrop* and his deed of reconveyance, to which we have several times referred, lead us to a

different conclusion. It therefore remains for us carefully to examine those conveyances, and ascertain their object and legal effect.

On the 25th of *August* 1801, about three years after *Knox* had mortgaged the *Waldo* patent to *Lincoln* and *Jackson*, they all three joined in a mortgage of the lands described in the petition, being only a part of the *Waldo* patent, to *Thomas L. Winthrop*. Their deed passed the whole estate in the lands therein described to *Winthrop; Knox* thereby conveying his right in equity, and *Lincoln* and *Jackson* the fee, which they held as mortgagees. On the 8th of *October* 1804, *Winthrop*, preferring to release the estate so conveyed to him as security, and rely on the personal obligation of *Knox*, *Lincoln* and *Jackson*, as he had a right to do by the terms of the indenture of *August* 25, 1801, made his deed of reconveyance to them; and on the day of its date tendered the same to *Knox*, *Lincoln* and *Jackson*, and demanded the money due on their covenants in the above mentioned indenture. The deed of reconveyance, for some reason or other, was not then accepted; but afterwards was delivered to them in *September* 1807. By reference to the indenture and to the facts as reported, the legal operation of *Winthrop's* deed to them must be considered to be that of replacing the estate in them as they held it prior to the conveyance to him in mortgage; that is, *Knox* as mortgagor owned the equity of redemption, and *Lincoln* and *Jackson*, as mortgagees, owned the fee. Such must have been the intention of all concerned; for it can never be presumed that *Lincoln* and *Jackson* intended that their title as mortgagees under *Knox's* deed of *Oct.* 17, 1798, to the lands in question should be lost or impaired in any degree by the reconveyance from *Winthrop;* it was merely an extinguishment of his rights as mortgagee.

But it appears that the assignment of the mortgage of 1798 was made and executed in *July* 1806, which was about ten months prior to the time when *Winthrop's* reconveyance was delivered, viz. *September* 1807; and the last question is whether this circumstance has any effect in defeating the intentions of *Lincoln* and *Jackson*, as expressed in their deed of assignment to *Thorndike*, *Sears* and *Prescott*. The answer to this question is, that at the time of the conveyance in mortgage to *Winthrop*, the fee of the lands was in *Lincoln*

and *Jackson* as mortgagees of *Knox;* and this new incumbrance, created by the conveyance to *Winthrop*, though continuing at the time of the assignment, did not prevent the operation of it to pass the estate to the assignees, who were strangers, subject to the mortgage to *Winthrop*, as well as to the right of redemption by *Knox;* for it is a well known principle, that in respect to strangers or third persons, the mortgagor is considered as owner of the fee; though as between mortgagor and mortgagee, the fee is considered to be in the latter. Therefore when *Winthrop* delivered his deed of reconveyance or release in *September* 1807, the incumbrance of his conditional and temporary title was thereby removed, and the estate remained in *Thorndike*, *Sears* and *Prescott*, subject only to *Knox's* right of redemption, as it was before the conveyance to *Winthrop*, and neither *Knox* or his representatives have ever redeemed the estate or imdemnified the mortgagees. Under these circumstances, and by the application of the legal principles above stated, it appears that long before the present petition was filed, the fee of the premises, whereof partition is prayed, had been conveyed to and was vested in *Thorndike*, *Sears* and *Prescott;* and thus the petitioners, who assert no claim, except what is alleged to be derived from *Lincoln* and *Jackson*, have no title to maintain this process. We have thus examined all the points made in the argument, and given our opinion on each; and the conclusion from this investigation is, that the verdict must be set aside and a new trial granted, according to the terms of the report. The petitioners, however, will judge whether a new trial can be of any use to them.

Verdict set aside.

Chamberlain *vs.* Bussey.

The deed of *July* 20, 1799, from the Commonwealth of Massachusetts to *Henry Knox*, for himself "and all others interested in the *Waldo* patent," is, at law, a conveyance to Gen. *Knox* alone, from the uncertainty respecting the other persons intended.

The Ten Proprietors have no legal interest in the lands granted *July* 20. 1799, to *Henry Knox* for himself and all others interested in the *Waldo* patent.

The proprietors of land, organized as a corporation under the statute, may have their respective proportions set off by process of partition, after discharging all legal liens existing thereon in favor of the corporation; but against all other persons, their rights can be enforced only by an action in the name of the proprietors as a corporation.

This was a writ of entry, in which the demandant claimed an undivided moiety of one tenth part of all the lands in *Bangor*, *Hampden*, *Newburg* and *Hermon*, except one hundred acres reserved for each settler, by certain resolves, and 3900 acres in *Hermon*, claimed by *R. G. Amory*. It was tried before *Weston J.* upon the issue of *nul disseisin*.

The demandant claimed under the patent granted to *Beauchamp* and *Leverett*; whose title having descended to *John Leverett*, he parcelled the patent into ten shares in common, and granted them, in 1719, to certain persons, thenceforth called the Ten Proprietors. These proprietors conveyed two thirds of their land, in twenty shares, to *Brenton*, *Waldo*, and others, who were called the Twenty Associates; and afterwards conveyed to *Waldo* 100,000 acres, retaining the like quantity themselves. Of these Ten Proprietors, *William Hunt*, father of the demandant, was one; who conveyed his share to *John Pitts* and others, by deed of *Feb.* 21, 1787, and to *John Jackson*, by deed of *May* 4, 1787; both which titles the demandant acquired by purchase.

It appeared that, in 1772, a survey was made by one *Chadwick*; and *May* 31, 1773, an indenture was executed by the Ten Pro-

prietors on the one part, and by *Francis Waldo*, and others, representing the *Waldo* interest, on the other part; by which the latter released to the Ten Proprietors the tract surveyed by *Chadwick;* and the Ten Proprietors released to the other party, all their interest in the residue of the patent. The lands so surveyed and released to the Ten Proprietors, began at the mouth of *Marsh* river, at the southeast corner of *Frankfort*, and ran westwardly, in the southerly line of said town, and upon the same line extended further westward, nine miles and a quarter; thence north, twenty degrees east, fifteen miles; thence east, twelve degrees south, eleven miles and a half; thence south, one mile and a quarter, to *Penobscot* river; thence down the river, to the beginning; and it contained 90,100 acres.

The General Court of Massachusetts, by a resolve passed *July* 4, 1785, proposed to "confirm to the heirs of the late Brigadier *Waldo*, others, interested in the grant to *Beauchamp* and *Leverett*, a tract of land equal to a tract thirty miles square;" and directed a survey to be made, "beginning at the point of land east of the mouth of the river *Muscongus*, thence extending up said river, according to the course thereof, and thence round by the sea shore, and up the west bank of *Penobscot* river, so far that a line, stretched across westwardly from the *Penobscot* to the north end of the first mentioned line, would embrace a territory equal to a tract thirty miles square."

The *Waldo* patent was accordingly surveyed, and the north, or head line was established on what is now the divisional line between the towns of *Frankfort* and *Hampden*, as delineated on *Greenleaf's* map of Maine; thus severing into two parts the tract surveyed by *Chadwick*, and released to the Ten Proprietors, leaving only about 42,000 acres of it within the limits of the *Waldo* patent.

A large portion of the *Waldo* patent, as thus located, adjoining the *Muscongus* river, was found to be within the limits of the *Plymouth* patent, which was an elder and better title. To indemnify the grantees for the land thus lost, the General Court, by its resolves of *Feb.* 17 and 23, 1798, caused to be surveyed and granted "to *Henry Knox*, and others, interested in the *Waldo* patent," all the lands remaining the property of the Commonwealth in four town-

ships lying north of the *Waldo* patent, being the present towns of *Hampden*, *Bangor*, *Hermon* and *Newburg*, excepting 100 acres to each settler. A deed of confirmation of these lands was also executed *July* 20, 1799, assigning them to *Knox* and "all others interested in the *Waldo* patent." The lands thus granted amounted to about 48,000 acres.

The demandant founded his claim on the language of the resolves and deed of the Commonwealth, contending that by the terms, "others interested," were intended the Ten Proprietors, who had lost their lands by the *Waldo* line, and who had an equitable interest in whatever related to that patent.

The tenant derived his title by deed from *Henry Knox* and wife, dated *March* 4, 1805, and recorded in 1806; and relied on the grant and deed from the Commonwealth to *Knox*, who, as he contended, was the sole grantee.

He also proved, that on the third day of *October* 1785, the Ten Proprietors, under one of whom the demandant claims, were an organized corporation, managing their part of the lands then held by them, as a body corporate; and that their share had before that time been released to them, by the other tenants in common of the *Waldo* patent, to hold in severalty by metes and bounds. At a meeting of the Ten Proprietors, holden *Nov.* 1, 1785, they voted that the bond presented by the heirs of Brigadier *Waldo*, for making good all lands that the proprietors might be deprived of, by surveying the patent according to the directions of the General Court, should be accepted; and that *William Hunt*, their clerk, be authorized and empowered, in their name and behalf, to make and execute a release and quitclaim to the Commonwealth of Massachusetts, of all their right to any lands contained in the grant to *Beauchamp* and *Leverett*, excepting what was contained within the bounds mentioned in the report of a committee of the General Court, appointed by a resolve of *Oct.* 28, 1783. The lands demanded were not within these bounds. Such a deed was accordingly made, *Nov.* 1, 1785.

Upon this evidence the counsel for the tenant contended, that the Ten Proprietors having released all their right in these lands,

before *Hunt* conveyed his particular share to *Pitts* and others, in 1787, nothing passed by this conveyance; and that as no grantee, except *Knox*, was specially named in the grant from the Commonwealth, the whole estate passed to him alone, by that grant.

The demandant offered to prove that nearly all the title of the Ten Proprietors had passed into the hands of Gen. *Knox*, in his lifetime, whose interests were adverse to his own; and that therefore he could not institute an action in their name, for his own benefit; and he contended that the proprietary, as to the four townships, was extinct, having done no act respecting them since they were granted by the Commonwealth, and all conveyances of lands in those townships having been made by Gen. *Knox*, and afterwards by the tenant, in their private capacities, as sole owners of the estate. This proof was rejected.

The Judge was of opinion that whatever might be the merits of the demandant's claim, he could not maintain this action in his own name; but that the title of the Ten Proprietors, if they had any, to any part of the four townships, should be established by an action in their name; and a verdict was taken for the tenant, subject to the opinion of the court upon the demandant's right to recover in this action.

Williamson, for the demandant, contended that the objection to his right to sue alone, should have been taken in abatement; and that in all actions, except those on contract, the want of other parties was cured by pleading over. *Ken. Propr's. v. Call* 1. *Mass.* 485.

The statutes creating tenants in common *quasi* corporations, are only enabling statutes, neither taking away, nor abridging any of their common law rights. They may sue in their corporate character, for an injury to the common property; or each one may, at his election, pursue his separate remedy at common law. *Monumoi beach v. Rogers* 1. *Mass.* 163. They may have partition among themselves; *Mitchell v. Starbuck* 10. *Mass.* 5;—and the seisin of one is the seisin of all, even of the corporation. 7. *Mass.* 475. 15. *Mass.* 156. On the death of a proprietor, his heirs and devisees become both tenants in common, and members of the corporation. His grantees acquire the same right by his deed. 2. *Dane's Abr.* 698.

If therefore the rights of tenants in common, after they have incorporated themselves under the statute, remain at common law as before, it results that one may sue another for his portion of the land, in any case of actual *ouster*. *Higby v. Rice* 5. *Mass.* 344. *Knox v. Jenks* 7. *Mass.* 488. And the demandant has no other remedy; for it does not appear that the Ten Proprietors have acted as a corporation within twenty years; and it is to be inferred that they have not, since their title became chiefly vested in Gen. *Knox*. The corporation is therefore extinct, within the meaning of the statute.

As to the release from the proprietors to the Commonwealth, it does not effect the question; it having been intended only to enable the Commonwealth to make the subsequent grant which is the basis of the demandant's claim.

Orr and *R. Williams*, for the tenant, denied the right of one member of a corporation of this sort to sustain a real action against a stranger. The lands are held by the corporation, which possesses all the rights of the several members, except the right to have partition at their pleasure. And as the corporation is proved to have existed, and does not appear to have made final partition of its lands more than ten years since, it must be supposed still to exist, and therefore should have brought this action.

But if the corporation is extinct, then its members are tenants in common; and the present tenant is one of them, by his deed from *Knox*. Upon this ground the demandant cannot recover, there being no evidence of actual *ouster*. *Doe v. Prosser Cowp.* 217.

But the Ten Proprietors had no title to the lands in question. The whole of *Beauchamp* and *Leverett's* patent was divided; part of it called the *Waldo* patent; part assigned to the Twenty Associates; and part to the Ten Proprietors. The loss which happened by interfering with the *Plymouth* patent, fell upon the part assigned to the others. The Ten Proprietors would have borne none of it, as their land did not extend beyond nine miles and a half from *Penobscot* river; and hence they were not entitled to any part of the lands granted to make up this loss. Nor have they lost any of their just rights on the northern side. Their claim is wholly under *Beau-*

champ and *Leverett*, the line of whose patent came up no farther than the north line of *Frankfort ;* falling short of every part of the land now demanded. Besides, these proprietors took another and satisfactory indemnity for all they might lose, in the bond of Brigadier *Waldo*, to which alone they elected to resort, relying on his personal responsibility.

If they have any just claim, it can only be enforced in a court of chancery ; for at law, the conveyance from the Commonwealth was to *Knox* alone he being the only grantee named in the deed. Courts of law do not recognize grantees by description.

Williamson, in reply, said that a grant to heirs *eo nomine*, was good at law ; 12. *Mass.* 447 ; and by parity of reason, the present demandant might take as one of the " persons interested," mentioned in the deed from the Commonwealth. The bond too, from *Waldo* to the Ten Proprietors, was conditioned not for the payment of money, but to " make good all lands " they might lose by the survey ; which can be satisfied only by admitting them to be interested, *pro rata*, in the grant to him.

This case having been argued last year, and continued for advisement, the opinion of the Court was delivered in this term, by

Mellen C. J. The premises demanded are what the demandant claims as his share in common, as one of the members or proprietors in a corporation called " the Ten Proprietors," which has long existed, and still continues to exist, under that title. No objections are made to the derivation of what the demandant considers as his right or property ; though some have been urged as to the proportion claimed ; but this needs not to be examined, as our decision has no connection with that point.

In the argument two grounds of objection are relied upon, against the demandant's right to maintain this action ;—first, that the land, of which an undivided proportion is claimed as the demandant's property, never belonged to the Ten Proprietors ;—and secondly, that if it did, and does now, no action can be brought to recover it, except in the name of the Ten Proprietors ; and that no individual proprietor can

maintain an action for his proportion, declaring on his own individual seisin. As to the first point, it appears on a careful examination of the reported facts, that no part of the land which had been assigned to the Ten Proprietors was lost, or taken away, in consequence of the interference with the *Plymouth* patent; and of course the land, which was granted to make up the deficiency, was granted to *Henry Knox* and others, interested in the *Waldo* patent; but the Ten Proprietors were not interested; and therefore no part of the tract granted could enure to their use. Besides, there is a total uncertainty as to every person, as grantee, excepting *Henry Knox*. And in addition to all these facts, it appears that the Ten Proprietors took a bond of indemnity from Brigadier *Waldo*, to secure them against all eventual loss, by reason of surveying the patent, according to the directions of the General Court. So that the fact is, they guarded themselves from any anticipated loss, by the personal security of *Waldo;* and that at last it was ascertained that the anticipated loss or damage was never in fact sustained. The decision of this point settles the cause; but we are disposed to express our opinion on the second also, as it has been the subject of investigation and argument.

By the operation of the provincial statutes, in force when the Ten Proprietors were incorporated, by virtue of a warrant issued on the application of a certain number of those proprietors, the seisin which the individuals had of their respective shares in common, became transferred to the proprietary; and thereupon the Proprietors could sue writs of entry, declaring on their own seisin as such, without giving the names of the members composing the corporation. The seisin being in the company, they could, at a legal meeting, manage and even dispose of any part of the property, by a major vote in interest of the Proprietors. The statute of this State, on this subject, contains nearly the same provisions as the provincial statutes. So long as a man remains a member or proprietor, his common interest is subject to that control which the law has given to a majority in interest. But he may withdraw from the company, and by process of partition have his share assigned to him to hold in severalty; though such a partition would not be granted, until all liens legally created and existing on the property by him owned, had been re-

moved. It was settled in *Mitchell v. Starbuck & al.* 10. *Mass.* 5. that such process of partition would lie by one proprietor, against the corporation or proprietary of which he was one. But as against all others, the rights of the proprietors are to be asserted and enforced by action, in the name of the proprietors or company, by which they are called and known on their own records; and their individual rights are suspended as to remedy by legal process. Such has been the long received and long established doctrine on this subject, and it is not now to be disturbed; and as the fact disproves the seisin alleged, the objection is good on the general issue. On both grounds we are of opinion that the verdict is right, and of course there must be *Judgment for the tenant.*

IRISH *vs.* WEBSTER & AL.

The Land agent cannot maintain an action in his own name, upon a promissory note not negotiable, given to him in his official capacity, for timber belonging to the State.

ASSUMPSIT against the defendants, as the makers of a promissory note of the following tenor:—"*Bangor, July* 28, 1824. For value received we jointly and severally promise *James Irish*, State's agent, or his successor in office, eighty-three dollars and thirty-three cents, in one year from date, with interest after." This note was given for logs cut on lands of the State, by permission of the plaintiff's predecessor in office. The plaintiff, at the date of the note, was, and still is the agent of the State for the management and sale of its public lands, under *Stat.* 1824, *ch.* 280; and the question was, whether he could maintain this action, in his own name, the note having been given to him in his official capacity, for a quantity of pine timber belonging to the State.

Greenleaf and *Godfrey*, for the State, referred to *Van Staphorst v. Pierce* 4. *Mass.* 258. 8. *Mod.* 116. *Hammond on parties* 33. *note. Alsop v. Caines* 10. *Johns.* 396. *Buffum v. Chadwick* 8.

Mass. 103. *Clapp v. Day* 2. *Greenl.* 305. *Fisher v. Ellis* 3. *Pick.* 322.

Gilman, for the defendants, cited *Gilmore v. Pope* 5. *Mass.* 491. *Niven v. Spikerman* 12. *Johns.* 401. *Pigott v. Thompson* 3. *Bos. & Pul.* 147.

MELLEN C. J. delivered the opinion of the Court.

The only question before us is, whether, upon the facts agreed, this action is maintainable by the plaintiff in his own name. Prior to the date of the note declared on, the defendants were indebted to the State in the sum named in the note, for logs they had purchased and cut under the permit of the plaintiff's predecessor in office; and the note was given for the agreed price of them. The note is not negotiable, and it does not appear that any discharge was given to the defendants, from their liability to the State on the original contract. It has been settled in several cases, that though a negotiable note, unless otherwise agreed, is an extinguishment of the original cause of action, a note not negotiable has no such operation. *Thatcher v. Dinsmore* 5. *Mass.* 299. *Maneely v. McGee* 6. *Mass.* 391. *Varner v. Nobleborough* 2. *Greenl.* 121. The inquiry then is, what is the consideration on which the note was given? The case of *Gilmore v. Pope* 5. *Mass.* 491, bears a strong resemblance in its principles, to the case at bar. In that it appears that the defendant, with others, had signed a subscription paper, by which the associates were admitted as members of a certain turnpike corporation; and which, after reciting the incorporation, and division of the stock into shares, proceeds thus:—"We the subscribers, in consideration thereof, and also of the benefit the said turnpike road will be to us and the public, hereby engage to take the number of shares set against our respective names, severally, and to pay on demand to *John Gilmore* all assessments that may be made by the corporation for the purpose of making the road." *Gilmore* was appointed agent of the corporation. The corporation afterwards made the road, and the defendant had received certificates of his share, but had never paid any part of the assessments. *Parsons C. J.* in giving the opinion of the court says, "the action cannot be maintained in the name of a mere agent of the

corporation; there being no consideration, as between the agent and the subscribers, to support an action of *assumpsit*." In that case the shares were rendered valuable by the authority, and at the expense of the corporation, not of *Gilmore* the agent. In this case the logs were the property of the State, and not of *Irish* the agent; and there is no more consideration for the promise in the one case, than in the other. In both cases a liability on the part of the defendant existed, independent of his express promise; in that, a statute remedy against delinquent proprietors would be resorted to by the corporation; and in this, an action by the State, on the original agreement. The cases of *Buffum v. Chadwick*, and *Clapp v. Day*, cited in the argument, were those of private associations; and therein differ from this, as well as from those cited in *Clapp v. Day* and commented upon. If there is a want of clearness on the subject under consideration, and if some of the cases are but faintly distinguished from others, touching the question in what instances an agent may sue in his own name, on a promise made to him as such, public policy seem to require that an agent of the State should make his contracts, not in his own name, but in the name of the State; and that all securities he may receive should be made payable to the State; and that where they have been made payable to him as agent, the suit should be in the name of the State. The statute which was referred to, giving power to treasurers of counties, towns and parishes to sue in their own names bonds given to them as such, or to their predecessors in office, seems to imply that without the aid of the statute such actions could not be sustained. We apprehend that the case of merchants and their factors stands on different ground; that the rights of each are regulated in some measure by principles peculiar to commercial law. For these reasons we are of opinion that this action is not maintainable; and therefore, according to the agreement of the parties, a nonsuit must be entered. *Plaintiff nonsuit.*

The President, &c. of the BANGOR BANK *vs.* HOOK.

The damages on a protested bill of exchange are not given as a liquidated arbitrary mulct; but as a compensation to the holder for the expense of remitting the money to the place where the bill ought to have been paid. And therefore if the holder receive part of the money of the acceptor, this diminishes the damages, *pro rata.*

The indorser of a bill of exchange is not liable for the costs of a suit commenced by the holder against the acceptor; nor for any commissions paid on the collection of part of the money of him.

ASSUMPSIT against the defendant as indorser of a bill of exchange for 3000 dollars, drawn by *Hutson Bishop* of *Belfast*, on *Alfred Curtis* of *Boston*, and by him accepted, but protested for non-payment.

It appeared, in a case stated by the parties, that the acceptor had been sued in *Boston*, and that the plaintiffs had there collected of him the amount of their judgment for the contents of the bill and costs of suit, except a balance of about 150 dollars; which they now claimed of the defendant; together with $49.20 for the customary commissions paid to the attorney for collecting and remitting the money; and damages at the rate of three *per cent.* on the *original amount* of the bill, with interest.

The defendant, upon the common rule, brought into the court below, the sum of 160 dollars, for the balance due upon the bill, and interest and three *per cent.* damages *on that balance only;* which the plaintiffs refused to accept.

Williamson, for the plaintiffs, contended that the defendant ought to pay the commissions paid by them to the attorney in *Boston*, as they were the ordinary and necessary charges incurred in making a collection wholly for the defendant's benefit. He also insisted that the plaintiffs were entitled to three *per cent.* on the whole amount of the bill; which, he said, was given by the statute in the nature of

liquidated damages, for breach of the contract as well in regard to the time, as to the place of payment. *Fletcher v. Dyche*, 2. *D. & E.* 32. *Lowe v. Peers*, 4. *Burr.* 2225. *Grimshaw v. Bender*, 6. *Mass.* 157. 1. *Dane's abr.* 420, *sec.* 1, *Stat.* 1821, *ch.* 88.

Abbot, for the defendant, argued that the statute introduced no new principle into the law-merchant; but only extended its rules to certain cases enumerated. The reason of giving damages, in any case, is, to reimburse the holder of the bill his expenses in transmitting his funds to the place where the bill ought to have been paid. But if the funds have actually been placed there by the acceptor, the reason ceases, and with it, the rule itself. As to the costs of the plaintiffs' proceedings against the acceptor, they are transactions *inter alios*, with which this defendant has nothing to do. *Copp v. McDugal*, 9. *Mass.* 1.

WESTON J. delivered the opinion of the Court.

Prior to an act of Massachusetts regulating damages on inland bills of exchange, which has been reenacted in this State, *Stat.* 1821, *ch.* 88, an allowance of this kind was by law limited to foreign bills, which had been dishonored. But by this act, it is extended to inland bills drawn or indorsed within the State, but payable without, or payable in the State, beyond certain limits prescribed. In order to determine under what circumstances it may be claimed, it may be useful to advert to its origin, and the principles by which it is regulated, in relation to foreign bills. By the law merchant, the holder of a foreign bill is entitled to recover the face of the bill, and the charges of the protest, with interest from the time when the bill ought to have been paid, and also the price of reexchange; so that he may purchase another good bill for the remittance of the money. Reexchange is the expense incurred by the bill being dishonored in a foreign country in which it was payable, and returned to the country in which it was made or indorsed, and there taken up. The amount of it depends on the course of the exchange between the countries, through which the bill has been negotiated. *Chitty on bills*, 544.

Parsons C. J. in delivering the opinion of the court, in *Grimshaw v. Bender*, 6. *Mass.* 157, says, "the rule of damages established by the law merchant, is in our opinion absolutely controlled by the immemorial usage in this State. Here the usage is, to allow the holder of the bill the money for which it was drawn, reduced to our currency at par, and also the charges of protest, with American interest on these sums, from the time when the bill should have been paid; and the further sum of one tenth of the money for which it was drawn, with interest upon it from the time payment of the dishonored bill was demanded of the drawer. But nothing has been allowed for reexchange, whether it is below or at par." And he adds, "The origin of this usage was probably founded in the convenience of avoiding all disputes about the price of reexchange, and to induce purchasers to take their bills, by a liberal substitution of ten *per cent.* instead of a claim for reexchange." It is manifest, then, that the ten *per cent.* damages are given instead of reexchange; and we must understand that the damages given by statute upon inland bills, are allowed upon the same principle; that is, to indemnify the holder for the expense he incurs, or is supposed to incur, in receiving the money at the place where the bill is drawn, and transmitting it to the place of its destination, where it was originally made payable. That this is the only ground upon which these damages are given, is not only supported by a consideration of the reason upon which the claim is founded on foreign bills, but from the fact that, by the statute, the scale of damages in regard to dishonored inland bills, depends upon the distance of the State or territory, where payable, from this State. Distance is also made the criterion upon which damages are allowed upon bills of one hundred dollars or upwards, drawn or indorsed here, payable in another place within the State; they being given only where that is distant seventy-five miles or more from the place of drawing or indorsing. If the disappointment, or considerations other than the expense of the reexchange, constituted the reason or basis of the damages, there seems no sufficient reason why they should not be allowed, where the place of payment is within the distance of seventy-five miles. Now if a bill made payable in a foreign country, protested

for non-payment or non-acceptance, is afterwards there paid and received, there arises no claim for reexchange; or that which is substituted here, the ten *per cent.* damages. So if it be partially paid and received abroad, at the place where made payable, this claim is reduced *pro tanto.* It is only where the bill is returned home, and there taken up, that this allowance can be demanded. The damages are incident to the principal. If that be paid, or as far as paid at the place appointed, the incident or accretion, which would otherwise attach to it, ceases. For the injury occasioned by the delay of payment, the law deems the interest an equivalent.

When the bill in question was dishonored, and the legal steps had been taken, by which to charge the defendant as indorser, the right of the plaintiffs to receive, and the liability of the defendant to pay, the damages given by the statute, accrued, and might have been enforced. The plaintiffs were under no obligation afterwards, either to sue the acceptor, or to receive from him the contents of the bill, without the damages to which they were entitled as against the drawer or indorsers. But when they did receive from the acceptor at *Boston*, the place where the bill was payable, the greater part of the bill, they may be considered, nothing appearing to the contrary, as having, *pro tanto*, waived and lost their right to the reexchange, or which is the same thing, the damages, which are a substitute therefor. We are, for these reasons, of opinion, that the three *per cent.* damages can in this case be allowed only upon the balance of the bill remaing unpaid, after deducting what was received in *Boston.*

As to the commissions paid by the plaintiffs to their attorney, we are not aware of any legal principle, by which they can be recovered against the defendant. The plaintiffs were not obliged to incur this expense. Their remedy was perfect against the defendant after the dishonor of the bill, without again resorting to the acceptor. If they thought proper to do so, they must themselves pay the agents they employ, for the reimbursement of which they can have no legal claim against the defendant, unless by express stipulation. The opinion of the court is, that the sum paid into court, by the defendant, was sufficient to cover the amount which the plaintiffs could sustain against him.

PARLIN *vs.* HAYNES.

If the tenant in a writ of entry, after action brought, purchase of a third person an outstanding title derived from the demandant himself, this cannot be pleaded in bar of the action. *Aliter*, if the title was purchased directly from the demandant.

THIS was a writ of entry, commenced *July* 27, 1825, on the seisin of the demandant. The tenant, as to a parcel of the land, pleaded *nontenure* and a disclaimer, upon which there was no controversy. As to the residue, consisting of two parcels distinctly described by metes and bounds, he pleaded the general issue.

At the trial, before *Weston J.* the tenant proved a good title to one the parcels defended. As to the other, he gave in evidence a deed from the demandant, conveying it to *Edward R. Favor*, dated *April* 30, 1825; and he offered to shew a deed of conveyance from *Favor* to *Ward Witham*, and another from *Witham* to himself; but both were given since the commencement of this action; and on this account both the two latter deeds were rejected by the Judge. The jury returned a verdict for the tenant as to the first parcel defended; and for the demandant as to the other; and the questions whether the rejected deeds were admissible, and whether the defence was made out without them, were reserved for the consideration of the court.

Allen, for the tenant. The deed from the demandant to *Favor* having been read without objection, the title is shown to be out of him, and he cannot recover. The verdict should have been for the tenant as to both parcels of land, it being evident that the demandant was not seised of either.

But all the deeds were admissible, without being specially pleaded. The rule to exclude deeds showing that the title is not in the demandant, unless they are pleaded, is confined to titles under which the tenant does not claim. *Wolcott v. Knight* 6. *Mass.* 418. And the reason is, that the demandant may reply that nothing passed by the deed. If it were otherwise, the tenant might show the deed to defeat one demandant, and prove that nothing passed by it, to defeat another.

But that rule does not apply to this case, the tenant deducing his title from the demandant himself. The deeds constitute an estoppel, which may be given in evidence under the general issue. *Adams v. Barnes* 17. *Mass.* 365. They disprove the seisin of the demandant, and show the illegality and injustice of his claim; and they constitute, in a real action, the same kind of defence that payment does, in actions personal; which may always be shown under the general issue, without regard to the time when it was made. The effect of a different rule would be to multiply suits; since the judgment in this case in favor of the demandant, would be the foundation of a new action for the tenant against him.

McGaw, for the demandant, relied on *Andrews v. Hooper* 13. *Mass.* 472, as decisive of the question.

MELLEN C. J. delivered the opinion of the Court.

This is a writ of entry, tried on the general issue. By the report it appears, that about three months prior to the commencement of the action, the demandant conveyed part of the demanded premises, for which he obtained a verdict, to one *Edward R. Favor;* and that, since the commencement of the action, *Favor* conveyed the same to *Witham*, and *Witham* conveyed the same to the tenant. The deed to *Favor* was admitted in evidence without objection; and the other two deeds, on objection by the counsel for the demandant, were excluded. The question reserved is, whether *Witham's* deed to the tenant was properly rejected; and, if so, whether the defence of the action is good without that deed. It is evident, that as both the deeds rejected were objected to, and excluded on the same ground, the inadmissibility of either is as fatal to the defence of this action, as of both. For the sake of clearness we will consider the merits of the defence as founded merely on the deed from the demandant to *Favor*. If this conveyance had been pleaded in bar, inasmuch as nothing appears that would have prevented the operation of the deed, it would have defeated the action, although the tenant did not claim under it, according to the principles laid down

in *Wolcott v. Knight*, 6. *Mass.* 418. Or if the conveyance, instead of being to *Favor*, had been directly to the tenant, and had been pleaded in bar, as was done in the case of *Everenden v. Beaumont*, 7. *Mass.* 76, it would have been a substantial defence, even if such conveyance had been made after the commencement of the action. Or if the present action had been a writ of right, instead of a writ of entry, the demandant's conveyance, if operative, though made before the action to a stranger, might be given in evidence on the general issue, according to *Knox v. Kellock*, 14. *Mass.* 200; or if made after the action commenced, it might, if made to the tenant, constitute a good defence on the general issue, according to the principles recognized and established in *Poor & al. v. Robinson*, 10. *Mass.* 131. The case now under consideration is different from all these; but it is clear that on the general issue, the deed from the demandant was inadmissible; and its admission without any objection does not alter the case; because it has no tendency to disprove the allegation of the demandant's seisin within twenty years before the date of the writ; and proof of such a seisin is sufficient for the demandant, unless the tenant can show a title superior to the demandant's. Independent, therefore, of the two deeds which were offered and rejected, the defence is without foundation.

The remaining question is, whether those deeds were properly excluded. In *Andrews et ux. v. Hooper*, 13. *Mass.* 472, the court lay down the law distinctly, that the tenant cannot be permitted to set up a title under a deed made since the commencement of the action; and observe that a title, thus acquired, had been uniformly rejected in the courts of Massachusetts. They further rely on the case of *Le Bret v. Papillon*, 4. *East*, 502, in which Lord *Ellenborough* says, that since the case of *Evans v. Prosser*, 3. *D. & E.* 186, was decided, it had been "considered as a settled rule of pleading, that no matter of defence arising after action brought, can properly be pleaded in bar of the action generally." We admit that a conveyance of the demanded premises by the demandant directly to the tenant, is a fair exception from this general rule, and would constitute a good plea in bar; and it is very clear that a de-

fendant may show that a plaintiff has, by his own act, defeated his own action; as where the demandant in a real action enters into and takes possession of the demanded premises; or a feme sole plaintiff in a personal action intermarries; in both of these cases, the entry and marriage, pending the action, will, when properly pleaded, defeat it. In the case of *Andrews & al v. Hooper*, before cited, the court observe that, to sustain an after purchased title would operate unequally and unjustly, by enabling a tenant to fortify a defective title, and avoid the payment of costs, for which he might otherwise be liable; and which in the course of an expensive suit might even exceed the value of the land in litigation."

It has been urged that, as the title procured by the tenant since the action was commenced, is derived from the demandant himself, through *Favor* and *Witham*, this case is not within the range of the principles before stated; but no authority is produced in support of the supposed distinction; and as the demandant has done no act in relation to the demanded premises, since the commencement of the action, showing his intention to defeat it; we are not able to perceive any sound reason why a deed from *Favor*, executed in the commencement of the suit, should be entitled to admission in evidence, any more than a deed made, under such circumstances, by any other person, admitting him to be even the true proprietor of the land; and surely such a deed could not be received to constitute a defence. The law is clearly otherwise.

It is true that the tenant may in another action avail himself of the title he has procured since the institution of the present, and by means of it recover back the premises from the demandant; but that is no reason why he should not succeed in obtaining judgment in this case, and thus secure to himself those costs which he has been obliged to incur in his action against a man, who, when sued, had no title whatever to the land demanded. We are all of opinion that there must be *Judgment on the verdict.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

HANCOCK.

JUNE TERM.

1827.

Memorandum. *Weston J.* was not present at this term.

PETERS & AL. *vs.* FOSS.

Where one, having entered into lands not his own, submitted to the title of the true owner, with whom he made a verbal contract for the purchase of the lands; and afterwards mortgaged them to a stranger; it was held that the mortgage was no disseisin of the true owner, the possession not having been changed.

THIS was a writ of entry, in which the demandants counted on their own seisin, and a disseisin by the tenant; and it was tried on the general issue.

The title of the demandants was under a mortgage made to them and registered in 1821, by *John Wentworth;* who died in 1823, having dwelt on the premises from the year 1801 till his death.

The tenant proved that on the 14th of *February* 1794, the Commonwealth of Massachusetts conveyed a tract of land, of which the premises are a part, to *Leonard Jarvis;* whose heirs at law conveyed the land in question, *March* 11, 1825, to the tenant. *Wentworth* entered in 1801 under one *Joy*, who had pretended to own the land; but was soon after informed that *Jarvis* was the true owner. In 1804 *Wentworth* agreed to purchase the premises of *Jarvis*, at two dollars

per acre; and continued to live on the land, under that agreement, as *Jarvis's* agent supposed. *Foss*, the tenant, married *Wentworth's* daughter; and after the decease of his father in law, being required by the demandants to give them possession of the land, he refused, saying he had bought it of the heirs of *Jarvis*.

Upon this evidence the Chief Justice directed a verdict to be returned for the tenant; which was taken subject to the opinion of the court upon the question whether the action could be maintained.

Greenleaf and *Deane*, for the demandants, maintained the following points:

1. Whether the title was originally in *Jarvis* or not, is not material in this action; because the mortgage deed of 1821, by *Wentworth* to the demandants, was a disseisin of *Jarvis* and all others.

2. *Wentworth* dying in possession, a descent was cast upon his heirs, and the entry of *Jarvis* was thereby taken away. Consequently his deed to the tenant, of *March* 11, 1825, could not operate, except to confirm the title of his wife, who was one of *Wentworth's* heirs at law.

3. The tenant and wife are both estopped to claim against the warranty of her father.

Orr and *Abbot*, for the tenant, denied that here was any evidence of a disseisin. *Wentworth* submitted to the title of *Jarvis* in 1804; after which he was a tenant at will; whose mortgage could not disseise the landlord, because there was no change of possession, nor actual notice given to the owner of the soil. No descent was cast, because *Wentworth* had nothing to descend. His possession was merely the possession of *Jarvis*. *Warren v. Fernside* 1. *Wils.* 176. *Little v. Megquier* 2. *Greenl.* 178. *Propr's. Ken. Pur. v. Laboree ib.* 286. *Higby v. Rice* 5. *Mass.* 344. *Groton v. Boxborough* 6. *Mass.* 50.

Mellen C. J. delivered the opinion of the Court.

It appears that *Wentworth*, under whom the demandants claim, never had any thing more than merely a possessory title, which he mortgaged to them in 1821; but he continued in the possession of

the land till his death in 1823, and some of his children remained there after his death. But though he entered on the lands in 1801, yet in the year 1804 he distinctly recognized the title of *Leonard Jarvis*, to whom the lands had been conveyed by a committee of the Commonwealth of Massachusetts in 1794; and whose heirs conveyed the same to the tenant in 1825. As *Wentworth*, in 1804, offered to purchase of *Jarvis*, and claimed no title of his own, he could not then be considered a disseisor; and we do not find him doing any act, in relation to this land, indicating a claim of property, until he made the mortgage deed; and we are not to presume any thing in favor of a wrong doer. As that was only two years before his death, his children and heirs would have had no better title to the land in consequence of the descent cast, if he had not conveyed whatever right he had, before his death. But it is said that as the mortgage deed was duly registered in 1821, this constituted a disseisin of the heirs of *Leonard Jarvis*, so that their deed to the tenant was ineffectual. The answer to this argument is obvious. The demandants never entered into the actual and open possession of the land; and without such entry and possession of all or a part of the lands described in the deed so recorded, it does not amonnt to a disseisin. This we have decided in the cases of *Little v. Megquier* and *Prop'rs. Ken. Pur. v. Laboree*, cited in the argument. As to the equitable interest in the improvements made on the land, we have nothing to do with them in this cause, the legal title only being in question. The objection that the tenant is estopped by the mortgage deed made by the father of his wife, cannot be sustained. He claims nothing in virtue of her heirship; and besides, if he was estopped to claim the land against that deed, he surely is not estopped to claim under the title of Massachusetts, which he has acquired since that deed was executed. To carry the doctrine to such an extent, would be a violation of all principle. There must be

Judgment on the verdict.

The Inhabitants of KNOX *vs. The Inhabitants of* WALDOBOROUGH.

A decision of the court in favor of the defendant, upon an agreed statement of facts, and a nonsuit of the plaintiff entered, and judgment thereon for the defendant for his costs, pursuant to such agreement, constitute no bar to a subsequent action for the same cause.

THIS was an action for supplies furnished to the wife of *John Braddock*, as a pauper, subsequent to those sued for in the former action between these parties, reported in 3. *Greenl.* 455. *That* cause was submitted to the jury in the court below, upon the evidence contained in a written statement of facts, agreed by the parties; and it came up on exceptions to the opinion of *Perham J.* on the case so stated. But in the bill of exceptions no notice was taken of the agreement of the parties expressed in that statement, that if the opinion of the court should finally be against the plaintiffs, they would become nonsuit; and therefore no nonsuit was entered at the term when the opinion of the court was delivered; but the cause stood over for a new trial at the bar of this court, according to the usual course, at the next term, when the agreement was adverted to, and a nonsuit entered.

Upon the trial of the present action, before *Weston J.* at the last *October* term, the defendants contended that by the facts agreed in the former case, the decision of the court, and the judgment thereon, the plaintiffs were estopped from denying that the settlement of the pauper was in *Knox*. But the Judge directed the jury to return a verdict for the plaintiffs; reserving the question of estoppel for the consideration of the court.

Abbot, for the defendants, said that the true question was, whether the essential point in contest had been decided in the former action? If it had, it could not be again controverted between the same parties. This is the principle of all estoppels; and where it applies in any form, the parties are concluded. Hence if matter of defence

has once been opened to a party, he is not permitted to draw it again into litigation. Now here, the whole controversy has been solemnly decided by this court, upon a case stated. 1. *Chitty's Pl.* 194. 1. *Pick.* 435. *Ferrer's case*, 6. *Co.* 7. *Outram v. Morewood*, 3. *East.* 346. *Co. Lit.* 352. 13. *Johns.* 227. *Leicester v. Rehoboth*, 4. *Mass.* 180. *Green v. Monmouth*, 7. *Mass.* 467. 2. *Johns.* 481.

Wilson, for the plaintiffs.

MELLEN C. J. delivered the opinion of the Court, at the ensuing *November* term in *Cumberland.*

The reported decision of the former suit between these parties, (see 3. *Greenl.* 455.) was founded on a statement of facts signed by the counsel of the respective parties in the Court of Common Pleas, containing the usual agreement, that if the court should be of opinion that, on the facts therein stated, the action was not maintainable, the plaintiffs would become nonsuit. It appears that the court were of that opinion, and that accordingly a nonsuit was entered, and judgment rendered in favor of the defendants for costs. The question submitted is, whether that nonsuit, and the judgment thereon, constitute a bar to the present action? In common cases a nonsuit certainly is not a bar to another action for the same cause. Then is the agreement any thing more than a particular mode of finally disposing of that action, without the form of a trial by jury? If the former cause had been opened to the jury, and the same facts had been proved, which are contained in the statement before mentioned, and thereupon the presiding judge had ruled that the action was not maintainable, and in submission to his opinion, the plaintiffs had become nonsuit; in such case it is clear the nonsuit would be no bar to the present action. How is the case altered because the nonsuit was entered in submission to the opinion of two or three judges? It is true that in the former case there was a submission to the opinion after it was given; in the latter there was an agreement to submit to it before it was given or known; but in both cases the opinion submitted to, was one founded on certain specified facts; and why should it be extended beyond those facts? Or if the counsel in draw-

ing up a statement, omit certain important facts, which were not then known to him, and perhaps not to his client, why should he lose the benefit of those facts when discovered? They may be such as would have changed the complexion of the cause, and led the court to a different decision. Even where no new facts exist, why should a nonsuit be a bar, though entered pursuant to the agreement of the parties? A man must be very unwise to expect, on a second trial, that the court will decide against the opinion they have already delivered in the cause. The hopelessness of such a proceeding will generally be a safeguard to a defendant; and, besides, he will recover costs against a plaintiff who will amuse himself in such imprudent and unprofitable experiments. It is true that the agreement which concludes the statement of facts in the reported case, and which is usually subjoined to similar statements, is very unequal; because a judgment on default is forever binding on the defendant, but a judgment on nonsuit is not so on the plaintiff; but this inequality is the consequence of a defendant's own contract; and it may easily be avoided, by properly framing the agreement. Where a verdict is given for a plaintiff, the agreement may be, that, if the court should be of opinion that the action is not maintainable on the facts reported, the verdict shall be so amended, as to stand a verdict in favor of the defendant. And where the agreement is subjoined to a statement of facts, it may be that if the court should sustain the action on the facts agreed, a default shall be entered; if otherwise, that a nonsuit shall be entered, and a waiver on record of all right to commence another action for the same cause.

We are all of opinion that the the present action is not barred by the nonsuit and judgment entered in the former one; and therefore, pursuant to the agreement of the parties, there must be

Judgment on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

WASHINGTON.

JUNE TERM.

1827.

Memorandum. *Weston J.* was not present at this term.

ADAMS & AL. *vs.* BALCH.

In an action against the sheriff for neglect or misconduct in the service of an execution, he is not permitted to impeach the creditor's judgment, except on the ground that it was obtained by fraud.

THIS was an action against the sheriff of this county, for the default of his deputy, in not safely keeping in his custody certain goods which he had attached in the suit of these plaintiffs against *Kelly & Coates;* so that their execution remained unsatisfied.

At the trial before *Weston J.* the plaintiffs produced a copy of their writ against *Kelly & Coates* by virtue of which the goods were attached; and of a note filed in that case, and of the judgment recovered therein. The note bore date *March* 21, 1822, was payable to *Osgood & Foster*, in thirty days with grace, and was indorsed in blank; but was not negotiable. The suit was commenced *April* 22, 1822, and the note was declared upon as a negotiable note, regularly indorsed to the plaintiffs. It was agreed that the original defendants were insolvent at the time the action against them was commenced.

It was contended by the counsel for the defendant, upon this evi-

dence, that the proof did not support the action; that the note upon which judgment appeared to have been rendered was of a different description from the note declared on, and did not warrant the judgment, as it was not negotiable, nor due at the time of the commencement of that suit; at which time, it was manifest from the plaintiffs own showing, they had no cause of action. The Judge overruled this objection, but reserved the point for the consideration of the court; a verdict, under his direction, having been returned for the plaintiffs.

Hobbs, for the defendant, contended that the sheriff was in no case liable for not taking or keeping the goods of a defendant, unless it appeared that the plaintiff had a good cause of action. If he had none, he could not be injured. *Pierce v. Jackson* 6. *Mass.* 242. But here it appears that these plaintiffs could have no action against the original defendants, because the note, which they have produced as the ground of their judgment, was not negotiable. It is of their own showing, and was by them filed in the cause, and is not now to be controverted.

But if the note should be laid out of the case, as forming no part of the record, yet on the face of the record itself the action was groundless, the note not having become due when the suit was commenced. This defect is not cured even by verdict. It was therefore a fraud on the other creditors of *Kelly & Coates* to attempt to sequester their goods by suit on a note not yet due; which the policy of the law will not permit, in any mode, to prove successful. *Cheetham v. Lewis* 3. *Johns.* 42. *Waring v. Yates* 10. *Johns.* 119. *Allaire v. Ouland* 2. *Johns. Ca.* 52. *Stewart v. McBride* 1. *Seg. & Rawle* 202. *Gordon v. Kennedy* 2. *Binn.* 287.

Orr and *Weston* for the plaintiffs.

MELLEN C. J. delivered the opinion of the Court.

It appears that *Kelly & Coates* gave their promisory note to *Osgood & Foster;* and though it was not negotiable, the payees indorsed it to the plaintiffs, who afterwards put the same in suit; in which suit against the makers the plaintiffs declared upon it as a negotiable

note, describing it as payable to *Osgood & Foster* or their order. In that action the defendants were defaulted, and judgment was rendered on the note against them. The note was dated *March* 21, 1822, payable in thirty days with grace; and the action was commenced on the 22d of *April* then next following; and of course before the note was due. The present action is commenced against the sheriff for the alleged misconduct of one of his deputies, in the service of the original writs in the action against *Kelly & Coates.* In the case at bar, a verdict was returned in favor of the plaintiffs, on which judgment is to be rendered, if the objections of the defendant's counsel were correctly overruled.

The first objection is, that as the note of *Kelly & Coates* was not negotiable, it was not proof of the declaration; and judgment should not have been rendered thereon. To this objection there are two answers; one is, that the note is no part of the record; it is only evidence adduced in support of the promise alleged, and undoubtedly it was improper evidence; and had it been duly objected to, it could not have been received. The other is, that even if the note should be considered a part of the record, and the judgment be reversible on that account, contrary to the decision in *Storer v. White*, 7. *Mass.* 449, and *Pierce v. Adams*, 8. *Mass.* 388, yet the judgment, which has been so rendered, remains in force, till reversed on error.

The second objection is, that the note was not due when sued. To this, the same answer is given; the judgment is in force till reversed; till then, we must respect it, and cannot, in this indirect mode, impeach it. It is true that, in certain cases, a judgment may be impeached and defeated, as to its effects upon third persons who are injured by it; they are are permitted to show that it was obtained, or is kept on foot, by fraud and covin between the parties. But though, by the report of the judge, it appears that, at the time of the default, *Kelly & Coates* were insolvent; still there are no facts before us tending to show that the judgment was obtained by one party, and consented to by the other, for the fraudulent purpose of defeating the right of other attaching creditors by the anticipated attachment of the plaintiffs; nay there is no proof that there were any other attaching creditors.

In fact, the case before us furnishes no proof of fraud in any one; but seems to shew there was none; and without fraud, the case of *Pierce v. Jackson*, cited in the argument, can certainly have no application.

In addition to what has been stated, we would observe, that, fraud being laid out of the question, there can be no legal authority or pretence for the defendant in this action to make the objections on which he has relied. If they could ever be sustained, they should be made by the defendants in the original action.

The cases cited by the defendant's counsel from the New York reports, are undoubtedly sound law, but in one material particular they differ from the case at bar. In those, the objections, founded on the want of title, or cause of action, apparent on the record, were decided to be good after verdict; that is the verdict did not cure the defect; the objections were made while the causes were pending. But in the case under consideration, judgment has been entered, and the cause long since finally determined. No case can be found where such an exception as the present, has prevailed after judgment, unless upon a writ of error. On every principle the plaintiffs are entitled to *Judgment on the verdict.*

BIXBY *ex'x. vs.* WHITNEY.

Where two parties executed a bond, submitting to arbitration "all debts, dues and demands heretofore subsisting between them;" and on the same day one of them gave the other a promissory note payable in specific articles at a remote day;—it was held that the note was not within the terms of the submission, it being, by intendment of law, given after the execution of the bond.

If arbitrators erroneously refuse to consider a particular demand laid before them, on the mistaken ground that it is not within the submission; the bond and award are no bar to a subsequent action upon the demand thus rejected.

If a note be given for specific articles, to a creditor living out of the United States, and no place is assigned for the delivery of them; the foreign domicil of the creditor does not absolve the debtor from the obligation of ascertaining from him the place where he will receive the goods.

ASSUMPSIT on a promissory note made by the defendant to the plaintiff, in her capacity of executrix, bearing date *May* 21, 1823, and payable in boards on or before *August* 1, 1824.

At the trial, before the Chief Justice, at the sittings after this term, the defendant contended that the note was merged in a submission of all demands between the parties to certain arbitrators, and their award thereon. To prove which he produced the arbitration bond, dated *May* 21, 1823, and conditioned to perform the award, in the usual form; reciting the submission, which was of "all debts, dues and demands heretofore existing" between the parties. He also produced the award of the arbitrators, made pursuant to the submission, awarding to the plaintiff upwards of £200 New Brunswick currency; she being an inhabitant of that province. He also proved that at the hearing before the arbitrators, which was *Nov.* 19, 1824, he required the plaintiff to produce the note, and lay it before them for their adjudication; which on her part was refused, on the ground that it was not a matter in dispute, but had been already liquidated. The note, however, was exhibited to the arbitrators, in order to as-

certain its tenor, but they did not take it into consideration, in making their award, not deeming it within their jurisdiction. The consideration of this note was admitted to be a large number of logs which the defendant had previously received, partly of the plaintiff's testator, and partly of herself.

The defendant further contended that the consideration of the note being a debt previously existing, it was within the terms of the bond, as a demand submitted to the arbitrators;—and that it was not competent for the plaintiff to withhold it from them; but its contents having been made known to them, they were bound to consider it in their award.

The Chief Justice overruled this defence; and the defendant filed exceptions to his opinion. The defendant also moved in arrest of judgment, for the following causes:

1. It appears by the writ that at the commencement of this action the plaintiff had her domicil in a British province; and no place in this State is set forth where she was ready to have received the boards promised in the note declared on; nor that she was ever ready to receive them, at any place.

2. It does not appear that the boards were not delivered according to the tenor of the note; but only that the defendant has not paid the money demanded in the declaration; whereas the defendant was not bound to pay the money unless he neglected to deliver the boards, or to have them ready to be delivered on the appointed day.

3. As no place of delivery is mentioned in the declaration, or in the note therein described, the declaration is in this respect substantially defective; because the place is material, and traversable, admitting parol evidence to prove it, when not mentioned in the note.

4. It does not appear that the plaintiff appointed any place where she would receive said boards, as, from her foreign residence, and the uncertainty of the note in this respect, she was bound to have done.

Orr and *Greenleaf* argued, in support of the exceptions, that in executing the bond, the defendant had given the plaintiff a stipulation under

seal, to pay such sum as the arbitrators should award, in lieu of all other demands. All other demands then existing between them were therefore absorbed in that one security, which, so far at least as the plaintiff, who is subject to the law of England, is concerned, was entitled to a preference in payment, over any contract not under seal.

But if the note was not merged in the bond, yet it was within its terms as an existing demand, and as such should have been submitted to the arbitrators, and included in their award. It is not reasonable that a party, who has entered into a submission of all demands, should be allowed to control the contract, and withhold demands, at his pleasure; harassing his adversary with suit after suit, as may best gratify his malignity or caprice. Yet such is the consequence of sustaining this suit.

The case of *Seddon v. Tutop* 1. *Esp.* 401, was the case of a demand accidently overlooked, in executing a writ of inquiry; but no case can be found where a party has been allowed subsequently to recover one which had been wilfully withheld from the decision of a competent tribunal.

A. G. Chandler, for the plaintiff, denied that the note was merged in the bond; which was a submission of demands previously existing, and could not include one which was created at the same time with the bond. This also was not intended as any thing more than an agreement upon the manner in which existing demands should be adjusted, but not as a substitute for other securities. The defendant's argument upon this point involves the absurdity of supposing the parties to be stipulating for a long term of credit, and a particular mode of payment, at the very moment that they were extinguishing the contract thus created.

Nor was the note within the terms of the bond. These related to affairs unliquidated; not to one which the parties had at that moment adjusted between themselves, and which was not in dispute. 1. *Dane's Abr. ch.* 13, *art.* 14, 5. *Mass.* 337. 4. *D. & E.* 147. The note, moreover, was not payable until the lapse of fourteen months; while the bond, from its express terms, might much sooner become

forfeited. The bond also related exclusively to the claims of the plaintiff as executrix; but the consideration of the note belonged partly to her in her own right.

But in no case can the defendant avail himself of the bond and award, without shewing that the award had been performed. If a plea of that sort would be bad, as the authorities clearly show, then the same facts, when given in evidence, will not support the general issue. But here, the defendant does not pretend performance of the award.

The motion in arrest of judgment was not argued.

The opinion of the Court was read at the ensuing *October* term in *Kennebec*, as drawn up by

MELLEN C. J. In this case a motion in arrest of judgment has been filed, and an exception alleged against the decision of the judge who presided at the trial. As to the motion:—The first, third and fourth reasons assigned in support of it, state omissions on the part of the plaintiff of certain particulars which it is contended she was bound to perform and aver. But it seems well settled that where no place is appointed for the delivery of specific articles, the obligor must go before the day of payment to the obligee and know what place he will appoint to receive them. The first act is to be done by the debtor. In the present case he made no such application, but suffered the days of payment to elapse, and thereby became liable to pay the contents of the note in money. If he had done his duty as to the ascertainment of the place of delivery, and offered there to deliver the boards, he could have successfully pleaded those facts, whether the plaintiff was ready then to receive them or not. Of course, an averment of her presence, or readiness, was of no importance. The second reason assigned has no merit in this stage of the cause, whatever it might have had on special demurrer. The verdict proves that the note in the present case has not been paid, either in boards or money. The motion is overruled.

As to the exceptions:—The submission and note both bear the same date; and the language of the parties in describing the sub-

jects submitted is, "all debts, dues and demands heretofore existing between the parties." As we do not know which was first signed, the bond or the note, we must so consider them as to render the conduct of the parties rational and consistent. To do this we must suppose the bond to have been signed first; and thus the note would not be embraced in the language; and this seems the most rational construction, because the terms of the note are peculiar, as to the mode and time of payment, and inconsistent with the submission; and it never was a demand of the testator before the note was given. It was given, as stated by the counsel for the plaintiff, for different demands, of different persons, claiming in different capacities. But if the note was included in the terms of the submission, it never was in fact submitted to their consideration by the plaintiff; and the case finds expressly that the arbitrators refused to take the same into consideration, and did not, in forming their award. This fact not only puts an end to the defence, but shows most clearly that it has no foundation in justice. *Webster v. Lee* 5. *Mass.* 334. *Hodges v. Hodges* 9. *Mass.* 320. *Smith v. Whiting* 11. *Mass.* 445, and cases there cited.

We are all of opinion that the exception, as well as the motion must be overruled, and judgment be entered on the verdict.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM.

1828.

EMERSON *vs.* TOWLE.

The time of returning into the clerk's office an execution extended on land, is not material, if it has been recorded in the registry of deeds within three months after the extent.

IN a petition for partition of lands, to which the respondent claimed title, under the plea of sole seisin, the title of the petitioner was derived from an attachment of the land *March* 25, 1824, upon a writ in his own favor against one *Stephen Towle;* and a subsequent extent of the execution issued in that case, which was made *Dec.* 22, 1824, within thirty days after judgment, and was recorded *Feb.* 8, 1825; but the execution was not returned to the clerk's office until more than a year after it was recorded, nor until after the present process was commenced. The respondent claimed under a deed of conveyance from the same *Stephen Towle* to himself, made *Aug.* 14, 1823, but not recorded until *March* 26, 1824, being one day after the attachment.

The respondent contended that the petitioner, an attaching creditor, could not hold the land against him by virtue of the extent, he having neglected to return his execution into the clerk's office for

more than a year after the extent, and until after this process was commenced. And *Preble J.* reserved this point for the consideration of the court, directing the jury to find for the petitioner.

J. and *E. Shepley*, for the respondent, maintained the point taken at the trial, insisting that as the execution must be returned to the clerk's office, in order to complete the title of the petitioner, and no time was specified in the statute; it must at least be done within a reasonable time, and, at all events, before suit commenced upon his title. But neither of these was done in the present case; and as the rights of the parties are to be determined by the state of things existing at the time of the commencement of the suit, and at that time the petitioner had not a perfect title, it was manifest that he could not retain the verdict. They cited *Ladd v. Blunt* 4. *Mass.* 402. *Heywood v. Hildreth* 9. *Mass.* 395. *Gorham v. Blazo* 2. *Greenl.* 237. *M'Lellan v. Whitney* 15. *Mass.* 137. 5. *Mass.* 403.

Greenleaf, for the petitioner, referred to the statute rendering the registry of a deed necessary, in order to complete the title as against strangers; and to the uniform construction, that it was sufficient if it was recorded before it was read in evidence; and such, he said, was by plain analogy the law in this case. *The United States v. Slade* 2. *Mason*, 71. *Prescott v. Pettee & al.* 3. *Pick.* 331.

Weston J. delivered the opinion of the Court at the ensuing term in *Cumberland.*

In the case of *Prescott v. Pettee* 3. *Pick.* 331, cited in the argument, the question presented in the case before us was discussed; and *Parker C. J.* by whom the opinion of the court was delivered, went into an elaborate consideration of the laws of the colony, province and commonwealth, of Massachusetts, upon the subject; with a view to arrive at the meaning of the legislature, in regard to the return of the execution into the clerk's office. The reporter deduces, as the result of this opinion, that if it be returned, before it is offered in evidence although after the return day, it is sufficient. And this deduction seems to be warranted by the reasoning of the

Chief Justice. The record in the register's office, gives effectual notice of the levy. It is the place, appointed by law, for the information of purchasers, and others, interested to know the fact. The grounds of that decision exist, with equal force, in this State. Our law is the same; and the illustration, derived from former laws, is as applicable here, as in Massachusetts. We are satisfied with the opinion cited, to which we refer; without repeating the reasons, upon which it is founded. *Judgment on the verdict.*

ANDREWS *vs.* BOYD.

By a devise of the income of one third part of a farm, the devisee becomes a tenant in common of that portion of the land itself.

THE question in this case, which was a writ of entry, was whether the provision made by *James Boyce* for his widow, in his last will, was a devise of a portion of the land for her life, or a bequest of a yearly portion of the issues and income, to be paid by the executor.

He devised to his wife for her life, "the net income of one third part of my homestead farm, together with my household furniture; also two cows and six sheep, with a privilege in my barn convenient for every necessary appertaining thereto; and if the abovementioned income shall not be sufficient to keep my said cows and sheep as they ought to be kept, it is my will that ample provision be made therefor at the expense of my son *James*." He also devised to her the use of certain apartments in the house, with a place for a granary for her corn. His son *James* was made guardian to a son who was *non compos*, whom he was directed to support; provision was made for the daughters; his estate was declared to be "held for the payment and fulfilment of every article abovementioned"; and *James* was made residuary devisee.

After the death of the testator, *James* entered upon the farm, and supported the widow and the *non compos*, for about nine years; when he conveyed his interest in the farm, by deed of quitclaim, to *David Boyd*, the tenant, who has ever since performed all that *James* was directed by the will to do, in the support and care of his mother and brother.

The title of the demandant was under the extent of an execution on a specific part of the farm, issued on a judgment in his own favor against *James Boyd* the devisee; the land having been attached prior to his deed to the tenant. Another extent had been made, on another portion, by another creditor of the same devisee; and a part of the farm had been sold by the administrator *cum testamento annexo*, for the payment of debts; so that the residue, it was agreed, was wholly insufficient to execute the intentions of the testator.

W. Burleigh, for the demandant, contended, upon these facts, that the provision made in the will for the widow was in the nature of a personal legacy, for which she had a remedy by action against the executor, who might sell real estate to raise money to discharge it. *Farwell v. Jacobs* 4. *Mass.* 634. *Baker v. Dodge* 2. *Pick.* 619. Upon the common rules of construction, it was apparent that such was the intent of the testator; he having designated what particular part of the premises she should occupy, which, by necessary implication, is an exclusion of all other parts.

J. Holmes and *E. Shepley* argued for the tenant, maintaining, in effect, the following positions.

1. By the devise of one third of the income, the widow took a freehold for her own life in an undivided third part of the land, in common with *James*, the devisee. *Reed v. Reed* 9. *Mass.* 372. *Stevens v. Winship* 1. *Pick.* 318.

2. The extent of an execution, therefore, on any portion of the land, by metes and bounds, as the sole property of *James*, is void against all persons but himself; and especially against the widow, and the present tenant, who holds for her use. *Bartlett v. Harlow* 12. *Mass.* 343. *Baldwin v. Whiting* 13. *Mass.* 57. *Atkins v. Bean* 14. *Mass.* 404.

3. Or else the whole estate passed by the will, charged with the payment of the annuities, debts and legacies, as a trust estate; either to the executor;—*Beasly v. Woodhouse* 4. *D. & E.* 89;—or to *James*, the devisee; *Cox v. Bassett* 3. *Ves.* 155;—in either of which cases the execution of the trust may be enforced in chancery;—*Com. Dig. Chancery* 3. *A.* 7. 3. *R.* 6. 3. *Ves.* 209. 1. *Ves.* 439. 5. *Ves.* 248. *Crague v. Lesley* 3. *Wheat.* 576;—and at common law the devise will be construed as upon condition, to effect the same object;—2. *Dall.* 131. *Baker v. Dodge* 2. *Pick.* 619;—but the estate is in no case subject to extent by the creditors of the trustee. *Russell v. Lewis* 2. *Pick.* 508.

This argument having been had at the last *April* term in this county, the opinion of the Court was now delivered by

Weston J The only title stated in the case, in behalf of the tenant in his own right, having emanated from *James Boyd*, the son of the testator, must yield to that of the demandant, in virtue of his prior attachment of the same land, as his creditor. In this view of the case, the demandant would be clearly entitled to judgment; as his title is unquestionably good against his debtor, and all claiming under him, subsequent to the attachment. But if the widow of the testator, or his executor, have a title, which the levy of the demandant cannot impair or defeat, it is distinctly stated by their counsel to have been the intention of the parties, and such has been the course of the argument, to admit the tenant to defend in their right. Through him the widow has enjoyed her portion of the estate to her satisfaction, if she be a devisee of one third of the farm; and by his agency, the executor may be considered as having paid her one third of the net income, if this provision in her favor is to be deemed a legacy. The question then submitted to the determination of the court is, whether the demandant is entitled to the land he claims, either as against the tenant, or as against the widow or the executor, so far as they may have derived an interest under the will.

To his son *James*, the testator gave all his real and personal estate, not otherwise devised or bequeathed. To his wife he gave, among other things, the net income of one third part of his home-

stead farm. Is this provision in favor of the widow, to be regarded as a legacy, or a devise to her, during life, of one third of the farm in common and undivided? If it be a legacy, the payment of it is a duty devolving upon the executor. It is manifestly to be drawn from one third part of the farm. If thus considered, it would seem to be necessary that the executor should hold it in trust, to enable him to perform this duty; and authorities are adduced, tending to show that this would be the legal construction by necessary implication, if it cannot be held to be a devise to the widow. If the executor held one third of the farm in trust, in common and undivided, during the life of the widow, it would interpose the same obstacle to a recovery by the demandant, as if the same estate were held directly by her. But whether this would be the legal result, if this provision for the widow were to be regarded as a legacy, it is not necessary for us to give an opinion; inasmuch as we are satisfied that under the will, the widow is by law entitled to a life estate in one third of the farm in question as tenant in common.

If a man devise the rents and profits of his land, the land itself passes. 3. *Com. Dig. Devise N.* 1. In *South v. Alliene* 1. *Salk.* 228, the whole court agreed that a devise of the rents and profits was a devise of the land; and it was decided by two judges against one, that a devise of the rents and profits, to be paid by the executor, was also a devise of the land. *Holt C. J.* who dissented, considered it by implication of law, a devise to the exeutors in trust, and this seems the better opinion. *Reed v. Reed* 9. *Mass.* 322, cited in the argument, was almost exactly like the case before us. The testator there gave to his wife one third of his personal estate, and the income of one third of his real, during her life. It was insisted in argument, that the provision for the wife was an annuity, or a legacy becoming due yearly, which could be claimed only of the executor, and that he took an estate in trust to enable him to pay it; but the court held that a devise of the income had the same effect as a devise of the land.

It does not appear to us that any fair distinction can be raised between income and net income. Net is a term used among merchants, to designate the quantity, amount or value of an article or

commodity, after all tare and charges are deducted. The income of an estate means nothing more than the profit it will yield, after deducting the charges of management; or the rent which may be obtained for the use of it. The rents and profits of an estate, the income, or the net income of it, are all equivalent expressions. The provision made for the widow was for her support and maintenance. This object is best effected by permitting her to enjoy the estate directly. But if liable to be levied on as the property of others, although it might pass subject to the charge, she might meet with great delay and vexation, while pursuing her legal remedies to obtain that, which the testator intended as a means of supplying her immediate wants. By the will, she had the privilege of keeping two cows and six sheep. The enjoyment of a part of the farm specifically, was necessary to enable her to do this. In this mode she would realize the income, not directly in money, but by the profits of her stock. It was probably contemplated by the testator, that she would cultivate her part of the farm through the aid of her son, that he would retain a portion of the produce for his labor, and that she would thus enjoy the net income. But there is nothing in the will to restrain her from availing herself of the income, in any other manner she might deem more eligible. The land, the source from which it was to be derived, was hers for this purpose; of which she cannot legally be deprived by her son, or by his creditors. The levy of the demandant, therefore, upon part of the land in severalty, by metes and bounds, as the property of *James Boyd*, cannot be sustained against her. The cases cited by the counsel for the tenant, are very clear to this point.

According to the agreement of the parties, the demandant is to become nonsuit, and the tenant allowed his costs.

Ross *vs.* Gould.

A deed, imperfectly executed by an attorney as the deed of his principal, is nevertheless admissible in evidence, in aid of the grantee's entry, to shew the extent of his claim of title.

Though a deed may be read in evidence to the jury, after the preliminary proof by the subscribing witnesses, yet if the genuineness of the instrument is in controversy, the burden of proof is still on the party producing it, to satisfy the jury, beyond a reasonable doubt, that it is genuine.

A mere mistake of the party in possession of land, as it will not constitute a disseisin, so it will not be construed into an abandonment of the possession; especially where it was caused by the owner of the fee.

This was a writ of entry, and was tried before *Preble J.* upon the general issue.

It appeared in evidence that in *June* 1779, one *Adam Ross* caused a certain tract of land, of which the demanded premises were parcel, to be surveyed, the lines and corners to be marked, and the courses and distances to be ascertained, the surveyor estimating and certifying the contents as two hundred acres. *Ross* entered into the tract thus surveyed, and continued in possession till his death. Soon after his decease, in *June* 1792, his two sons, *Daniel* the demandant, and *Joseph*, caused the same tract to be resurveyed, by another surveyor, who returned the same courses, distances, monuments and contents, as before. They continued in the actual possession and improvement of the land, under these surveys, till *May* 20, 1793; at which time they, with other persons in a similar situation, entered into a bond with the proprietors of *Coxhall*, for quieting the settlers, and extinguishing the title of the proprietors to the lands settled upon. The committee agreed upon by the settlers and proprietors proceeded to estimate the value of the lands possessed by *Daniel* and *Joseph Ross*, at a certain price by the acre, assuming the quantity to be two hundred acres.

It further appeared that *John Low*, *Nathaniel Conant* and *Samuel Sawyer*, agents to the proprietors of *Coxhall*, duly authorised to

adjust all claims with settlers, and to give deeds of the land, and who had entered, in their behalf, into the bond of *May* 20, 1793, and were themselves proprietors, proceeded, on the 10th day of *April* 1794, to give to *Daniel* and *Joseph Ross* a deed of the parcel in their possession, describing it precisely as in the surveyors' certificates of 1779 and 1792, adding the words "but more or less" to the estimated quantity of two hundred acres. To the admission of this deed in evidence, when it was offered by the demandant, the tenant objected; but the judge admitted it to be read, as legal evidence to the jury. At the time of giving this deed, the grantees gave to the agents their joint promissory note for the sum ascertained to be due to the proprietors, for the land in their possession, computed at two hundred acres, collaterally secured by their mortgage of the same tract, by the same description. The land thus conveyed was occupied by both the grantees till *April* 1816, when *Joseph Ross* died. His widow and children continued the same occupancy and possession till *December* in the same year.

It also appeared that on the ninth day of *March* 1816, *Daniel Ross* entered into a written agreement, under seal, with *John Low*, respecting the running out of the tract; from which, and from other evidence, it was apparent that the land was to be surveyed at the expense of *Low;* that, the balance then due on the note aforesaid being first paid, *Low* should give a deed of one hundred acres in severalty to *Daniel Ross*, and of the other hundred acres in severalty to the heirs of *Joseph Ross;* that the surplus quantity of land, if there should be any, should belong to *Low*, he agreeing that if there should be a deficiency in the quantity, he would make it up. During this time *Low* declared, to *Ross* and others, that the mortgage had run down, and the land was his; and that he could keep the whole tract, the money not having been all paid; but that he did not wish to wrong the *Rosses*, and would let them have their 200 acres, they agreeing to take that quantity, and give up the surplus. The condition of the mortgage was indeed broken; but no entry for condition broken had ever been made, nor was the equity of redemption in any mode foreclosed. *Daniel Ross* had paid one moiety of the note, and some partial payments had been made towards the

other moiety, the residue of which was paid by the widow and heirs of *Joseph*, *Dec.* 26, 1816, and the note cancelled and destroyed. On the last mentioned day *Low* and *Daniel Ross* went on the land with a surveyor and chainmen, and a hundred acres, parcel of the tract, was surveyed and marked off for *Ross;* he assisting to mark the lines and set up the monuments; but at the same time declaring that he ought to hold by the old deed, as they had paid for the whole; and *Low* on the contrary, claiming the whole tract as his own. *Ross*, however, proceeded to assist in the division of the tract, and appeared satisfied with what was done; and on the same day received from *Low* a deed of the hundred acres, more or less, so surveyed and marked off. At the same time another hundred acres of the same tract was surveyed for the widow and heirs of *Joseph Ross*, to whom a deed was given *Dec.* 27, 1816.

The residue of the tract, which constituted the demanded premises, was surveyed and marked off for *Low*, *Jan.* 1, 1817, *Daniel Ross* being present and assisting; and it did not appear that *Ross* after that time, ever exercised any act of ownership over this surplus, or claimed any right in the same, until within three months prior to the commencement of this action.

It further appeared that *Low*, on the 28th day of *December* 1816, made a deed conveying the demanded premises to *Gould*, the tenant, who immediately entered, and had continued to occupy, till the time of trial.

The tenant also produced a paper purporting to be a deed of the same surplus, from *Daniel Ross* to *Low*, dated *Sept.* 16, 1816. Its genuineness being contested by the demandant, the usual preliminary proof of the signatures of the subscribing witnesses was adduced, they being both dead, after which the paper was read in evidence to the jury. A great variety of testimony, both direct and circumstantial, was then offered by both parties, for and against the genuineness of the paper as the deed of *Ross;* upon which the Judge instructed the jury that the tenant having introduced the instrument purporting to be a deed from *Ross* to *Low*, and claiming under that instrument, it was not the duty of the demandant to prove it to be a forgery; but it was the duty of the tenant to give them reasonable satisfaction that the

deed was genuine. And if he had failed thus to satisfy them upon this point, they would return their verdict for the demandant. And they did find for the demandant.

If the instructions of the Judge were erroneous, or if the law, on the facts above stated, was with the tenant, the parties agreed that the verdict should be set aside.

N. Emery and *E. Shepley*, for the tenant, contended that the deed, executed by the committee of the proprietors, did not convey the land to *Ross*. But this point, however, was not determined by the court.

Though *Ross* had occupied the land long enough to have acquired a title; yet he entered into an agreement to surrender the possession, assisted to mark out and designate the portion given up, which he voluntarily and absolutely abandoned, without any intention of resuming it. By this act his possessory title became forever extinct. *Ken. Prop'rs. v. Laboree* 2. *Greenl.* 283. *Small v. Porter* 15. *Mass.* 495. *Little v. Libbey* 2. *Greenl.* 244. *Klock v. Richtmyer* 16. *Johns.* 314. *Smith v. Lorilla* 10. *Johns.* 338. If it did not, yet his having seen *Gould* purchase of *Low*, erect buildings on the land, and make improvements for eight or nine years, without giving him notice of his claim of title, was a fraud, which estops him from setting up this title against this tenant.

As to the burden of proof, the jury were not properly instructed. The witnesses to the deed, and the magistrate before whom it was acknowledged, were all dead. The mode of proof, in such case, was to call one person to testify to the hand writing of one of the subscribing witnesses to the deed. Then the law presumes it to have been the deed of the grantor, and suffers it to be read in evidence to the jury. 1. *Phil. Ev.* 362, 363. It never presumes fraud, but supposes every thing morally as it should be, till the contrary is proved. 1. *Phil. Ev.* 151. The burden of proof is always on him who charges the illegality or fraud. What the law supposes, it does not permit to be controverted but by proof, to be adduced by the party who charges the fraud. *Williams v. The East India Co.* 3. *East* 199.

The tenant in the present case has not had the benefit of these

salutary rules. He proved the deed by one witness, and it was read to the jury as a deed presumed by the law to be the deed of the grantor. After this, the *onus probandi* was on the demandant, to show that it was a forgery; and evidence having been offered on both sides, to this point, the jury should have been instructed that it was his duty to satisfy them of its falsehood, and not that it was the duty of the tenant to prove it a genuine deed. Yet they were told that the presumption of law was against the deed.

J. Holmes and *Goodenow* argued for the demandant, contending at large that the deed of the proprietors' committee was sufficiently executed to pass their title; but if not, it was sufficient to convey the title of the committee; and that the mortgage of *Ross* in 1794 to the proprietors, or at least to their committee, estopped them, and their privies in estate, from setting up a title against it. But these arguments are omitted for the reason before given.

But, they argued, if the deed of the proprietors was imperfectly executed, and so void as a deed, yet it was properly admitted in evidence to show the extent of the possession and claim of the grantee. *Little v. Megquier* 3. *Greenl.* 176. *Robison v. Swett ib.* 316. *Ken. Prop'rs. v. Laboree* 2. *Greenl.* 275.

They insisted further that the vote of the proprietors, appointing *Sawyer*, *Low* and *Conant*, a committee to settle with the demandant, and to quiet him in his possession, might be considered as a grant to the committee for the use of the settlers; and the deed of the committee as an execution of the trust, *ut res magis valeat.*

The possession of the tenant, they said, was wholly tortious and intrusive. The proprietors had been disseised more than twenty years, and moreover a descent was cast. Their entry therefore was unlawful, and could give no right to one claiming under them. Nor could the act of *Ross*, in relinquishing his possession of the demanded premises, avail the tenant, since it was occasioned by the false representations of his grantor. The truth was, the mortgage money having been paid, and no entry for condition broken, the estate vested in the mortgagor, without a release. *Perkins v. Pitts* 11. *Mass.* 125.

As to the burden of proof, the rule is, that the party making title, must establish it by evidence. *Actori incumbit onus probandi.* 1.

Stark. Ev. 376. And with this agrees the rule of the civil law, *ei incumbit probatio qui dicit, non qui negat.* Here the real question was, whether the tenant must make out his case, or not; and the jury were instructed that on this point he must give them reasonable satisfaction by proof. The doctrine of the other side introduces the new principle, that the conscience of the jury is to be instructed, and the burden of proof changed, by the opinion of the judge in a matter of fact. The preliminary proof, by the subscribing witnesses, is addressed to the court, not to the jury; and if it can be suffered to weigh in the decision of the question, it draws that decision to a new tribunal, not warranted by the constitution. It is not until the preliminary proof has been offered to the court, that the parties are permitted to litigate the genuineness of the deed before the jury; whose province and duty is to decide upon the whole evidence before them. *Homer v. Wallis* 11. *Mass.* 310. 1. *Phil. Ev.* [423.]

Mellen C. J. delivered the opinion of the Court.

The case presents three questions for consideration.

1. Was the deed, signed by *Low* and others, as agents for the proprietors of *Coxhall*, properly admitted in evidence?

2. Were the instructions given by the presiding judge to the jury correct?

3. Is the law, on the facts reported, in favor of the tenant?

With respect to the first question, we would observe that the ground on which our decision is placed renders it unnecessary for us to decide whether the deed was so executed by the agents, as to pass the fee of the estate therein described to *Daniel* and *Joseph Ross.* If it was, and if the verdict in favor of the demandant was found under correct and legal instructions from the court, it is perfectly clear that the demandant has a right to retain the verdict; but if it was not, still it was admissible to shew the nature and extent of the claim of the grantees under the deed, which was registered in *February* 1795, the year after its execution. The report states that the judge admitted the deed "as legal evidence to the jury." It certainly was such, and therefore the first objection is of no importance.

The next inquiry is, whether the instructions were correct as to the *onus probandi*. On this point the argument of the counsel for the tenant is specious, and has been ingeniously urged, but we are perfectly satisfied that it possesses no intrinsic merit. It is a general, if not a universal rule, that the burden of proof rests on him who has the affirmative of a proposition. Hence a plaintiff must prove his declaration; the *onus probandi* is on him; but if the defendant admits the facts alleged against him, but pleads and relies on another fact, as a bar to the action, then he must prove this fact; the *onus probandi* is thrown upon him. In the case at bar the tenant introduced the deed from *Daniel Ross* to *Low*, the execution of which was denied by the demandant. The tenant thereby affirmed it to be the demandant's deed; and of course the burden of proof was on him. To a certain extent his counsel admits the principle; but he contends that as soon as he had offered evidence of the execution, though of a *prima facie* character, sufficient to authorise him to read it to the jury, he had, by so doing, thrown the *onus probandi* upon the demandant, to disprove the execution, and satisfy the jury that it was not his deed. The true answer to this course of reasoning is, that nothing is to be admitted to the jury without the sanction of an oath, unless by consent, express or implied. A promissory note, offered in support of a declaration upon it, may be read to the jury without any preliminary proof, if the defendant consents to it; this is the case of express consent. If the nature of a plea in bar be such as not to deny the genuineness of the contract declared on, as for instance, the plea of general performance, or the plea of seisin at the time of making the covenant alleged, or the plea of payment, or release; these are cases of implied consent; and for the reasons above mentioned the contract declared on may be read to the jury without any proof of execution. But not so when the issue is upon the plea of *non est factum*; there must then be some *prima facie* proof offered, to justify the court in permitting the contract to be read to the jury in evidence, and submitted to their consideration. And the same principle applies if the contract be offered in evidence, and is denied. When it is so admitted, the jury are the proper and constitutional tribunal to decide the question

whether the contract be genuine, or not. In the examination of the contested fact, the *onus probandi* may, in the course of a trial, be thrown from one party upon the other several times, according as the complexion of the proof may change. But when it is said, as was stated by the judge at the trial, that the *onus probandi* is on the party who offers a paper as a genuine deed under which he claims, the plain sound common sense and legal meaning is, that it has reference to all the evidence in the cause respecting the alleged genuineness of the contested paper; or, in other words, it means that the party affirming the paper or instrument to be genuine, must furnish to the jury so much evidence as to leave a balance of proof in favor of the genuineness of the instrument, after making all due allowance for the influence of the proof adduced on the other side to produce a different conviction in the minds of the jury. The application of these plain principles shows, most manifestly, that the instructions of the judge to the jury were perfectly correct.

Having thus disposed of the second objection, we would repeat the observation that we made in considering the first objection, namely, that if the agent's deed did convey the estate to the grantees, then of course the tenant has no possible ground of defence. But in considering the third question, we will proceed upon the principle that no legal estate passed by the deed, without giving any opinion on the point. In this view of the subject, *Daniel* and *Joseph Ross* must be considered as entering upon the lands described in the deed wrongfully, and by causing the deed under which they claimed to hold, to be registered in *February* 1795, they are to be considered disseisors of the proprietors, as to those lands, and to have continued such disseisin until the 9th of *March* 1816, without a question, according to repeated decisions of this court. *Little v. Megquier* 2. *Greenl.* 276.. *Robinson v. Swett & al.* 3. *Greenl.* 316, and *Proprietors of Kennebec Purchase v. Laboree* 2. *Greenl.* 275, and the cases there cited. But it has been contended that by means of the agreement made between *Low* and the demandant on the 9th of *March* 1816, the disseisin and all its effects were done away, and the possession of the demanded premises abandoned, or surrendered. It is clear the agreement was not intended as a conveyance by the

demandant to *Low*, but only as a preparatory arrangement, and that a deed was contemplated to be given in pursuance of it; but the jury have found that what the tenant relied on as the contemplated deed was not proved to their satisfaction to have been executed by the demandant; and that it was not his deed. The question then is whether there was any voluntary abandonment of the possession by the demandant, doing away the effects of his disseisin of the proprietors. A disseisin cannot be committed by mistake; *Gay v. Brown* 3. *Greenl.* 126; because the intention of the possessor to claim adversely is an essential ingredient in a disseisin; and for the same reason mere mistake will not constitute an abandonment of possession; and much less if such arrangements as were made, were the consequence of false representations by a party interested. The report shews that the demandant acted under the influence of the misrepresentations made by *Low* in relation to the mortgage; he assuring them that in virtue of such mortgage he had the absolute ownership of all the premises mortgaged, though he was willing to yield up a part on the terms proposed. Now the fact was that no estate had become absolute in *Low*, he never having entered to foreclose the mortgage; and though on the 26th of *December* 1816, the balance due on the mortgage was paid by the heirs of *Joseph Ross*, yet, on that very day, *Low* declared that all the land was his, when conversing with the demandant. We cannot consider these transactions as amounting to an abandonment of the possession of the premises, of which the tenant can avail himself, to any advantage. The effect of the disseisin then, not being done away, nor the possession of the demandant changed, under circumstances prejudicial to his possessory rights, we have only to compare the possessory titles of the parties; and the demandant's, being the elder, is the better title. We are all of opinion that there must be

Judgment on the verdict.

CRAM *vs.* BURNHAM.

Cohabitation, known to be adulterous in its origin, a former wife being still alive, conveys no right to the guilty parties, against third persons; nor does the continuance of such cohabitation, after the death of the lawful wife, afford legal presumption of a subsequent marriage.

ASSUMPSIT on a promissory note made by the defendant's intestate, payable to *Maria Cram*, alleged to have been then, and still to be, the wife of *Jacob Cram* the plaintiff.

At the trial before *Preble J.* it appeared that the marriage of the plaintiff with his reputed wife, if it was legal, was duly solemnized in this county *Sept.* 3, 1815; since which time they had continued to dwell together, and were the parents of a family of children. But it was also proved that in 1796 he was lawfully married to another wife at *Weare*, in New Hampshire, with whom he cohabited till 1812, when he left her, and came to reside in *Limerick* in this county, in the immediate neighborhood of the woman he afterwards married; and that his first wife was living at *Weare*, at the time of the second marriage, and till *Jan.* 29, 1816; of which facts the second wife had full knowledge. It also appeared that the note in suit was given for part of the purchase-money of a parcel of land conveyed by *Cram* to the intestate, and was made payable to the wife to induce her to sign the deed with him, as his wife, relinquishing her right of dower; and that in another deed given to the intestate, and in a receipt taken by him, he had recognized *Maria* as the wife of *Jacob Cram*.

Upon these facts a verdict was taken for the plaintiff, subject to the opinion of the court, upon the question, whether the plaintiff could maintain the action in his own name.

N. Emery and *D. Goodenow*, for the defendant, contended that the second marriage, while the first subsisted, was merely void; and therefore conveyed no rights whatever to the husband. It did not make them husband and wife. *Reeve's Dom. Rel.* 102. Cohabitation, at most, is but evidence *prima facie* of marriage. *Newburyport v. Boothbay* 9. *Mass.* 414. But here it is rebutted by the evi-

dence adduced. The issue of such second marriage is illegitimate. *Reeve* 237. The second wife may be a witness, upon an indictment of the husband for bigamy, after proof of the first marriage. 1. *Phil. Ev.* 70.

And if the marriage was thus void, no subsequent act of the parties could make it good, by way of ratification, after the death of the first wife. No lapse of time, or assent of parties, can make a marriage, without the formalities of law; however they may be regarded, in the absence of opposing testimony, as evidence of a marriage previously had. If the previous marriage is proved, there is no room for presumption; and no new relation of that kind can be created, while the former exists in all its force. *Cro. El.* 858. *Peake's cases* 39. *Morris v. Millar* 4. *Burr.* 2057. 3. *Camp.* 438. 4. *Camp.* 215.

J. Shepley, for the plaintiff, said that no action whatever could be sustained upon the note, unless the present suit was supported; as the plaintiff and his wife would be estopped, by the deeds, to deny the marriage, should it be shown against an action brought by her as a *feme sole*. And to shew that the marriage was good, after the death of the first wife, in all cases except indictments for bigamy, adultery, and the like, he cited 1. *Com. Dig. tit. Baron & Feme B.* 1. *Fenton v. Reed* 4. *Johns.* 52. And he further contended that the intestate, having taken their deed and receipt, as husband and wife, ought not now to be admitted to avoid the payment of the purchase-money by this defence.

Weston J. delivered the opinion of the Court.

In order to sustain this action, it is incumbent on the plaintiff to prove that he is the husband of the woman, who, in the note declared on, is called *Maria Cram*. It is in evidence that they have cohabited together, and that they claim to stand to each other in the relation of husband and wife.

In most cases, cohabitation, as husband and wife, is evidence from which the law presumes a lawful marriage. So also where the presumption may be repelled, it will fix upon the party, who thus holds

himself out to the world in the character of a husband, liabilities as it respects others, which attach to this relation.

There is another class of cases, where the parties, without any imputation upon their innocence or purity, live together in the fullest belief that they are lawfully married; although in fact the marriage may not be lawful, from a want of authority in the person by whom it may have been solemnized, or from some other legal defect in point of form. These have often been recognised as marriages *de facto;* from which, to a certain extent, rights and duties may arise, as it respects both the parties themselves and their children. If the plaintiff had relied upon cohabitation alone, as evidence of a legal marriage, it might have justified the presumption that a lawful marriage had taken place, when he might lawfully enter into that connexion. He however introduces and relies upon proof of the solemnization of his marriage, at a certain period. It fully appears that at that time, he being the husband of another woman, then in full life, this pretended marriage was clearly void.

Until the death of the lawful wife, their cohabitation was lewd and lascivious; and would have subjected him to severe punishment, and *Maria Adams* also, if conusant of the first marriage, and that his lawful wife was still alive. After her death, their cohabitation, although not attended with a breach of marriage vows, was still an offence against decency and good morals, for which they would have been liable to a legal prosecution. It is in proof, that the nature and circumstances of their connexion were known to the neighborhood; and that neither party made any secret of the facts, by which its criminality was made apparent. If the plaintiff can predicate rights upon a course of conduct thus flagrant, as well might he do it if his lawful wife had resided in the same town. If she had been unfaithful, and that fact had been verified before the proper tribunal, he might have been legally absolved from the obligation he had assumed. But a mere pretence of this sort, which he appears to have set up, and which might have been altogether without foundation, afforded him no justification whatever. Having neglected the duties of a husband, towards her to whom they were rightfully due, having violated his marriage vows, and openly lived in an adulterous connexion with

another woman ; in the face of these facts, he now claims, in relation to her, the rights and prerogatives of a husband ; in consequence of a pretended solemnization of marriage, which he knew to be void. To sustain a claim of this sort, would comport neither with public policy, with good morals, nor with law. The plaintiff might be liable to others, as the husband of *Maria Adams;* but it is one thing to incur liabilities, and another to establish rights.

In the case of *Fenton v. Reed*, cited in the argument, the right of the original plaintiff was not predicated upon an unlawful connexion then continuing, like the case before us ; but upon one believed to be innocent in its commencement, and, under the circumstances, not liable to be prosecuted as an offence, and which had ceased by the death of him, whom the plaintiff regarded as her second husband. Even there, the court pronounced the second marriage void ; but sustained her demand, which they probably deemed equitable upon the merits, upon the ground that subsequent to the death of the first husband, another marriage might be presumed. In the case before us, no such presumption can arise. The plaintiff does not depend upon presumption. The marriage upon which he relies, and of which he furnished formal proof, is that solemnized before the death of his lawful wife, and which is therefore inoperative and void. The court in New York say that a contract of marriage, made *per verba de presenti*, amounts to an actual marriage, without any formal solemnization. They cite the case of *McAdam* and *Walker*, in the house of Lords, 1 *Dow*, 148, which was an appeal from the Court of Sessions in *Scotland*, where Lord *Eldon* states the law in the same manner ; which he says is warranted by the law of *Scotland*, and by the canon law. It might deserve great consideration, whether a doctrine thus broad would be sanctioned in this State.

In *Cunninghams* and *Cunninghams*, also in the house of Lords, on an appeal from the court of Session in Scotland, 2 *Dow*, 482, which is to be found in a note to 4 *John* 53, Lord *Eldon* and Lord *Redesdale* held "that in cases of cohabitation, the presumption was in favor of its legality ; but where it was known to have been illicit in its origin, that presumption could not be made." And such is the case now under consideration.

As to the argument that the defendant's intestate, by giving the note to the woman by the name of *Maria Cram*, recognized her as the wife of the plaintiff, he might not have known the circumstances of their connexion; and his administratrix is well justified in requiring proof of the plaintiff's legal title to the note in question.

New trial granted.

The inhabitants of PARSONSFIELD *vs.* DALTON.

Where a town had become a congregational parish, by building a meeting house for that denomination, and settling a minister; and afterwards an act was passed incorporating certain individuals by name, with their families, having *B. R.* for their pastor, with their associates and such others as might afterwards associate with them, as the congregational society in the same town of *P*;—it was held that this act did not create a new corporation, but only recognized and confirmed the rights of the parish already existing and entitled to the parish funds, and to the lands reserved for the use of the ministry in the town.

THIS was a writ of entry, in which the controversy regarded the title to certain lands in *Parsonsfield*, the tenant claiming them under the first or congregational parish or society, whose title he held; and the demandants claiming them as belonging to the town.

It appeared that between the years 1785 and 1790, the town adopted various measures for building a meeting house; and that in 1788 a deed was made by *John Brown*, conveying to a committee of the town four acres of land on which the meeting house was afterwards erected, and including the demanded premises, for the use of the town for parochial purposes. In 1790, the town voted that the meeting house should be the property of the congregational society; that the taxes of fifteen persons called baptists, which were assessed for building the meeting house, should be abated; and that one of the lots designated for the use of the ministry shonld be exchanged

with *John Brown*, for land and buildings near the meeting house. *Brown* accordingly executed another deed of a larger tract of land, including the land described in the former deed, to a committee of the town, for the use of the congregational society; which use the town ratified and approved. Various other arrangements were made by the town, for building the meeting house, the baptists being expressly exempted from taxation for that purpose, and for settling the Rev. *Benjamin Rolfe;* which was done in 1795, at the expense of the town, the baptists excepted. It appeared from other votes, up to the year 1801, that the expenses of erecting a house for Mr. *Rolfe*, paying his salary, and finishing the meeting house, were in the same manner assessed on the "congregational society," as it was termed at some times, and at others on "Mr. *Rolfe's* parishioners." In 1799, it was voted that the baptists should have their proportion of money arising from the sale of ministerial lands in the town; and in 1801, the "congregational society" having applied to the legislature for incorporation, the town voted to oppose the measure, "if it deprives the other societies of their right in the public lands in said town, given for the support of the ministry"; and at the same time also voted that the ministerial lands in the town should be equally divided "between the three societies." The town held its meetings in the meeting house, and placed a town pound, and a school house on the tract of four acres, which remained till 1801.

On the second day of *March* 1802, an act was passed incorporating thirty one persons by name, having Mr. *Rolfe* for their pastor, with their families and estates, and such other persons as had already associated or might afterwards associate themselves for that purpose, into a religious society, by the name of the congregational society in *Parsonsfield*, with the usual parochial corporate powers. At that time, and for several years previous, there were two other societies of baptists, in the same town, having their separate ministers and places of worship; but no other parish was organized under an act of incorporation.

Upon this evidence *Preble J.* before whom the cause was tried, instructed the jury that, for the purposes of this trial, they might consider the act of *March* 2, 1802, not as creating a new society, but

as giving form and consistency and a corporate capacity to the congregational society already in existence, and known and recognized as such by the town. And a verdict was returned for the tenant, subject to the opinion of the court upon the correctness of those instructions.

J. Shepley argued for the demandants, and admitted that if the act of *March* 2, 1802, created no new corporation, but only defined and confirmed the powers of an existing parish, the property in controversy would belong to the society whose title the tenant holds. But he contended that the act created a new corporation, such as is called a poll-parish, having no territorial limits, but known only by the individuals belonging to it. *Jewett v. Burroughs* 15. *Mass.* 464. *Dillingham v. Snow* 5. *Mass.* 547. *Cochran v. Camden* 15. *Mass.* 296. *Minot v. Curtis* 7. *Mass.* 444. *Sutton v. Cole* 8. *Mass.* 96. 3. *Pick.* 232.

Previous to the passage of the act, no body of men could claim to control the property, against the will of the town. All the grants were made to the town, and by it was the property managed, and all business relating to it transacted. The majority of the inhabitants remained unaffected by the new act, which could not abridge their rights already vested; nor devolve on the new society any duties incumbent on the town or parish. *Shapleigh v. Gilman* 13. *Mass.* 190.

N. Emery, for the tenant, adverted to the different votes passed on this subject by the town, which, he said, showed a distinct appropriation of the land for the use of the congregational parish, or society, of which Mr. *Rolfe* was the pastor. This appropriation effected nothing more than the law itself would have done, and it ought to be held valid, if it can be, without violating existing rules. The special act created no new corporation. It was not limited to individuals by name; but included in its terms all who then were, or might afterwards become members of the congregational society, of which body, the act is nothing more than a legislative recognition, confirming its rights and privileges. *The Episcopal Char. Soc. v. The Episcopal Church in Dedham* 4. *Pick.* 372. *Medford v. Pratt ib.* 422.

Parsonsfield *v.* Dalton.

MELLEN C. J. delivered the opinion of the Court at the ensuing term in *Cumberland.*

By the report, it appears to be admitted that the tenant has a good title to the premises demanded, if, upon the facts therein stated, the congregational society in the town of *Parsonsfield*, under which he claims, owned the same when the conveyance was made to him. The nature and merits of the title of that society, therefore, are the subjects of our consideration.

It appears that in 1788, one *John Brown* made and executed a deed of four acres of land to a committee of the town, embracing the demanded premises, for the use of the ministry; and in the year 1790 he made another deed of a larger tract of land, including what was conveyed by the former deed, to a committee of said town for the use of the congregational society; and that the town appropriated all the last named tract to the use of that society. A meeting house having been erected by the town on the lot, in *January* 1795, Mr. *Rolfe* was ordained as the minister of the congregational society, by the vote and under the authority of the town; and he continued in that office for some years after the act of incorporation was passed which is hereinafter mentioned. All the transactions in relation to the meeting house and the settlement and support of Mr. *Rolfe*, though of a parochial character, were conducted in the name of the town. In 1801 a committee was chosen to procure an act to incorporate the congregational society; and the act was passed *March* 2, 1802, which will presently be particularly examined. No other religious society appears to have been incorporated in the town; though there are, and for many years have been many baptists, who were generally excused from the payment of expenses incident to the erection and completion of the meeting house, and also of the salary of Mr. *Rolfe*. There is nothing unusual in the mode of proceeding which the town adopted respecting those concerns which were strictly parochial; as the court took occasion very distinctly to observe in the case of *Jewett v. Burroughs* which was cited by the counsel for the demandants. The facts in that case, as well as the argument of the court, as stated by the chief justice in delivering their opinion,

seem to throw a strong light on the case before us. Before examining the act of incorporation of *March* 2, 1802, until which time it is apparent the whole town composed one parish, and, in respect to parochial affairs, acted as such, as we have before observed; it is to be distinctly remarked that such parish was called, in all the proceedings of the town, the "congregational society." The court observe in the above cited case of *Jewett v. Burroughs*, "if the town was a parish, it was a congregational parish; for the former minister, Mr. *Hasey*, was expressly settled as a congregational minister, and continued such until his death." The same observation seems equally applicable to the present case, *mutatis mutandis*.

Let us in the first place inquire and ascertain what was the congregational society, and what were its rights prior to the act of incorporation. The records of the town call the society over which Mr. *Rolfe* was ordained, the congregational society; and such it was in fact. For the use of this society the tract of land, of which the demanded premises are a part, was conveyed to the town; by means whereof such society became entitled to it. This is no new principle. In the grants of numerous townships lying in this State, lots have been reserved and afterwards drawn, for the use of the ministry, long before any congregational society was or could be formed; but when formed, the estate vested. In this state of things in *Parsonsfield*, it would seem that before the act of incorporation was passed, the estate was vested in the congregational society over which Mr. *Rolfe* was ordained; and that, unless for purposes of convenience and peace, the aid of the act was not a matter of importance. In the case of *Jewett v. Burroughs*, it appears that the town of *Lebanon* acted as such, in the concerns purely parochial; and that the congregational society, over which Mr. *Hasey* was settled, had never been incorporated as the congregational or first parish in the town; but being overpowered by a majority of those who had seceded and filed certificates, according to the statute of 1811, respecting religious freedom, they obtained a resolve authorizing a particular magistrate to call a meeting of the congregational society in *Lebanon*, for organizing the parish. After being thus organized, the parish proceeded to the ordination of Mr. *Burroughs* as their minister; and in that capacity he commenced

the action to recover certain lands which had been drawn as ministerial lots; and the court sustained the action and rendered judgment in his favor. Suppose the same course had been pursued in *Parsonsfield;* would any doubt exist as to the title of the congregational society to the lands in question?

This leads us to the examination of the incorporating act of *March* 2, 1802, and to see whether it has in any manner impaired that title. Certain persons are named in the act, thirty one in number, and it is declared that they "having for their pastor or teacher in religion, the Rev. *Benjamin Rolfe*, regularly settled in said town, a congregational minister, with their families and estates, together with such others as have already associated themselves or may hereafter associate themselves for the same purpose, in the manner herein prescribed, be and are hereby incorporated into a religious society, by the name of the congregational society in *Parsonsfield*, with all the powers, privileges and immunities, to which parishes in this Commonwealth are by law entitled." The language of this act is explicit, and shows that the religious society thereby incorporated is the same which was before known in the town as such, and for whose benefit the lands were conveyed by *Brown*, and whose interests and concerns had, for a series of years, been regulated by the town, though of a parochial character, according to the prevailing usage in such circumstances. It has been objected that the fourth section of the act, which declares, "that said congregational society be and hereby is invested with the right to and control over all the real estate heretofore granted, bargained, sold, exchanged, reserved, given or appropriated to the congregational society, or for the support or use of the congregational ministry in said town;—to be held and appropriated by said society for the sole use and benefit of the congregational ministry in said town forever;"—is in its nature beyond the legitimate powers of legislation; but as we view this cause, the objection is not founded in fact, and of course the principle contended for is inapplicable.

We do not consider the fourth section as designed or as professing to take the property of one society and grant it to another; but merely as declaring in a clear and explicit manner a principle which before existed. It declared that the society was thereby invested

with the right to, and control over, the estate; but notwithstanding this phraseology, we do not consider it as making, or intending to make, any change of property or ownership Every part of the act distinctly indicates that such was not the object in view. It only authorized the congregational society to act in a parochial form; which they never had done; but which, according to the opinion of the court in *Jewett v. Burroughs*, they might legally have done, without an act of incorporation. It authorized them to do what the resolve before mentioned authorized the congregational society in *Lebanon* to do. In the present case, the act was not necessary to the perfection of the title of the congregational society, or those claiming under them, to the lands in question, and so it has not strengthened the title; neither can it be considered as having impaired or weakened it. In this point of view, it is seen at once that the objection founded on the fact that the act created and incorporated a poll parish becomes of no importance. It may be further observed, in support of the construction given to the act in question, that the second section provided that any inhabitant of the town might, at any time become a member of the congregational society, by filing with the clerk of the society a certificate of his wishes and intentions. This shews that it was not intended as granting exclusive rights and privileges, but as leaving those rights and privileges unaffected, in respect to property, as well as conscience.

We have carefully examined the other cases, cited by the counsel for the demandants, but we cannot perceive that that they have any particular application to this cause, or that they were decided on principles which can properly have any influence, in the view we have taken of it.

With respect to the act incorporating the first congregational society in *Sutton*, it is different from the act in question in this case. Only a certain number of the inhabitants of *Sutton* were incorporated as a society, whose names are all stated in the act, but none others are made members; whereas the act before us incorporates not only those inhabitants of *Parsonsfield* who are named, but all who had before the date of the act associated themselves with them for the purposes in view. It was not exclusive as in the case of

Sutton, but so comprehensive as to be completely identified with the pre-existing congregational society.

We are all of opinion that the instructions to the jury were correct, and that there must be *Judgment on the verdict.*

GREEN *vs.* THOMPSON.

If in an action of trespass *quare clausum fregit*, before a justice of the peace, the defendant justifies under the plea of title in himself, and thereupon removes the cause, by recognizance, into the Court of Common Pleas, where he suffers judgment by default, before issue joined;—this judgment does not estop him from contesting the title of the same plaintiff, in a writ of entry subsequently brought for the same land.

This was a writ of entry for fifty acres of land, tried before *Preble J.* upon the general issue.

It appeared that both parties claimed under deeds from the same grantor, the deed to the tenant being the elder, by about fifteen months. It also appeared that in an action of *quare clausum fregit*, afterwards brought before a justice of the peace by the demandant against the tenant, for a trespass on the same land, the defendant justified under the plea of soil and freehold in himself, and thereupon brought the cause into the Court of Common Pleas, pursuant to the statute, by way of recognizance; and that he afterwards, and before issue joined, consented to a judgment against himself, by default, for one dollar damages. It was further proved that after the date of the deed to the demandant, the tenant had accepted from him a lease of a part of the same premises, for the term of one year, which had expired.

Upon each of the grounds, the demandant contended that the tenant was estopped to deny his title; but the Judge overruled the objection, as to the conclusiveness of the evidence, leaving it to the jury merely as strong evidence against the tenant, to be considered

with the other testimony. To this the demandant excepted, the verdict being against him.

J. Shepley and *D. Goodenow*, for the demandant. The title having been specially pleaded by the tenant, in a former action, and judgment against him by his own consent, he ought not to be suffered again to draw it into controversy. If a verdict be found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect to the same fact or title. *Outram v. Morewood* 3. *East* 346. And the matter may be shown under the general issue, if there has been no opportunity to plead it. *Howard v. Mitchell* 14. *Mass.* 243. It is not in respect of the judgment itself, for this only bars a further recovery of damages for the same cause; but the rule proceeds on the higher principle of public policy, that what has been once tried, and passed upon, shall not be again litigated by the same parties, that there may be an end to controversies. 3. *East* 354, 355, 357. The issue is as high, in a writ of trespass, if taken in the realty, as in an assize; and hence it is said that if the defendant justify his entry by reason of inheritance, and it be found against him, this shall be peremptory. 3. *East* 362.

J. Holmes and *Appleton*, for the tenant, were stopped by the Court; whose opinion was delivered by

Weston J. If the matter relied upon by way of estoppel, being pleaded, must have been deemed conclusive; there having been no opportunity to plead it, it will have the same effect in evidence. The judgment, as between these parties, establishes the fact that, at the time of the alleged trespass, the demandant had the lawful possession of the close, where the same was committed. It does not appear at what time this was done. It might have been at any time within six years, prior to the commencement of that action. The tenant's title accrued only fifteen months before; and could have protected him but for that period. Prior to that time, he might have been a trespasser upon the premises, and have been so adjudged;

but this could have no tendency to affect an after acquired title. So if the demandant had been the tenant's lessee, he might have maintained trespass against him; but a judgment thus obtained would not have defeated the general title of the lessor.

With regard to the plea of soil and freehold in the former action, no issue was joined or trial had upon it. After filing this plea, the defendant was defaulted. The declaration against him is thereupon to be taken as true; and the effect is the same, whether the default be made before or after the plea.

The facts, therefore, established by the judgment, are not necessarily inconsistent with title in the tenant; and do not estop him from controverting the title of the demandant in this action.

If the fee of the land was in the tenant, his taking a lease of it for one year of the demandant, did not extinguish his title, or pass it to the demandant, by way of estoppel or otherwise. The tenant would be holden to fulfil all the covenants, by him entered into as lessee; and he would be estopped from averring, by way of defence, that the lessor had nothing in the premises; nor would he be permitted to disclaim his tenure, or deny the title of the lessor, during the continuance of the lease. Having performed his duties as lessee, there is no legal impediment, after the expiration of the term, to his maintaining a paramount title to the premises, against him to whom he once stood in the relation of lessee. *Co.* says, "if a man take a lease for years of his own land by deed indented, the estoppel doth not continue after the term ended. For by the making of the lease the estoppel doth grow, and consequently by the end of the lease, the estoppel determines." *Coke Lit.* 47 *b.*

The exceptions are overruled, and there must be

Judgment on the verdict.

ALLEN *vs.* SAYWARD.

The covenant of lawful seisin in fee, and good right in the grantor to convey, does not operate to estop him from setting up an after-acquired title in himself, against the grantee.

The word "give," in a deed of bargain and sale, in this State, does not import a covenant of warranty.

IN this case, which was trespass *quare clausum fregit*, the title of the plaintiff was derived by a deed from the defendant and *Henry Smith*, as executors of the last will and testament of one *Ebenezer Sayward*. The deed contained no covenants, except that the grantors had good right, and lawful authority, under the will, as executors, to sell and convey the premises to the grantee.

The defendant offered to show a paramount title to a part of the land, acquired by himself, subsequent to the conveyance by him and Mr. *Smith*, to the plaintiff. But *Preble J.* before whom the cause was tried, ruled that he was estopped to show this, by his deed to the plaintiff, as executor. The defendant further contended that the deed to the plaintiff, by calling for a boundary "to a white oak tree marked, or to the *Moulton*-line," did not thereby bound the plaintiff by the tree, unless it stood in the *Moulton*-line. But the Judge ruled that the *Moulton*-line must be considered as being at the tree; and that the plaintiff could not be prevented from holding up to the tree, by any proof that the line did not extend to it. A verdict was thereupon taken for the plaintiff, subject to the opinion of the court, upon the correctness of those directions to the jury.

Appleton for the defendant, contended that he was not estopped by the deed to the plaintiff. The executors were invested with a naked trust or authority to convey the estate, not coupled with any interest in it. It was no part of their duty to make any personal covenants respecting the title; nor was it in their power to enter into any which would bind the estate of their testator. *Sum-*

ner v. Williams 8. *Mass.* 201. 4. *Dane's Abr. ch.* 115, *art.* 10. The covenant, therefore, in their deed, is to be interpreted in relation to the whole subject matter, and according to the true intent of the parties; which was nothing more than to stipulate for the existence of their authority, and its regular exercise, according to the forms of law. *Shep. Touchst.* 163. *Browning v. Wright* 2. *Bos. & Pul.* 13. *Griffith v. Garland T. Raym.* 464. *Frothingham v. March* 1. *Mass.* 247.

2. But whatever may be the effect of this covenant, it cannot conclude the defendant in the present case; because the principle on which estoppels are allowed is to avoid circuity of action; and where there can be no circuity of action, there is no estoppel. 4. *Dane's Abr. ch.* 124, *art.* 6. *Co. Lit.* 446. 14. *Johns.* 193. 6. *Wood's Conv.* 144. But here no circuity will be prevented, for the judgment in this case cannot be conclusive upon the title; and any remedy of the plaintiff would not be against the defendant alone, but against him and his co-executor. The essential condition of identity of parties would be wanting. Nor, upon any principle, is the defendant estopped by the deed, for it contains no covenant of warranty; and without this, no title not *in esse* will pass by way of estoppel. *Jackson v. Wright* 14. *Johns.* 193. 3. *Johns.* 366. *Co. Lit.* 265. *Whitlock v. Mills* 13. *Johns.* 463.

3. As to the construction of the call for boundaries, the intent of the parties, which is the governing principle, evidently carried the grantee, at all events to the *Moulton*-line, and no farther. This was undoubtedly known to be the true limit of the tract to be conveyed; and the tree and the line were supposed to be exactly coincident. Hence, if the tree should be found to be on this side of the line, and is held to be the boundary, the grantee would not hold all the tract intended to be conveyed; and if it should be found to stand over and beyond the line, the grantors would be made to convey land to which both parties knew they had no title. Upon any other than the construction now contended for, the words "or to the *Moulton*-line" are entirely useless in the deed. If they were not intended to designate the real limit of the grant, why were they inserted at all?

J. Holmes and *D. Goodenow* for the plaintiff. All the parties to a deed are estopped to gainsay any thing contained in it. *Jacob's Law Dict. verb. Estoppel.* 2. *Bl. Com.* 295; even though nothing passed by the deed. *Wolcott v. Knight* 6. *Mass.* 418. Thus a lessor is estopped from setting up a subsequent title, against his lessee; 4. *Dane's Abr. ch.* 116, *art.* 1, *sec.* 16;—so is a grantor in fee, against his grantee; *Jackson v. Hinnam* 10. *Johns.* 292; *Jackson v. Stevens* 13. *Johns.* 316. *Adams v. Frothingham* 3. *Mass.* 253. *Porter v. Hill* 9. *Mass.* 34;—so is an executor, assuming to act as such, without authority; *Poor & al. v. Robinson* 10. *Mass.* 136; so is the heir, releasing with warranty to the disseisor of his father, in the father's lifetime; *Co. Lit.* 265. *Goodtitle v. Morse* 3. *D. & E.* 370. And this doctrine applies against the State itself; *Commonwealth v. Pejepscot Prop'rs.* 10. *Mass.* 155;—the only exception being the case of public trustees, acting for the public benefit, where an estoppel would work injustice to creditors, not being parties to the deed. *Fairtitle v. Gilbert* 2. *D. & E.* 171. It is the covenant which works the estoppel; and here the covenant is purely the defendant's own. *Sumner v. Adams* 8. *Mass.* 162.

2. The tree is to be considered as a monument, being so designated by the grantor; and therefore the plaintiff is entitled to hold to that boundary, it being visible and indisputable. If the *Moulton*-line lies beyond it, the grant must extend to that line, because every thing ambiguous and equivocal in a deed is to be taken most strongly against the grantor.

3. If the testator was seised at the time of his decease, which the executors cannot deny, their deed passed the whole estate and seisin, and constructively the possession also, to the plaintiff. Nothing passed, therefore, to the defendant, by the deed under which he claims to hold the land, his grantor not being seised at the time of the conveyance.

J. Shepley, in reply, denied that there was in the case any evidence of such disseisin of the defendant's grantor; but whether there was or not was immaterial, this point not being now open to the plaintiff, it not having been taken at the trial, nor stated in the judge's report. *Tinkham v. Arnold* 3. *Greenl.* 120.

Allen *v.* Sayward.

WESTON J. delivered the opinion of the Court, at the ensuing term in *Cumberland.*

In order to determine whether the defendant is estopped to claim the land in question by reason of the former conveyance, it becomes important to ascertain what covenants he entered into by that deed. The covenants, whatever they are, must be deemed his own; as he had no authority thus to bind the estate of his testator.

By the use of the word "give," in the deed of the executors, it is insisted a covenant of warranty arises by implication of law, during the lives of the grantors. The legal effect of the term *dedi* is derived from feudal times. So long as a tenure was created, by the use of this term, and the feoffee and his heirs held of the feoffor and his heirs, by certain services, the law held the latter to warrant and defend the land, which was the consideration for these services. But after subinfeudations were abolished by the statute of *quia emptores*, and the feoffee, instead of holding of the feoffor, held of the chief lord of the fee; by the word "give," *(dedi,)* the feoffor only was bound to warranty, and not his heirs. But this covenant, thus raised by implication of law in a feoffment, does not arise from the use of the same term, in instruments which derive their efficacy from the statute of uses. 2. *Bl. Com.* 301. Of this description are conveyances in this State. That in most general use, is a deed of bargain and sale. It is true that, to effectuate the intentions of the parties, courts may and do construe a deed in this form to be a feoffment, a covenant to stand seised, or any other instrument known to the law, for the conveyance of real estate. The deed in question, is a deed of bargain and sale. It was a mode apt, appropriate and effectual, for the purpose intended. No other end is to be answered by regarding it as a feoffment, except that of raising by implication of law a covenant of warranty against the executors; a covenant, which they were under no obligation to make; and which they cannot be presumed to have intended. And after all it would be questionable, whether they would be bound by any other than express covenants.

The only covenant expressed is, that they had good right and lawful authority, under and by the will, and as executors thereto, to sell

and convey the premises. It is certainly far from being clear that any thing more was intended than that they were duly qualified as executors; and that they derived from the will sufficient authority to sell the real estate of their testator. Beyond that, neither the duty of their office, nor common prudence required them to go. Whether any, and what estate, whether defeasible or indefeasible, the deceased had in the premises, the purchaser had the means of being satisfied from other sources. And to inquiries of this sort, he would be impelled by the common principle of *caveat emptor*, which has its chief application in the purchase of real estate. In the case of *Sumner v. Williams*, the majority of the court, who decided in favor of charging the administrators upon the covenant of warranty, did so upon the ground that a covenant of this sort was clearly and fully expressed by the terms of the deed; although there was much reason to doubt whether they intended to bind themselves personally. But as they alone could be bound, there was no other alternative but to hold them, or reject the covenant as altogether inoperative. Taking this covenant however in its utmost latitude, it may be construed to mean that the testator died seised, and that there was then no adverse seisin. This may have been true, and is not necessarily inconsistent with an after acquired title on the part of the defendant. Where a party has given a deed with a warranty of land, of which he had not a sufficient title, if he afterwards acquire a good title, it enures to his grantee by way of estoppel; and this to avoid circuity of action. But a covenant of seisin, or what is equivalent, that the party has good right to convey, does not thus operate upon an after acquired title. The party may have been seised, and may have conveyed his seisin to his grantee, by which these covenants are supported and verified; the seisin of the grantee may afterwards be devested upon elder and better title, and this may be subsequently lawfully purchased by the grantor, for his own use and benefit, and it will not enure to the grantee, who in such case can have no claim whatever for breach of covenant. The opinion of the court therefore is, that the deed given by the defendant and his co-executor, does not estop him from adducing in evidence and maintaining a paramount title, by him subsequently acquired.

It has been insisted that to permit him to do so, would be to enable him to commit a fraud upon the plaintiff. If this title had vested in him before the date of his deed as executor, either that transaction, or his attempt afterwards to defeat the conveyance, by a prior title, of his own, would have been a fraud upon the plaintiff; in which case, if he could sustain his own title, which he would certainly not be suffered to do in chancery, and possibly not at law, he would at least be holden to refund to the plaintiff the purchase money, thus fraudulently obtained. But he was at liberty afterwards to acquire a title of a party having lawful authority to convey; and the enforcement of rights accruing subsequently, would be no fraud upon the plaintiff. But it is urged that his grantor, not being seised, had no right to convey. That is a question not presented in the report of the judge. If the deed, under which the defendant claims, is liable to this objection, it may avail the plaintiff hereafter.

New trial granted.

Emery *vs.* Chase.

By a grant of land by deed of bargain and sale, "reserving" to the grantor "the improvement of the one half of the premises, with necessary wood for family use, during his own natural life, and the life of his wife *H. E.*"—it was held that the estate passed, one moiety to the use of the grantee and his heirs in fee, and the other moiety to the use of the grantor and his wife for their lives, and the life of the survivor of them, with remainder in fee to the grantee and his heirs.

Where, in a deed, a valuable consideration is expressed to have been paid, parol evidence is not admissible to prove another and different consideration intended, or promised and not performed.

This case, which was a writ of entry, came before the court upon a statement of the following facts agreed by the parties.

One *Joshua Emery*, the husband of the demandant, and now deceased, in his lifetime conveyed the demanded premises, being nearly

all his estate, to the tenant, by a deed in the usual form, with general warranty, containing this reservation ;—" reserving the improvement of one half of said premises, with necessary wood for family use, during my natural life, and the life of my wife *Hannah Emery*." This deed was signed by the wife also, in token of her relinquishment of her right of dower in the premises.

If parol testimony was admissible, the demandant would prove that, at the time the deed was executed, the tenant verbally engaged to pay the grantor's debts, amounting to 800 or 1000 dollars; that he at the same time took a conveyance of all the personal property of the grantor; that all the property thus conveyed was worth 3000 dollars; that this was nearly all the grantor possessed; that the tenant was his son-in law; that the demandant refused to sign a release of her right of dower, unless provision was made for her support; and that no other consideration was paid for either of the conveyances, than is above expressed.

J. Holmes and *J. Shepley*, for the demandant, contended that the reservation was to the grantor for life, and in trust for the wife during her life; in which case the trust was commensurate with the use, and vested in his heirs during her life. The *Stat.* 27. *Hen.* 8. *cap.* 10, executes the trust to the use, and thus the wife is in of an estate for life, in jointenancy. *Nowell v. Wheeler* 7. *Mass.* 189. *Shapleigh v. Pilsbury* 1. *Greenl.* 271. The release of her right of dower was a sufficient consideration to support this reservation in her favor. For by our law she may do, what ordinarily cannot be done, by releasing a contingent right. And if she is capable to make the release, she must of necessity be capable of receiving, to her own use, the consideration paid for it. Here she has only given up one contingent interest, in exchange for another; and by the common law of the country, she is capable of taking any reservation to herself, as a consideration of her release of dower. *Fowler v. Shearer* 4. *Mass.* 14.

Had the reservation been by release from the tenant to the demandant and her husband, during their lives, he would have been estopped by his deed. And the case here is in principle the same;

for where a deed secures the mutual rights of both parties, the party who accepts and records it is bound, as far as he who signs and seals.

As to the parol testimony, it was at least admissible to shew the situation of the family, and the value of the estate at the time of the conveyance. *Fowler v. Bigelow* 10. *Mass.* 384. *Leland v. Stone* 10. *Mass.* 461.

D. Goodenow, for the tenant, resisted the admissibility of the parol testimony, on the established principle that it could not be received to affect a deed which was free, like the deed here, from any latent ambiguity.

He contended that the reservation in the deed did not even purport to be for the use of the wife The words "and the life of my wife," can amount to nothing more than a limitation of the husband's estate. Resulting or implied uses can never arise but to the original owner of the land. *Storer v. Batson* 8. *Mass.* 436. Even if the land be bought with the money of another, no use results to him to whom the money belonged. *Jenny v. Alden* 12. *Mass.* 375.

It is therefore of no avail that the wife relinquished her right of dower; since this is of no higher value than the payment of money. Nor is the case better by her release being in the same deed with her husband's conveyance. To this conveyance, legally speaking, she is a stranger; and a reservation or exception in favor of a stranger is void. *Co. Lit.* 470. 4. *Cruise* 46.

The reservation itself is also void, being of a residuary part of an estate, after a grant of the whole in fee. 2. *Bl. Com.* 164. *Plowd.* 152. 3. *Bac. Abr.* 383. *tit. Grant. Thompson v Gregory* 4. *Johns.* 81. But if any thing remains, after the death of the grantor, it is to his heirs, or family, and not to his wife.

Weston J. delivered the opinion of the Court.

In regard to the question whether parol testimony could be received in this case, we are very clear that it is inadmissible. There is no latent ambiguity in the deed; and its effect must be determined by the legal construction of the terms used.

That *Joshua Emery*, from whom the estate passed in that deed, intended a benefit to his wife, the demandant in this action, is sufficiently apparent. Whether she has any remedy at law, and if any, whether in the mode now pursued, will depend upon the legal operation of the deed. The land is conveyed "reserving" the improvement of one half the premises, during the natural life of the said *Joshua*, and the life of *Hannah*, his wife. Although this term is used, it is clearly not technically a reservation; for that is of a thing not *in esse*, but newly created or reserved out of the lands or tenements conveyed. *Co. Lit.* 47. *a.*

There is another objection to its being regarded as a reservation; for that can be for the benefit of him only from whom the estate passed, which was the husband. If holden to be an exception, it could not avail the demandant; for the estate excepted is unaffected by the deed; it could therefore pass no interest therein to the wife. The conveyance is in form a deed of bargain and sale, founded as such deeds must be, upon a pecuniary consideration. A deed of bargain and sale derives its validity from the statute of uses; a use being thereby raised to the bargainee, which the statute executes. But as by the settled construction of that statute, a use cannot be limited upon a use, the bargainee cannot take to the use of another; the statute executing the use in the bargainee only. Equity enforces as a trust the second use, which the statute does not execute; and in such cases a remedy may be afforded by a bill in equity, under the chancery powers of this court; but not by any process known to the common law, by which such use is holden to be a nullity.

The deed might operate as a covenant to stand seised to uses; but it is not founded upon the consideration of blood or marriage, which is deemed essential in this species of conveyance. And although deeds upon other considerations have been sometimes called covenants to stand seised, and have used the language peculiar to such instruments, yet their legal operation has been as deeds of bargain and sale, as they were found to possess the requisites which belong to this kind of assurance. *Welch v. Foster* 12. *Mass.* 93.

A deed of land may in this State be considered as any species of conveyance, not plainly repugnant to its terms, and necessary to give effect to the intent of the parties. Thus, to this end, an instrument in

the form of a deed of bargain and sale, has been held to be a feoffment. *Thatcher v. Gill*, cited in 6. *Mass.* 32. A feoffee may take to the use of another. A feoffment may be made to all manner of uses; and whether they be future, contingent, shifting or resulting, the statute executes them as they arise. 2. *Bl. Com.* 334. 1. *Cruise*, 441.

If we regard the instrument before us as a feoffment, a question arises, to what uses? From an inspection of the deed it is impossible to doubt that the parties intended that the use of one half of the premises should be to the husband and wife during their lives. It is true, that in the *habendum* the granted premises are to the said *Jonathan Chase*, his heirs and assigns, "to his and their only proper use and benefit forever." If this be considered as determining and appointing the uses of the whole estate, it is clearly repugnant to the intention and limitation expressed in the former part of the deed. It was most manifestly intended that the use, benefit, and enjoyment of one half of the premises should not accrue to the grantee and his heirs, until after the death of the grantor and his wife. The uses in the *habendum* must therefore, to give effect to the intention of the parties, be held to be qualified by the uses before appointed. The *habendum* cannot defeat or destroy an estate granted in the premises; so far as the former is repugnant to the latter, it is inoperative and void. 3. *Com. Dig. Fait E.* 10. Taking the whole instrument together, it is apparent that it was the intention of the grantor, that the estate should pass, one moiety to the use of the grantee and his heirs in fee, and the other moiety to the use of the grantor and his wife for their lives, and the life of the survivor of them, with remainder in fee to the grantee and his heirs. Had these uses been declared formally and technically, the statute would have executed them, according to the intention of the grantor. There is in this deed a want of accuracy and legal precision in the language used, but as the intention is plain, and the uses manifest, we are of opinion that they may be regarded as executed by the statute, without violating legal principles.

Defendant defaulted.

The inhabitants of SACO *vs.* OSGOOD.

Where one gave bond to a town, conditioned to support its paupers for five years, and to save the town harmless from all damages, costs and expenses which might happen or accrue for or on account of the liability of the town to be called upon to support or provide for poor persons; and after the expiration of the five years, a suit was commenced against the town, for supplies furnished to a pauper by another town, accruing partly before and partly after the expiration of the term; in which suit the defendants prevailed;—it was held that the obligor was liable for his proportional part of the expenses of defending this suit, within the condition of the bond.

THIS action, which was debt on bond, came before the court upon a case stated by the parties, to the following effect.

The defendant gave bond to the plaintiffs *April* 25, 1820, conditioned to support all the paupers then by law chargeable to *Saco*, or who should be by law chargeable, during the term of five years from the first day of *May* then next; and to "save the town harmless from all damages, costs and charges that shall accrue or happen to said town for or on account of the liability of said town to be called upon to support and provide for poor persons, as well as those that are chargeable to the State, and other towns, as those belonging to said town;"—and providing that "in all cases, at his own charge, in the name of said town," he might appear and defend any suits respecting paupers, to final judgment, &c.

On the 24th day of *October* 1825, after the expiration of the five years, the inhabitants of *Hallowell* commenced their suit against *Saco*, to recover monies expended for the support of a female pauper, for one year and seven months, commencing *March* 24, 1824, and ending *October* 24, 1825; which was successfully defended by *Saco*, but at an expense of one hundred and twenty five dollars more than was recovered in costs; and the present suit was brought to recover against the defendant his proportion of that sum.

Thacher and *Fairfield*, for the defendant, contended that as the

pauper in question had not a settlement in *Saco*, and nothing was in fact paid for her support, no charges or expenses had "happened or accrued" to the town, till the inhabitants of *Hallowell* commenced their suit, which was not till after the expiration of the time nominated in the bond; and therefore that for such expenses the defendant was not liable.

But if the suit had been earlier, the plaintiffs could not recover. The defendant was bound in respect to the support of paupers chargeable to the State, or to other towns, receiving relief in *Saco;* and of the paupers actually belonging to *Saco*. But no provision is made for indemnifying the town against the expenses of any groundless suit brought against it, in relation to persons not belonging to *Saco*, nor receiving relief there. Such suits were not anticipated by the parties, nor provided for in the bond; and must be defended by the town at its own charge.

J. and *E. Shepley*, for the plaintiffs.

Mellen C. J. delivered the opinion of the Court.

From a careful examination of the whole contract on which this action is founded, it is easy to ascertain the intentions of the parties. *Osgood*, for the stipulated compensation, must be considered as having assumed to defray all those expenses which the town of *Saco* would have been obliged to defray, for the maintenance of their poor during the stipulated term of five years; and to save the town harmless from all damages and costs in actions prosecuted against the town on alleged causes of action accruing within the limits of the above term. The language of the bond, on this part of his duty, is, that he shall "save the town harmless from all damages, costs and charges that shall accrue or happen to said town, for or on account of the liability of said town to be called upon to support and provide for poor persons, as well those that are chargeable to the State and other towns, as those belonging to said town." The term "liability," as here used, does not mean a legal liability to a recovery of damages; but it is used in a popular sense. The "liability to be called upon to support poor persons," is a very different thing

from a liability to support them. The town of *Saco*, like other towns, is liable to be called upon by suit, though the suit may be successfully defended; and the bond of the defendant was intended to save the town from the expenses of such suits, whether well founded or not. The action by *Hallowell* against *Saco* is one embraced by the terms of the condition. In answer to the objections of the defendant's counsel as to the extent of liability in point of time, we would observe that the liability has reference only to those expenses which other towns claim as having been actually incurred within the stipulated five years. If claimed as incurred before, the condition would not extend to an action brought to recover them within the term; and if claimed as incurred within the term, an action would lie after the expiration of the term. This is the construction and limitation which justice and the reason of the thing require. In another part of the condition it is provided that he was to defend actions at his own expense; and to be furnished by the overseers of the poor with all such information as might be necessary in relation to the actual or alleged liability of the town to the claims of other towns. By examining the claim of *Hallowell*, it appears that a part of their pretended claim against *Saco*, in the action alluded to, was for expenses incurred without the limits of the five years; the effectual resistance to which action, as to such part, was for the benefit of the town, and not the defendant merely; and should therefore be considered by way of reducing the plaintiffs' demand for the expenses incurred in defending the action. By deducting the ascertained proportion, there will remain due to the plaintiffs, the sum of $82,37. The defendant must be defaulted and judgment entered against him for that amount.

Ex parte Cousins, *petitioner.*

A license to sell the land of a minor, under *Stat.* 1826. *ch.* 342, may be granted in the alternative, for public or private sale.

The petitioner in this case represented that his ward, a minor, was seised of certain real estate, which it would be for his benefit to dispose of; and thereupon prayed for license to sell it either by public auction, or private sale, as might be most for the interest of the minor.

At the reading of the petition a question was made whether it was necessary, under *Stat.* 1826. *ch.* 342, that the mode of sale should be designated by the Court.

The Court were of opinion that it was not necessary; and granted a license to the guardian to sell the land either by public auction or private sale, as he might find most for the interest of his ward.

Hussey, for the petitioner.

Baker *vs.* Haley & als.

Bonds for ease and favor being those only which are given to purchase an indulgence not authorized by law; a bond given for the debtor's liberties, under *Stat.* 1824, *ch* 281, is good, though it does not strictly conform to the rules indicated in the statute.

Such bond may properly be taken to the office making the arrest.

Debt on bond. The principal defendants, having been taken in execution, applied to a magistrate to be admitted to the poor debtor's oath, pursuant to *Stat.* 1824, *ch.* 281; whereupon the plaintiff,

who was the officer serving the execution, proceeded to take this bond, conditioned for their appearance at the appointed day, &c. in the usual form. The bond was taken to the officer himself, in the sum of sixty eight dollars and twenty nine cents, which appeared to be more, by three dollars and sixty eight cents, than the amount of the debt and costs, the latter sum being inserted for the fees of the officer. The debtors lived within twenty miles of the prison and clerk's office. These facts appearing upon oyer of the condition, the defendants thereupon demurred in law.

Fairfield, for the defendants, said that the bond, being given to the officer to procure their release from imprisonment, was void at common law, being for ease and favor, unless it was protected by the provisions of the statute relating to the subject. But he contended that it did not conform to the statute, because it was taken to the officer instead of the creditor; and because it was for a sum beyond the amount of the execution and the legal costs arising thereon.

1. It is true that the statute only requires that a bond shall be procured, to the satisfaction of the officer, without saying to whom it shall be given; but by the analogy of the law in other cases, it should be given to him for whose benefit it is made. *Lent v. Padelford* 10. *Mass.* 230. This is further evident from the circumstance that the statute gives no authority to the creditor to commence a suit on the bond in the name of the officer; a provision which is always inserted where the bond is taken in trust for others; as in the case of official bonds given by executors, administrators, guardians, trustees, sheriffs and constables.

2. By referring to the place of residence of the debtors, the court will take notice that it is within twenty miles of the place of return; which was the distance actually computed by the officer. And calculating his fees by this distance, it is evident that he claimed thirty cents more than his legal fees; probably for service of the execution; which, though a very common charge, is not authorized by law. Our fee-bill, in this respect, is precisely what it was in Massachusetts, at the time of the decision of *Commonwealth v. Shed* 1. *Mass.* 227. See *Boswell v. Dingley* 4. *Mass.* 411. *Shattuck v. Wood* 1. *Pick.*

171. The bond, therefore, not conforming to the directions of the statute which requires the addition of only the "legal costs," the officer is not excusable for liberating the prisoners, and the bond is void. *Winthrop v. Dockendorff* 3. *Greenl.* 156.

J. Shepley, for the plaintiff. Bonds given for ease and favor are not void, unless given to obtain an indulgence not authorized by law, or for a breach of the officer's duty. Hence in *Morse v. Hodsdon* 5. *Mass.* 317, a replevin bond was held good at common law, though not taken in exact conformity to the statute, and being more favorable to the obligee than the statute prescribes. So in *Clap v. Cofran* 7. *Mass.* 101, which was the case of a gaol-bond given for less than double the amount of the debt and costs. And in the present case, the bond was not given for an unlawful indulgence, but for an enlargement which the officer was bound to grant; and the condition is in the very words of the statute. If it would have been more regular to have taken it to the creditor, yet upon legal principles it is still a good bond at common law. *Burroughs v. Lowder & al.* 8. *Mass.* 380. 381. *Smith v. Stockbridge & al.* 9. *Mass.* 223.

But it was properly taken to the officer. The instances in which bonds are taken to persons not directly interested, as in Probate bonds, and the like, are all provided for by special regulations in the statutes. In the present case the statute is silent; but it provides that if the debtor is not admitted to his oath, he shall be arrested again, and the same proceedings had as if he had never been enlarged on bond. Now, as it is made the officer's duty to enlarge him on his giving bond, if this bond is to be given up to the creditor, the officer will be destitute of any protection.

As to the alleged excess of fees; the law does not presume it; and without such presumption, the case discloses nothing from which that fact necessarily results. But if it were so, it would not affect the validity of the bond, as an obligation at common law.

WESTON J. delivered the opinion of the Court at the next term in *Cumberland.*

Several objections have been made by the counsel for the defendants, to the bond and to the condition, set forth on oyer.

First, that it is a bond given for ease and favor. To this it has been well replied that bonds for ease and favor are given to purchase an indulgence not authorized by law; and that the indulgence granted in this case is thus authorized.

Secondly, that the bond is taken to the officer, when it should have been taken to the creditor. The statute is silent upon this point; but it is contended that, as it is for the use and benefit of the creditor, it should have been given directly to him; more especially as there is no provision in the law giving him the control of the bond, if it be taken in the name of the officer. If unable to find property sufficient to satisfy the execution, the officer is commanded to take the body of the debtor, and commit him to prison. Thus the creditor is enabled to coerce payment, by taking the body in pledge. But if it appear that this would be a fruitless remedy; and that the party arrested would be entitled to be discharged from prison, in virtue of the statute made for the relief of poor debtors; by the humane policy of the law, the officer is not permitted to commit him there. *Stat.* 1824, *ch.* 281. The precept in the execution is by that statute qualified, and its operation postponed, until it can be ascertained, in the mode prescribed, whether the party is entitled to be relieved, upon taking the poor debtors' oath. But the officer's duties in relation to the execution, are not thus closed. If it be ascertained that the debtor is not entitled to the oath, he is to surrender himself to the gaoler, or to the officer by whom the arrest was made, to be committed in the same manner as if these proceedings had not been interposed. If he do surrender himself, the condition of the bond is complied with; and neither the officer nor the creditor has any further remedy thereon. But if he do not surrender himself, the officer, in virtue of the bond, has in his hands the means of causing the execution to be satisfied, which it is his official duty to enforce without delay. The final process of the law is put into his hands, that he may render it effectu-

al to the creditor; and the taking of the bond is one of the modes, by which he is enabled to discharge this duty. It is to be taken to his satisfaction. It is ultimately for the benefit of the creditor; but through the intervention and agency of the officer. There seems therefore a propriety in his taking the bond in his own name; and there is certainly nothing in the statute which forbids it. It is true the creditor has not the direct control of the bond, as he has of a bail bond, nor is it distinctly provided that it shall be prosecuted for his benefit, as probate bonds, and bonds given by sheriffs, coroners, and constables, for the faithful performance of their respective duties, may be, in behalf of those who have suffered by their default. But the creditor, having the official responsibility of the officer, is sufficiently secure. If he should unreasonably delay to enforce the bond, or to pay the money over on demand when collected, he would be answerable to the creditor for neglect of duty.

It is lastly urged that the bond is void, because taken for more than the amount of the debt and costs, and all legal costs arising on the execution. If this had been made to appear by averments to that effect, it would still remain a question whether the bond might not be good at common law. But it is not made to appear. We must presume that the officer has done his duty, until the contrary be shown. It is insisted that the officer is entitled only to poundage and travel. Admitting that this position is correct, and that he can claim nothing for the bond, if drawn or procured to be drawn by him, we can calculate the poundage; but there is nothing in the declaration, or in the bond or condition on oyer, by which the amount of the fee for travel may be ascertained. If the defendants would have presented this question, they should have pointed out the legal fees and the excess, if there be any, by proper averments.

Declaration adjudged good.

Fox *vs.* Adams *& al. and trustees.*

Where a general assignment of property, for the benefit of all the creditors of an insolvent debtor, was made *May* 25, and a further instrument was executed *June* 2, giving priority to a large amount of debts due to the United States; it was held that the assignment still took effect from the first date, unaffected by any events intervening between that and the second agreement.

An assignment in trust for the benefit of creditors is not vitiated by a condition that the creditors shall accept the provision made for them in full of their respective demands.

The time limited in such assignment, for creditors to become parties to it, may be so short or so long as to justify a presumption of fraud, and thus defeat its operation.

Such an assignment, by an insolvent debtor in another jurisdiction, will not be permitted to operate upon property in this State, so as to defeat the attachment of a creditor residing here.

The questions in this case, which was *assumpsit* against the house of *Adams & Amory*, were raised upon the facts disclosed in the answers of *Isaac Emery*, one of the persons summoned as their trustees, in a foreign attachment.

It appeared that *Adams & Amory*, merchants in *Boston*, having become insolvent, made an assignment of their property, *May* 25, 1826, to *Ellery*, *Sargent* and *Brooks*, in trust for the benefit of the assignees, and such other of their creditors as should become parties to the assignment within seventy days then next. The proceeds of the property, after paying certain preferred creditors, sureties on bonds, and indorsers, was to be applied *pro rata*, to the other creditors, parties to the indenture; and a release was inserted, of all demands against the principal debtors.

On the second day of *June* 1826, a further agreement was indorsed upon the same indenture, and declared to be a part of the same, reciting that the amount due to the United States, upon cus-

tom-house bonds was intended to be inserted in the annexed schedule of preferred debts, but could not previously be ascertained; but was now inserted, in the amount of upwards of 90,000 dollars, and declared to be entitled to preference in payment, over all other debts.

On the sixth day of *June* a further indenture was executed, transferring the property and the whole trust from *Ellery*, *Sargent* and *Brooks*, to *Jonathan Amory* and *Jonathan Amory, jun.*

On the 23d day of *May* 1826, *Emery*, the trustee, being indebted to *Adams & Amory* twenty five hundred dollars, for cash advanced on consignments made and expected, and they having his goods in their hands, on consignment, to the value of a thousand dollars, they drew on him for twenty five hundred dollars, at sixty days sight, in favor of *Isaac Adams* of *Newburyport*. On the 25th of *May* the drawers inclosed this draft to *Emery*, requesting him to accept it and hold it subject to the order of the payee, or till he should hear from them again; and he received and accepted the draft on the same day. On the 23d or 30th of *May*, they wrote to *Emery*, informing him that his goods, which had been consigned to them, would be delivered up, on his forwarding the draft, accepted, to *Isaac Adams*, the payee. And afterwards, on the latter day, they again wrote requesting him to hand over the draft to Mr. *Deshon* of his own town, and stating that their assignees, to whom the goods had been transferred among the the rest of their property, would not deliver them to the Messrs. *Motley*, agreeably to his order, unless the draft was accepted; of which the drawers had not yet been advised; and did not pretend to control the business. But before he had time to comply with this request, he was summoned, on the same day, as their trustee, in the present suit. The gross amount due from *Emery* to them was included among the mass of their property assigned; and the goods were sold for whom it might concern. Formal notice of the assignment of this debt was given by the assignees in about twenty days after the failure.

It appeared by affidavits annexed to the assignment, and disclosed by the trustees, that the property assigned was insufficient to pay the debts due to the creditors who were parties thereto.

J. and *E. Shepley*, for the plaintiff. 1. The assignment takes effect from the second of *June*, when the new agreement was executed; which acts upon the original like the codicil upon a will, postponing its operation till the date of the codicil. Even a small sum of money thus given, causes the will to pass lands acquired after its date, and before the making of the codicil. *Coppin v. Fernybrough* 2. *Bro. Ch. Ca.* 291. *Powell v. Clever*, *ib.* 511. *Brownell & ux. v. D'Wolf* 3. *Mason* 494. In principle this case is analogous to *Denny v. Ward* 3. *Pick.* 199. where the alteration of a writ, by inserting the name of a dormant partner, after an attachment made, though with the subsequent assent of the debtor, was held to vacate the attachment, so far as a subsequent attaching creditor was concerned.—It was in effect taking back the deed, and re-delivering it in another form, and to other uses, an attachment having intervened.

2. Courts of law will not give effect to assignments, whether by operation of law, or by act of the parties, in a foreign jurisdiction, until after the debts of their own citizens are satisfied. So are the cases of ancillary administration. *Goodwin v. Jones* 3. *Mass.* 517. *Selectmen of Boston v. Boylston* 4. *Mass.* 324. *Richards v. Dutch* 8. *Mass.* 515. *Dawes v. Boylston* 9. *Mass.* 350. *Stevens v. Gaylord* 11. *Mass.* 269. *Dawes v. Head* 3 *Pick.* 128. As to the case of bankruptcy, though the English decisions are contradictory,—3. *Ves. & Beame* 97,—yet in this country the question seems at rest. 5. *Cranch* 289. 3. *Pick.* 133. That the same principle should be applied to assignments by the act of the parties themselves, is intimated in *Meeker v. Wilson* 1. *Gal.* 419; and expressly decided in Massachusetts, in *Ingraham v. Geyer* 13. *Mass.* 146. If it were not thus settled by authority, the extreme inconvenience to our own citizens, resulting from giving unqualified effect to foreign assignments, to which they might never be able to become parties if they would, ought to induce the court to withhold its sanction.

3. The assignment is void for legal fraud, as against creditors not parties to it, they not being permitted to become so, without releasing their debts. To this point it is admitted that the cases are opposed. *Widgery v. Haskell* 5. *Mass.* 144. *Harris v. Sumner* 2. *Pick.* 129.

Leaving v. Binkerhoof 5. *Johns. Chan. Ca.* 329. *Hyslop v. Clark* 14. *Johns.* 459. *Austin v. Bell* 20. *Johns.* 442. and *Bond v. Smith* 4. *Dal.* 76. support the position. *Lippincott v. Barker* 2. *Binn.* 174. and *Halcey v. Fairbanks* reported in *Oliver's Conv.* 573. seem to the contrary ; though in the latter case the arguments of *Story J.* are against the assignment, the weight of authority only being understood to turn in its favor.

It is also void because the time prescribed, beyond which creditors shall not be permitted to come in, is unreasonably short, the debtors having been merchants in very extensive business. On this point it is for the court to fix a rule for itself; and in similar cases courts usually advert to the enactments of the legislature, as affording correct analogies. Thus courts of equity adopt the periods of the statute of limitations; and in cases like the present it would seem that the period of six months, allowed by law to the creditors of deceased insolvents to bring in and prove their claims, was not an unreasonable rule. *Prevost v. Gratz* 6. *Wheat.* 497. *Ricard v. Williams* 7. *Wheat.* 117. *Hughes v. Edwards* 9. *Wheat.* 489.

4. The drawing of an order in favor of *Isaac Adams* was no assignment of the debt to him, nor was it payment of the debt, so as to prevent a suit by *Adams & Amory* for the amount against *Emery;* the draft having remained always subject to the control of the drawers, and never having been in possession of the payee. *Dennie v. Hart* 2. *Pick.* 204. *Lansing v. Gaine & al.* 2. *Johns* 300. *Leigh v. Horsum* 4. *Greenl.* 28. *Chitty on bills* 117.

J. Holmes argued for *Isaac Adams*, the payee; contending, first, that the draft on *Emery* having been made and accepted before the assignment, the property vested in the payee. It was not necessary that he should have cognizance of the transaction, in order to derive the benefit of the draft. 2. *Stark.* 228. 237. *Powell v. Monier* 1. *Atk.* 612. 1. *Esp.* 40. *Wynne v. Raikes* 5. *East* 520.

2. The control reserved by the drawers, was not to retain any property in the draft; but was merely a directory reservation, as the agents of the payee. After the acceptance of a bill, the drawer is the agent of the payee, to whom the property has passed. If this had

been the case of goods thus coming to the hands of the agents of the vendee, they could not have been stopped *in transitu*. *Dixon v. Baldwin* 5. *East* 175.

3. But the control reserved over the bill after its acceptance, being expressed in the alternative, the paramount right to control it belonged to *Adams*, who was both creditor and payee. It is preposterous to suppose that it was left at the will of the drawers, whether the payee should have the benefit of the draft. Its being left in the hands of the acceptor, gave him no property in it; but he was bound to deliver it to the payee on request, or pay him the value. Nor was it in the power of the acceptor to annul his acceptance. *Bentinck v. Dorrien* 6. *East* 200.

4. At the time of the service of the plaintiff's writ the defendants had no existing right of action against *Emery*, which their creditors could attach. They had previously parted with every shadow of control over the draft, as the agents of the payee, by requiring the acceptor to deliver it to *Deshon*. This process is nothing more than a direction to the trustee or debtor not to pay over to his creditor. But what could *Emery*, at the moment of service, have paid over to *Adams & Amory*, after having accepted their draft in favor of *Adams*, and thus become his debtor? The drawers could no longer countermand the direction thus given, and therefore had no longer a claim against *Emery*. Even before acceptance, the bill was an assignment of the debt, being given for the whole amount of the fund. *Mandeville v. Welch* 5. *Wheat.* 277.

N. Emery, for the assignees. Enough appears in the assignment to show that it was made to the honest creditors of the assignors; and if it amounts to a preference, they had a right to make it. So far as the United States were concerned, the assignment only speaks the language of the law, in giving them a priority to all other creditors. Such transactions, having their foundation in mercantile integrity and good faith, it is the interest of all communities to support, and to facilitate in their intended effects.

The indorsement of the second of *June*, so far from being a new contract, was merely in the nature of a further assurance, previously

covenanted to be given, to carry the original agreement into full effect. It changed no rights then vested; it bears no analogy to the codicil of a will, which is liable to perpetual variations, and is ambulatory, so long as the testator lives; but it is an exposition of the previous contract, declaring what was the intent of the parties in making it; and it may well be supported as such, in perfect consistency with the symmetry of the law.

If the assignors had a right to make the assignment, and even to pass the property absolutely and instantly to *bona fide* creditors, preferring whom they would; they had a perfect right to indicate that preference by any rules and conditions they might choose to adopt, and to fix at pleasure the time beyond which certain creditors should be excluded. In this case, however, the period of seventy days was amply sufficient for vigilant creditors in all parts of the United States. The case of deceased insolvents furnishes no correct or safe analogy, as to the time of proving claims, there being an essential difference between the acts to be performed in the two cases, and also between the modes of performing them.

Weston J. delivered the opinion of the Court at the ensuing term in *Cumberland*.

The first question presented in the disclosure of *Isaac Emery* is, whether, before the service of the trustee process upon him, there had been any assignment to *Isaac Adams*, of the debt due from him to the principal defendants. An order was enclosed to him from the defendants, in a letter dated *May* twenty third, 1826, for twenty five hundred dollars, in favor of *Isaac Adams*, and requesting him to accept the order, and to hold it for the said *Isaac;* or until he should hear from them again. This order, *Emery* says, he accepted on the day he received it, which was the twenty fifth of *May*. On the twenty third of the same month, he says he was indebted to the defendants in the sum of twenty five hundred dollars; but that they had, at the same time, merchandize of his consigned to them to the amount of one thousand dollars. From the whole disclosure it is to be inferred that his acceptance for the whole amount, was upon the

condition that these goods should be returned to him, or should be subject to his order. Upon being interrogated whether the defendants, in their letters of the twenty third, or thirtieth of *May*, or either of them, informed him that his goods to the amount of a thousand dollars should be delivered as he should direct, if he accepted the order, he replies generally that they did, if he would forward it to *Isaac Adams*. He does not designate which of these letters contained this proposition, but as the letter received on the thirtieth contained a different one, we may fairly understand that it was contained in the letter of the twenty third. But as *Emery* did not comply with this proposition, it may be presumed that he was unwilling to do so, until assured of his goods. Prior to the thirtieth, he had directed these goods to be delivered to the Messrs. *Motley*, which the assignees of the defendants had declined to do, unless the order was accepted. By the letter received on the thirtieth, he was directed to deliver the order to *Deshon*, as the condition upon which he was to receive his goods. The twenty five hundred dollars were advanced by the defendants to *Emery*, on goods sent, and to be sent, by him to them, to be sold in the usual course of transacting commission business for their reinbursement. He was deficient only fifteen hundred dollars in the amount of goods forwarded, and he was therefore under no obligation to answer the defendants' order for twenty-five hundred dollars, until his goods were restored. Taking the whole disclosure together, the negotiation was kept open between them, in regard to this condition, until *Emery* was served with process in this action. Upon this ground therefore, the assignment to *Isaac Adams* does not appear at that time to have been complete and effectual. Still less does it appear that any assignment was made to him for his own use and benefit, or upon any valuable consideration paid by him. His appearance was merely nominal. Nothing was done by his personal agency. *Emery* held no communication with him. This course may have been taken by the defendants, merely to deposit funds in his hands, subject to their order. They manage the business throughout; and finally direct the order to be placed in the hands of *Deshon*. That the defendants, notwithstanding the order in favor of *Isaac Adams* of the twenty third of *May*, still considered

the debt as due from *Emery* to them, is apparent from the fact that in their assignment of the twenty fifth of the same month to *Ellery* and others, a copy of which is made part of *Emery's* disclosure, the debt due from him is specifically included. If *Isaac Adams* had been the holder of the order, and the acceptance had been complete, prior to the service of this process, the defendants could not have done any thing to prejudice his rights. But he does not appear ever to have been the holder of the order; nor does it sufficiently appear that the acceptance had then become effectual.

A question of more importance remains in the case, and one equally applicable to both the trustees; whether they ought to be discharged by reason of the assignment to *Ellery* and others, of the twenty fifth of *May*. It is objected that the assignment ought not to have operation until the second day of *June*, after the service of the trustee process, because on that day, custom house bonds, to the amount of nearly one hundred thousand dollars, were provided for out of the property assigned. If the assignment of the twenty fifth of *May* were liable to no legal objection, it might remain good, and from that date, notwithstanding the provision subsequently made for the custom house bonds, by the assent of all the parties to the instrument.

It is further objected that the assignment contains conditions, which the defendants had no right to impose upon their creditors, and that it is therefore void in respect to such as have not expressed their assent, by becoming parties thereto. Those conditions are, that the creditors should accept the provision made for them in full of their respective demands, and should thereupon release the defendants therefrom; and that no creditors were to have the benefit of the property assigned, who did not become parties to the instrument within seventy days. With regard to the condition requiring a release, *Story J.* in the case of *Halcey v. Fairbanks*, upon a full consideration of the authorities, deduces that they support the validity and legality of such a stipulation, although he declares, that if the question were entirely new, the inclination of his mind would be strongly against it. In that case the same learned judge states that the time limited for creditors to become parties to the instrument, may be so short or so long, as to justify a presumption of fraud,

which would defeat its operation. There can be no doubt of the soundness of this opinion. The law requires in all transactions the most perfect good faith. If therefore an instrument, purporting to be made for the benefit of all the creditors of the party making the assignment, does not allow them a reasonable and sufficient time to avail themselves of its provisions, its apparent fairness is merely specious and delusive. So also it is liable to objection, if the time be unreasonably extended, and the adjustment of the business, and the claims of the creditors, thereby unnecessarily delayed. From the property assigned, and the debts and credits of the defendants, detailed in the schedules attached to the assignment, it appears that their business was much extended, and that they were engaged in foreign commerce. They had many creditors, and were indebted in an amount approaching four hundred thousand dollars. The residence of their creditors does not appear; but we know they were not confined to their own State; and as they were numerous, and the dealings of their house extensive, it would take some time to notify them, and to afford a fair opportunity to all, who chose to do so, to come into the arrangement. It is difficult to account for the fact that so small a proportion in number and amount executed an instrument apparently equitable, and which proffered advantages only to such as thus expressed their assent, if the creditors generally had notice within the period limited, and a reasonable time to make proper inquiries into the state and condition of the concerns of the defendants. Under these circumstances, we are strongly inclined to the opinion that the shortness of the time constitutes a sufficient objection to the validity of the assignment against such creditors, as have not expressly assented thereto; but we do not place the decision of the cause upon this point; but upon the ground that a general assignment made by an insolvent debtor in another jurisdiction, shall not be permitted to operate upon property in this State, so as to defeat the attachment of a creditor residing here.

In foreign administrations, to which proceedings here are made ancillary, funds thus collected within this jurisdiction are held subject to the claims of our own citizens, to whom payment is to be made

in full or in part, according to circumstances. 3. *Pick.* 128, and the cases there cited.

In the case of *Le Chevalier v. Lynch & al. Doug.* 170, the assignees of a bankrupt were not permitted to defeat a process of foreign attachment made after the bankruptcy; although the policy of the bankrupt system is much favored in England, and the attachment was made in a colonial jurisdiction. The bankrupt law of a foreign country does not legally operate to transfer property in the United States. 5. *Cranch* 289.

Nor can property in this State be put out of the reach of creditors here, by the insolvent laws of another State. Comity between States is not thus to be extended, to the prejudice of our own citizens. The case of *Ingraham v. Geyer*, 13. *Mass.* 146. cannot be distinguished in principle from the one before us. There, an assignment made in Pennsylvania, resembling the one in question, except that four months instead of seventy days, were allowed to creditors to accede to its provisions on their part, was not permitted to defeat a foreign attachment made in Massachusetts, by a creditor resident there; although the trustee had notice of the assignment, and set it forth in his disclosure. *Trustees charged.*

The State of MAINE *vs. The inhabitants of* KITTERY.

Towns are punishable by information for not opening public highways newly laid out, as well as for not keeping them afterwards in repair.

THIS was an information filed by the Attorney General against the defendants, for not opening, making and repairing a certain highway, laid out by the authority of this court, the time allowed for opening it having expired; to which they pleaded not guilty.

At the trial before *Preble J.* the defendants objected that this process could not be sustained, because the mode of proceeding by in-

formation, instead of indictment by the grand jury, violated the provisions of the constitution; but that if this was a legal mode of proceeding, in proper cases, it did not apply to the case of a road never yet opened; but only to those which, having once been opened and made, were afterwards suffered to be out of repair. But the Judge overruled both these objections, and a verdict of guilty was returned by the jury; which was taken subject to the opinion of the court upon the points raised at the trial.

J. Shepley, for the defendants, insisted only on the second point. And he contended that as the duty of making and repairing roads was imposed on towns by statute only, the statute remedy provided for its neglect was the only remedy to be pursued. 3. *Mass.* 307. 13. *Mass.* 364. In the matter of opening roads newly created, the *Stat.* 1821, *ch.* 118, *sec.* 12, has made ample provision, where towns neglect to open them, by directing the Court of Sessions to cause it to be done by a committee of their own appointment, at the expense of the town. No other remedy exists. The *Stat.* 1827, *ch.* 370, provides for the remedy by information only in the cases previously punishable by indictment; and these were only the cases of roads already made, but out of repair.

The Attorney General, in reply, said that the *Stat.* 1823, *ch.* 225. authorized this court to lay out and alter public highways, in certain cases, but did not vest it with any power to appoint a committee to open such roads. And the *Stat.* 1821, *ch.* 118. gave the Sessions power to appoint such committee to open any roads laid out by the authority of that court, but no others. Unless, therefore, the present remedy existed, the power of this court to lay out roads would be contemptible, because its orders could be disregarded with impunity. And the application of this remedy violates no principle of law. It is a general rule that all public misdemeanors punishable by indictment, may also be prosecuted by information, unless restrained by statute. *Commonwealth v. Waterborough* 5. *Mass.* 259. The road in question is known by the records of this court as a public highway, and the jury have found that it is not in a state of repair, for safe and convenient travelling. The statute has made it the duty of

the town to maintain it at all times in such repair; and the neglect of this duty is a misdemeanor, for which, by *Stat.* 1827, *ch.* 370. an information well lies.

MELLEN C. J. delivered the opinion of the Court.

The first question is, whether this information lies for the offence charged therein, or whether the proceeding should have been by indictment. In such cases, from time immemorial, informations have been sustained in Massachusetts; and also in this State since our courts were organized. The 18th section of *Stat.* 1821, *ch.* 118. recognizes an information as one of the legal modes of proceeding against a delinquent town for such an offence. And by the 3rd section of *Stat.* 1827, *ch.* 370. it is provided "that all prosecutions against towns and plantations for not keeping in good repair the highways and bridges within the same, shall be by information in the Supreme Judicial Court, or Court of Common Pleas." Still it is contended that such mode of proceeding violates the provisions of the constitution. We do not know of any constitutional provision militating against the present proceeding. The 7th section of the first article provides "that no person shall be held to answer for a capital or infamous crime, unless on a presentment or indictment of a grand jury"—except in certain specified cases, not touching the present case. We forbear making any further observations on this part of the cause. The second objection deserves a more particular consideration. It is contended that no information or indictment will lie, where the road complained of has never been actually opened. This argument is founded on the 12th section of the statute of 1821, *ch.* 118, which provides "that where any new highway shall be laid out and accepted by the Court of Sessions, a reasonable time shall be allowed to the town through which such highway shall lead, to make it passable, safe and convenient for travellers and others, passing with their teams, wagons and other carriages; and if any town shall neglect their duty in this respect, the said court, on application therefor, shall appoint a committee of three disinterested freeholders in the same county to enter into any contract or contracts for making such new

highway passable as aforesaid; the expense of which shall be immediately afterwards defrayed by the delinquent town, and in default thereof, the said court shall issue a warrant of distress against such town." This act was passed *March* 2, 1821. The highway in question was laid out and established by this court, in virtue of the power given by the act of 1823, *ch.* 225; and the provisions of the act of 1821, above quoted, apply in terms and exclusively to highways, laid out by the Court of Sessions. The act of 1823, contains no such provision or alleged limitation; and if any such exists, it must depend for its existence on implication and the construction of that act. In giving it this construction, we must look to the law as it stood before the act was passed, and attend to the difficulty which it was intended to obviate. The difficulty arose from the different views and opinions of different Courts of Sessions, in the several counties through which a proposed highway was intended to be laid, and the supposed influence of local or personal interests or feelings, incompatible with the general interests of an increasing community; and hence it was deemed a measure of prudence to confer upon a court, whose jurisdiction is coextensive with the State, the power of laying out and altering public highways, in and through two or more adjoining counties. This having evidently been the object in view, it surely could not have been intended that it should depend on the Courts of Sessions of the counties through which a road should be laid, whether such road should ever be opened, and thereby become the subject of indictment or information, when the legislature did not see fit to confide to such courts the jurisdiction as to their location. Such a construction would not be respectful to the legislature. Besides, the language of the act does not require or justify it. The second section provides that the committee appointed to lay out such highway "shall report their doings, with the damages awarded, as soon as may be, to the Court of Sessions in each county in which such public highway, so laid out or altered, shall pass; and the said Court of Sessions shall have the same proceedings on such report, (after the acceptance thereof in the Supreme Judicial Court,) as on one made by a committee of their own appointment." Now, what

proceedings are, by the law of 1821, to be had on such report made by such a committee, after their acceptance of it? The statute answers the question. They are those proceedings, in the first place, which respect the recording such reports, and next those in which the towns and the owners of lands, through which a road is laid, are interested in respect to the damages awarded by the committee in their report;—they are those proceedings prescribed in the first eight sections of the statute of 1821, in relation to the question of damages; the mode of finally settling their amount when contested by parties interested, and compelling payment when refused; proceedings regularly to be had in all cases; but they have no connection with the opening and making the highway. Such are not proceedings on the report. They are proceedings which may be had on application to the court; but a town may not so delay opening and making the road as to render an application necessary or proper. This construction fairly satisfies the words of the act, and avoids those inconsistences to which the argument of the counsel for the defendants would seem to conduct us. It may be further remarked that the second section of the act of 1827, by which our jurisdiction as to laying out highways was taken away, contains a proviso "that all highways already laid out and established by authority of the Supreme Judicial Court, shall be and remain public highways, to all intents and purposes, until discontinued or altered by the Court of Sessions in the respective counties in which they are situated." This is stronger language than is used in the statute of 1821, in declaring the effect of a legal acceptance of the return of a locating committee. Surely a public highway to all intents and purposes must be a subject of prosecution by information if not made and kept in good repair.

But without confining ourselves to the limited view which we have thus taken of the subject, we would observe further that the argument of the defendants' counsel seems to have proceeded on a mistaken ground. He has contended that there is no such obligation on a town to open and make a road in the first instance, as subjects the town to any prosecution for omiting so to open and make it; and that an information is not an authorised proceeding, except in those cases where the road has been opened and made, but has been suffered to be

out of repair. But by the act of 1821, when a highway has been laid out and accepted, it is thenceforward to be known as a public highway; and any man may, if he should incline so to do, lawfully travel in it before it is opened and made. The 12th section before cited is predicated on this principle, when it provides that if a town neglect its duty by not opening and making the road within the time allowed by the court for the purpose, which is merely a reasonable indulgence to a town, then it shall be opened and made in the manner therein mentioned, at the expense of the delinquent town. This shews that the duty of the town commences when the road is accepted. The mistake on which the argument of the counsel proceeds is this; he has not made the necessary distinction between punishment and remedy. The mode of proceeding prescribed in the above mentioned section is only a remedy provided when a town shall refuse or neglect to perform its duty. It is admitted that when a statute imposes a duty and prescribes the mode of prosecution and punishment for its neglect, that mode must be pursued; but the statute of 1821, merely imposed the duty of making and repairing highways, but did not prescribe the mode of punishment for the neglect of that duty. The common law mode of proceeding by indictment or information was therefore the proper mode, and that has always been the course pursued. But as the law formerly was, there might have been twenty prosecutions against a town for not opening or making or repairing a highway, and twenty convictions and fines assessed and collected, and yet all this would not necessarily have caused the opening, making or repairing it; hence the wisdom and utility of the provision in the statute of Massachusetts, of which that in the 12th section of our statute of 1821, is a transcript. It furnished a complete remedy where punishment would not prove sufficient to induce a refractory town to do its duty. It is true that before this State was separated from Massachusetts, provision had been made by statute, in that commonwealth, for the appointment of an agent to expend the fine assessed by the court on a town, in making the necessary repairs on the road which was the subject of prosecution; a provision essentially similar to that in our own statute; and when the statutes of Massachusetts were revised, both the before mentioned

provisions were re-enacted by our legislature. But that which is contained in the 12th section seems now to be unnecessary, inasmuch as if a town will not repair the road informed against, within a limited time after the assessment of a fine, it may then be expended, by an agent appointed by the court, in immediately accomplishing the object of the prosecution. In support of the construction we have given, it may be remarked that the statute makes no provision for opening and making a town way when legally laid out and accepted. How is it to be opened and made, unless by the power of the court before which the town may be convicted, when such town shall refuse or neglect to do its duty?

We are all of opinion that the instructions given to the jury were correct. The objections are overruled, and the proper judgment must be entered.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

CUMBERLAND.

MAY TERM.

1828.

STEARNS *vs.* BURNHAM.

An executor, appointed under the laws of another State, cannot indorse a promissory note payable to his testator by a citizen of this State, so as to give the indorser a right of action here in his own name.

And this objection, though in disability of the plaintiff, may be taken under the general issue, in an action by the indorsee against the maker of the note.

THIS was *assumpsit* by the indorsee against the maker of a promissory note, payable to *William Stearns*, of *Salem*, in Massachusetts, and indorsed by his executrix, who resided in the same town, and whose letters testamentary issued from a Probate Court in that State, to the plaintiff, who also was a citizen of Massachusetts. The maker always resided in this State.

It was tried before the Chief Justice, upon the general issue, and the plea of the statute of limitations; and a verdict was taken for the plaintiff, subject to the opinion of the court, upon the question whether any right to maintain this action was conveyed to the plaintiff, by the indorsement of the executrix. Another question was raised, upon the statute of limitations, but not having been considered by the court, the arguments upon it are omitted.

Stearns *v.* Burnham.

N. Emery and *Longfellow*, for the defendant, argued against the power of the executrix to convey to the plaintiff a right of action in his own name, on the ground that it facilitated the withdrawing of funds from this State which might be wanted for the payment of debts due to our own citizens; and that it prevented the setting off of demands against the testator, and displaced equities. And they said that it went to the virtual repeal of our statute provisions on this subject, so far as personal property was concerned. *Goodwin v. Jones* 3. *Mass.* 517. *Russell v. Swan* 16. *Mass.* 314. 2. *H. Bl.* 561. *Thompson v. Wilson* 2. *N. Hamp. Rep.* 291.

Greenleaf and *Willis*, on the other side, contended that as the executor succeeded to all the rights and equities of the testator, with the general power to indorse and thus transfer his negotiable notes; it was essential to the exercise of this right that the indorsee should have all the powers of the payee, including the right to sue in his own name. Otherwise the note must lose its negotiable character. This right being once vested in the indorsee, belonged to him always, and in all places, by the law merchant. The executor is no longer known as such, except as having been the medium of passing the property to the indorsee; and his authority, under the laws of another State, to transfer the property, and with it the privileges of an indorsee, may be proved before this court, as the execution of a power of attorney, or any other act *in pais*, done abroad. *Chitty on bills* 108, 111. *Rawlinson v. Stone* 3. *Wils.* 1. *Willes* 559. *Mosher v. Allen* 16. *Mass.* 451. *Talmage v. Chapel* 16. *Mass.* 71.

But the objection comes too late; it being to the disability of the plaintiff, and not having been taken in abatement, nor by special plea in bar. *Langdon v. Potter* 11. *Mass.* 313.

Mellen C. J. delivered the opinion of the Court.

The only question of any moment, is whether the plaintiff is entitled to maintain this action as indorsee of the note declared on, the same having been indorsed by Mrs. *Stearns*, the executrix of *William Stearns's* will, proved and approved in Massachusetts. It is clear that that the executrix herself, could not maintain an action in our courts

upon the note, as was decided in the case of *Jones v. Goodwin* 3. *Mass.* 514. The principles and reasons on which that decision is founded are stated at large by Mr. Chief Justice *Parsons;* and on this occasion a reference to that case is sufficient, for a knowledge of the learning on the subject, so far as applicable to the present case. We would merely observe that the power of the executrix, by law, is to administer all the goods, chattels, rights and credits of the testator which are within Massachusetts. Debts due to the testator at the time of his death from persons residing in other States, are placed, by law, on the same ground as goods and chattels belonging to him and being in another State. Over these she, as executrix, deriving her authority under thelaws of Massachusetts, has no control. We are then led to inquire how an executor or administrator, acting under an authority derived from another State, can, by indorsing a note due from one of our citizens, give to his indorsee a power which he himself does not possess, that is, of successfully sueing for and recovering it in our courts. If this can be done, it will be an indirect mode of giving operation, in this State, to the laws of Massachusetts, as such; or in other words, to an authority derived directly from laws, which are not in force in this State. By adopting such a principle, the effects or credits of a testatator or intestate, found in this State, might be withdrawn, which may be necessary for satisfying debts due from such testator or intestate to citizens of this State. Such a principle or course of proceeding has often been successfully opposed. 3. *Mass.* 517. 4. *Mass.* 324. 8. *Mass.* 515. 9. *Mass.* 350. 11. *Mass.* 269. 3. *Pick.* 128. 5. *Cranch* 289. 1. *Gal.* 429. 13. *Mass.* 146. No such consequence would follow, if the executrix should be held to prosecute for the collection of the money due on the note in her own name; for before she could do this, she would be obliged to file a copy of the will of the testator in some Probate Court in this State, and have the same there recorded; this having been done, the Judge of Probate would thereupon proceed to take bond of the executrix, and settle the estate (lying or being in this State,) in the same way and manner as he may the estates of testators whose wills have been duly proved before him. See 14th and 17th sections of the *Stat.* 1821, *ch.* 60. The

principles of justice and policy on which the abovementioned provisions of our statute are founded, would seem to lead our courts of law to that course of proceeding, in a case like the present, which would harmonize with those principles, and have a manifest tendency to produce the same beneficial results. This must have been the ground of the decision in the case of *Thompson v. Wilson* 2. *New Hamp. Rep.* 291. The facts of that case are exactly similar to the one under consideration, and the court decided that the action could not be maintained. It has been said that the objection which has been urged is good only in abatement; but we are very clear that it is well sustainable on the general issue, inasmuch as it shews that no title was derived under the indorsement, to maintain this action, any more than if the indorsement had been a forgery.

We are all of opinion that the verdict must be so amended as to stand as a verdict in favor of the defendant, and judgment be entered thereon accordingly.

WINSLOW, *plaintiff in error v.* PRINCE, *original plaintiff.*

The provision of *Stat.* 1821, *ch.* 164, *sec.* 46, exempting the clerk of a militia company from the payment of costs to the defendant in any suit where the captain has indorsed on the writ his approval of the prosecution, extends to the costs in all subsequent stages of the proceedings, as well as to those accruing in the Justice's court.

THIS was a suit brought before a justice of the peace, by *Prince*, as the clerk of a militia company, to recover a fine for neglect of appearance at training. The defence was that *Winslow* was permanently unable to do military duty, and so not liable to be enrolled. But the justice overruled this defence, because it was not offered to

the captain, as an excuse, within eight days. Hereupon the defendant brought a writ of error, and the judgment was reversed without argument, and a new trial ordered at the bar of this court; which was had at the last *November* term, and a verdict was returned for *Winslow*, the plaintiff in error.

It did not appear on the record, nor on the copies sent up by the magistrate, that the captain had ever indorsed on the writ his approval of the suit, so as to exempt the clerk from the payment of costs, pursuant to the statute; whereupon the plaintiff in error claimed his costs as the party prevailing. But upon a suggestion of diminution in the record, the original writ was brought up, with the captain's approval indorsed, accompanied with his affidavit, and those of the magistrate and the constable, that the indorsement was made before the writ was served; and the record was amended accordingly.

The plaintiff in error still claimed his costs, contending that the exemption in the statute applied only to suits before justices of the peace, and while they were there pending. The justice's court being the forum alluded to in all cases where the clerk was concerned, the clause respecting costs must be taken with reference to such suits, especially as the right of appeal was expressly taken away.

But THE COURT did not sustain the claim, observing that the provision in the statute was general and unqualified, extending to all the costs in every suit where the condition was complied with; and that as the action tried at the bar of this court, after the reversal of the former judgment, was the same which had been tried before the justice, the exemption attached itself to it as well in one stage as in another.

Greenleaf, for the plaintiff in error.

Fessenden and *Deblois*, for the defendant in error.

The inhabitants of GORHAM *vs. The inhabitants of* CANTON.

Upon a question of domicil, the declarations of the party whose home is in controversy, made at the time of his going or returning, may be received as evidence of his intention.

THE question in this case was whether *Enoch Waite*, the husband of the pauper, had his domicil in *Canton*, at the time of the passage of *Stat.* 1821, *ch.* 122.

In *May* 1818, he went to reside in the family of Dr. *Holland* in that town; and from that time till *May* 1825, he continued to reside there, except when absent on excursions and journies, which amounted to about one third of the time. In order to ascertain the character of his residence there, and of his motives or intentions relating to it, the defendants offered evidence of his declarations, (he being now dead,) made at different times during that period, when setting out on such excursions and journies, showing a design to remove; which was admitted by the Chief Justice, before whom the cause was tried.

The plaintiffs then offered evidence of his declaration while in *Falmouth*, on one of those peregrinations, that he was *going home* to Dr. *Holland's;* which the defendants objected to; but the Chief Justice overruled the objection and admitted the testimony; and a verdict being returned for the plaintiffs, the question upon the admissibility of this testimony was reserved for the consideration of the court.

Fessenden and *Deblois*, for the defendants, admitted that his declarations made while going, and stating the place to which he was bound, might be received in evidence, as explaining the act he was then performing. But, that the place to which he was going was his *home*, was an independent fact, concerning which his declarations could not be taken as part of the *res gesta*, but stood on the ground of any other hearsay evidence. Such testimony, though it may be the declaration of the pauper himself, and though he be dead, is not admissible upon the question of his settlement. *Rex v. Chaddeston*

2. *East* 27. *Rex v. Ferryston ib.* 54. *Rex v. Eriswell* 3. *D. & E.* 707. *Rex v. Abergwilly* 2. *East* 63. *Rex v. Newnham Courtney* 1. *East* 373. *Rex v. Swith* 8. *East* 539. 1. *Phil. Ev.* 196. *Swift's Ev.* 123. Nor can it be received as *res gesta*, because it relates to an independent fact, and rests. for belief, solely on the credit of the party, deriving no support from what he was then doing, and not illustrating his intent. 1. *Stark. Ev.* 47. 1. *Phil. Ev.* 218. The testimony offered by the defendants was wholly of this latter character, being of declarations made at the place of his residence, and showing the intent with which he was then leaving it.

Adams, for the plaintiffs, to show that the testimony objected to was the proper evidence of domicil, cited *Vattel, b.* 1. *ch.* 19. *sec.* 218. *West Cambridge v. Lexington* 2. *Pick.* 536.

WESTON J. delivered the opinion of the Court.

We are of opinion that the testimony objected to, was properly admitted. It was part of the *res gesta*. The pauper, being at *Falmouth*, was setting out from there to go to some other place. He declares where, and for what purpose. His intention can be known only to himself; except so far as it is communicated by his declarations. And these declarations are legal evidence of his intention. Where it is necessary to show the nature of an act, or the intention with which it is done, proof of what was said by the party, at the time of doing the act, is admissible. 1. *Phil. Ev.* 218. Thus, under the bankrupt system, the declarations of a trader, at the time of his absenting himself from home, are received in evidence to show the motives of his absence. Had the pauper declared that he was going to consult Dr. *Holland* as a physician; to adjust accounts between them; to procure the clothes he had left at his house; or for any special purpose, proof of such declarations would have been admissible. Of the same character, in principle, is his statement that he is going to Dr. *Holland's*, because that is his home. Such declarations show the intention with which the act is done. A man without a family or house of his own, leaves the place, where he has resided and had his home, and it becomes important to ascertain for what

purpose; whether his absence is intended to be temporary or permanent; what he said at setting out, or on the way, upon this point is evidence of his intention; and has often been received on questions of domicil. *Judgment on the verdict.*

PERKINS *adm'r. vs.* DUNLAP & AL. *ex's.*

Where N contracted for the purchase of an estate from A, and paid him 1200 dollars in part, and D advanced the residue for him, being 500 dollars, and took the conveyance directly to himself, upon a verbal agreement that he should release the land to N on payment of the 500 dollars; and then D died, and his heirs refused to convey;—it was held that to carry into effect the original understanding of the parties, N might be considered as having advanced the 1200 dollars to enable D to purchase the estate, for which the estate of the latter was liable, as for money lent to the testator.

IN this case, which was *assumpsit* upon promises of the testator, with the common money counts, the material facts are stated in the opinion of the Court, which was delivered by

MELLEN C. J. The facts of the case are these. *Abbot* being the owner of the Dunning-Tavern estate, contracted with *Nickels*, the intestate, for the sale of it for 1700 dollars. *Nickels* paid in part by other property of the value of 1200 dollars, as estimated by the parties, and as found by the jury, and the remaining 500 dollars were paid by *Dunlap*, the testator; and thereupon *Abbot* conveyed the said tavern estate to the testator by an absolute deed in fee. From the report it appears that the 500 dollars were paid to *Abbot*, and the deed made to the testator, at the request of *Nickels;* and though there is no evidence that the testator was conusant of the arrangements between *Abbot* and *Nickels* in the earlier stages of them, yet it does appear that in their completion he became fully acquainted and connected with them, and for the purpose of effectuating the

objects of all concerned, he accepted the deed from *Abbot*, under the circumstances disclosed in the case; declaring afterwards to the assessors of the town, on a question of taxation, that he was interested only to the amount of 500 dollars in the estate, on payment of which sum he should convey it to *Nickels*. Thus it is evident that all were assenting to the several parts of the transaction; and it is immaterial, as to this cause, at what time the testator became an assenting party to it, because it is a familiar principle that subsequent assent is equivalent to previous request; and the continued possession and enjoyment of the estate, by the testator and his representatives, is a continuing assent to avail themselves of the advantages resulting to them from the payment of the 1200 dollars by *Nickels* to *Abbot*. In this view of the facts we do not perceive any objection to the maintenance of this action on the ground of there having been no request on the part of the testator, or knowledge of the contract with *Abbot* for the estate, prior to his own connexion with it.

The next inquiry is whether the statute of frauds is a bar to the action. The plaintiff does not expect nor profess to maintain it on the parol promise of the testator to convey the estate to *Nickels*, on his paying the 500 dollars and interest; he has no such count in his declaration; but he contends that he has a right to recover the 1200 dollars, being the value of the tavern estate, as money paid at the request, and for the use, of the testator. In this view, it is contended that the statute of frauds has no connection with the subject; and that it cannot furnish a bar to such claim, any more than it would be a bar against the recovery of a sum of money lent to A, to assist him in purchasing a farm of B, and which A appropriated to that purpose. Viewing the transaction as ultimately assented to by all three of the parties, the cause has been presented to us, and the facts marshalled, in the following manner. The testator is considered as having agreed to become the purchaser of the estate; as having himself paid 500 dollars, in part of the price; as having received from *Nickels*, beneficially, the remaining 1200 dollars; and then taking the deed from *Abbot* to himself; *Nickels* intending and expecting to receive the full ultimate advantage of the above sum, and the testator know-

ing of this intention and expectation, and frankly agreeing to the arrangement on which they were founded. It is impossible not to see that the testator intended that the 1200 dollars should in some way or other be accounted for to *Nickels;* and if, in such a solemn transaction as the conveyance of real estate, it is the duty of the court to give such a construction to a deed, as that, if it cannot operate in the way it was intended, it may operate as a different species of conveyance, so as to effectuate the general intention of the grantor, there can be no sound reason why the general intent of all the parties to the transaction we are considering, should not be carried into effect by the construction we have given to it; in the former case *ut res magis valeat quam pereat;* in the latter, to do justice, by compelling the representatives of the testator to account for the advantages they have received, and continue to enjoy, by means of the arrangement which was made for his benefit, and sanctioned by his assent, in receiving the conveyance to himself. It is no new principle that a man may be held accountable in damages, as on an implied contract, in many cases, in which he never imagined that he had made any species of contract; as in that class of cases where a man may waive the tort as in *Hambly v. Trott Cowp.* 375, and seek his remedy for damages occasioned by the wrong, in an action of *assumpsit.* Thus for instance, where a trespasser has converted the property taken into cash, the injured party may sue the trespasser in an action of trespass, or waive the tort, and treat him as a debtor, having the plaintiff's money in his hands.

Let us suppose the fact to have been that, pending the negociation for the purchase of the tavern estate, the testator had offered to advance 500 dollars to *Abbot* in part payment, and that *Nickels* had assented to it, and thereupon the conveyance had been to him. Could the statute of frauds be a bar to the testator's recovery of the 500 dollars, as money paid to *Abbot* for the use of *Nickels?* How is the case altered, except as to the amount advanced, because *Nickels* advanced 1200 dollars to *Abbot* by the testator's consent, and thereupon the conveyance was made to the testator? Was not this money advanced, and has it not gone, to the exclusive use of the testator, by his consent? This consent may be fairly implied

from the reported facts; indeed they will not admit of any other implication; and if his assent is implied, the law raises a promise of payment. In an equitable and pecuniary point of view, such was the essence of the whole transaction; and the refusal of the defendants to procure a conveyance to the representatives of *Nickels*, when the tender was made, is in affirmance of the idea. On these facts, thus presented, we do not perceive any legal principle which prevents our considering the 1200 dollars, as paid by *Nickels*, by the consent of the testator, clearly implied, and for his use and benefit. And why should not the plaintiff recover it? Equity and justice would be unable to assign any satisfactory reason, while the heirs or devisees of the testator claim to hold, and do hold the estate, under existing circumstances. When a contract is made for the purchase of an estate, and a part of the price is deposited, and upon examination of the abstract of the title it is found defective, and no deed can be given to convey a good title, the deposit may be recovered back. So if a man verbally agrees for an estate, and pays the price, and then the owner refuses to make a deed, the money paid may be recovered back, the bargain being disaffirmed. In such cases as these, the statute of frauds is no bar. 1. *Bos. & Pul.* 306. 3. *Stark.* 1614, 1615, and cases there cited. The action is not attempted to be maintained upon the contract for sale, to recover damages for not conveying; but to reclaim the money paid, which is detained without any consideration given for it. These are plain principles. The objection as to the tender, that no deed was offered to the executors for signature, cannot now be sustained. If a good one, it was waived by their conduct in assigning other reasons at the time. The tender was rightfully made to the executors; and if they had not the power to convey, they should have procured a conveyance from those who were authorized to do it.

On the whole we are all of opinion that the action is maintainable, and there must be *Judgment on the verdict.*

Longfellow and *Fessenden* for the plaintiff.

Orr for the defendants.

Bullard *vs.* Hinckley.

Land being under mortgage, A, a creditor of the mortgagor, attached his right in equity of redemption. Afterwards B, another creditor, attached the fee. A, having obtained judgment, caused the right in equity to be seized in execution and sold by the sheriff; after which the mortgagee made a deed of release and quitclaim of his right in the land, to the mortgagor.—It was held that by this deed the original mortgagor became the assignee of the mortgage, invested with the character of a mortgagee;—and that B, the second attaching creditor, who subsequently obtained judgment in his suit, could not take the land for his debt, there having been no entry to foreclose the mortgage;—and that a deed of release and quitclaim, afterwards given by the original debtor to the purchaser of the equity of redemption, vested in the latter the title to the whole fee.

A deed of quitclaim from the mortgagee to the mortgagor does not operate to extinguish the mortgage till it is delivered, although it may previously have been put on record by the mortgagee.

In this case, which was a writ of entry, both parties claimed the land under levies of executions against one *Houghton*, the former owner.

The demandant, who was a creditor of *Houghton*, deduced his title from an attachment of the fee, *March* 28, 1824, and a regular course of subsequent proceedings, perfected by an extent of his execution upon the land, which was set off as the estate of *Houghton* in fee, in due form of law, *May* 28, 1825, being within thirty days after judgment; which proceedings were duly registered, and the execution returned.

The tenant proved that the same land was mortgaged by *Houghton* to one *Larrabee*, *June* 1, 1822, to secure the payment of 850 dollars on or before *June* 1, 1828; which mortgage was recorded *March* 13, 1824. On the 19th of *March* 1824, all *Houghton's* right, title and interest in the land was attached at the suit of *David Dunlap* against him and others; judgment was recovered in that

suit at the *June* term following; the execution being duly issued, *Houghton's* right in equity of redemption was taken in execution *July* 12, and advertised for sale, and due notice given, being within thirty days after judgment; pursuant to which advertisement it was sold by auction, according to law, *Aug.* 17, 1824, and a deed of conveyance thereof given on the same day, by the officer, to Mr. *Everett*, who was the judgment creditor's attorney. The right in equity, thus sold, not having been redeemed by *Houghton*, Mr. *Everett* conveyed the premises to the tenant *Aug.* 2, 1825, by deed of quitclaim.

To rebut this evidence, the demandant produced a copy of a deed from *Larrabee* to *Houghton*, dated *July* 15, 1824, and recorded on the following day. wherein, for the consideration expressed of 150 dollars, he professed to convey to *Houghton*, by release and quitclaim, all his interest in the land. And he proved that personal notice of the existence of this deed was given to Mr. *Everett*, by his agent, on the first day of *August*.

He also produced a copy of a deed of quitclaim of the same land from *Houghton* to the present tenant, dated *July* 29, 1825; expressly referring to *Larrabee's* deed thereof to him above mentioned, to fix the identity of the land, as the same which he held by that deed.

The tenant then proved that the deed of release from *Larrabee* to *Houghton* was prepared and recorded at *Larrabee's* request and expense; that *Houghton* had then been absent from the State for about two years, and did not return till the autumn of 1824, or the winter following; that no person was present at its execution but the grantor, the scrivener, and the other subscribing witness; and that after the registry of the deed, it was returned by the scrivener to *Larrabee*. There was no other evidence of its delivery.

Hereupon the tenant contended that it was not competent for *Larrabee*, by these transactions, to defeat the seizure of the right in equity; by which, and due notice thereof, the rights of the judgment creditor were perfectly vested;—and that if it was competent for the mortgagee in such a case to dissolve the mortgage at his pleasure, yet having, in the present case, undertaken to do it by a deed of quitclaim,

the deed could have no operation till it was delivered, which was not till after the sale of the right in equity. Both these points the Chief Justice, before whom the cause was tried, reserved for the consideration of the court, and directed a verdict to be returned for the demandant, subject to their opinion.

Greenleaf and *Everett*, for the tenant, insisted on these points. 1. That the release of *Larrabee* to *Houghton* was fraudulent and therefore void, as was evident from the inadequacy of consideration, and the other circumstances in proof respecting it.

2. That if it was not void, yet it could not take effect till delivery; which was not till long after the sale of the right in equity by the sheriff. But clearly it could not operate on a creditor without notice; and here was none given till the thirty days after judgment had expired; so that unless the judgment creditor could still proceed as upon a right in equity already taken in execution, his lien on the property would be gone.

3. The *Stat.* 1821, *ch.* 60, *sec.* 1, which preserves the lien of an attaching creditor upon the fee, after a mortgage upon it is discharged, applies only to mortgages actually redeemed, pending an attachment on mesne process. But here was no attachment on mesne process then pending, but a seizure in execution. Nor was it a redemption by the debtor, but a gratuitous and fraudulent release by the creditor, in his absence, and without his assent.

4. The proceedings under the sale of an equity of redemption have relation to the time of seizure. But *Houghton's* right in equity was displaced by the seizure, and finally transferred by the sale, so that he had nothing, at the time of making the release, on which it could legally operate. *Barker & al. v. Parker & al.* 4. *Pick.* 505.

Orr, for the demandant. The intent of the *Stat.* 1821, *ch.* 60, was to place all attaching creditors on equal ground, after the redemption of the mortgage; preserving the lien of those who had attached the right in equity only, and transferring it to the fee. Thus the prior attachment, in either mode, is first to be satisfied. Upon this ground the seizure in execution, by *Dunlap*, was but a continuance of his lien created by the attachment; to perfect which he should

have extended his execution on the fee, as soon as the mortgage was discharged.

And this discharge was valid. The presence of the mortgagor is not necessary to an extinguishment of the mortgage. The statute provides that it may be done in his absence, by the mortgagee, by an entry in the margin of the record. If, instead of going in person, he sends a release, the effect is the same. Whether the money was actually paid, or not, is of no importance, since it was a good release of the debt, by deed under the seal of the creditor ; against whom it is a perpetual bar. And the tenant is estopped to deny this deed, since it is recited in the deed from *Houghton* to him, as the basis of his title.

The opinion of the Court was drawn up by

MELLEN C. J. If nothing rendered the sale of *Houghton's* equity of redemption by the sheriff ineffectual, it follows that by the proceedings stated in the report, the tenant became the owner of this equity. And if *Larrabee's* release to *Houghton*, bearing date *July* 15, 1824, after the right in equity had been seized, did not operate to extinguish the mortgage, then it did not render the sale of the equity ineffectual, but only operated as an assignment of his right and title as mortgagee to *Houghton ;* and therefore when *Houghton* made his release to the tenant on the 29th of *July* 1825, it constituted him the owner of the estate in absolute fee simple, by uniting the two parts of the estate in him ; that is, the fee and the right of redemption.

This leads us to inquire when the release from *Larrabee* to *Houghton* took effect, and how it operated when it did take effect. Now it appears from the report, that though it was recorded *July* 15, 1824, on the day of its date, yet it was sent to the registry by *Larrabee* himself, *Houghton* being then and for some months after, out of the State ; and of course the release could not have been delivered till several months after the equity of redemption was sold to *Everett*, nor have any effect till its delivery. To construe the deed from *Larrabee* to *Houghton* as an extinguishment of the mortgage, operating as such, before the sale of the equity, would defeat the rights of *Dun-*

lap, who had seized it on execution ; and to construe the deed as an extinguishment after the sale of the equity, would operate to cause the deed to enure to the benefit of *Everett* and not to that of *Houghton.* The release, under the circumstances of this case, could not operate to the prejudice of the tenant ; but on the contrary it could and did operate by way of assignment of *Larrabee's* title as mortgagee ; it was a release to him of the land ; and this was released by *Houghton* to the tenant, as before mentioned, making him absolute owner of the whole estate. It has been contended that the release to *Houghton*, being recorded before the sale of the equity, was equivalent to an acknowledgment of satisfaction of the mortgage on the record. But we are of opinion that it must be considered only as a deed, and so operating only from its delivery. And this shews that notice of this release, given to *Everett* on the first of *August*, cannot affect his purchase of the equity on the 17th ; for notice of a deed that had not then been delivered, and which was then, and for months after, a dead letter, could avail nothing.

Has the demandant a better title than the tenant ? *Bullard's* attachment of the land as *Houghton's* was made *March* 28, 1824 ; nine days after *Dunlap* attached the equity of redemption ; and his levy on the premises was *May* 28, 1825. This was after *Larrabee's* deed to *Houghton* had been delivered, and was in force, as an assignment of *Larrabee's* title as mortgagee ; and it was before the date of the release from *Houghton* to the tenant. Still, such an estate could not be taken in execution for *Houghton's* debts ; it being only the estate held by him at that time as assignee of *Larrabee* the mortgagee ; for *Larrabee* never had entered to foreclose the mortgage. See *Blanchard v. Colburn & ux.* 16. *Mass.* 345. Of course *Bullard* gained no estate or title by means of his levy on the 28th of *May* 1825.

From this view of the cause it is evident that the demandant has no title. *Verdict set aside and a new trial granted.*

Quincy & al. *vs.* Tilton.

Where parties agree to rescind a sale once made and perfected without fraud, the same formalities of delivery &c. are necessary to revest the property in the original vendor, which were necessary to pass it from him to the vendee.

This was a replevin, against a deputy sheriff, for 101 boxes of soap, which he had attached as the property of *Minchin & Willis*; and a trial was had before the Chief Justice upon the question of property in the debtors.

It appeared that the plaintiffs, on the 10th of *August* 1826, contracted with *Minchin & Willis* to exchange a quantity of wine, for a quantity of the plaintiffs' soap, of which the parcel replevied was a part. The wine was *Madeira* wine, imported by *Minchin & Willis*, and was in the hands of the custom house officer; but being of a bad quality, it was marked by the officer as *Fayal* wine, and paid duty as such. Before the bargain was concluded, one of the plaintiffs tasted the wine, and observed that it was as good as the soap. Afterwards, the plaintiffs being dissatisfied because the wine was entered as *Fayal* wine, although it had been represented to them as *Madeira*, and they understood it to be entitled to debenture as such, the parties submitted the matter to referees; who decided that as the wine had not been received by the plaintiffs, but was still in the custom house stores, it should remain the property of *Minchin & Willis*, and that the soap should be returned or paid for, at the market price. This decision was made in the afternoon of *Aug.* 17, and was agreed to, at the time, by both parties. No fraud was imputed, on either side. In the night following, the soap, being still in the possession of *Minchin & Willis*, was attached by the defendant. On the next day the plaintiffs commenced this action; and not being able to find all the boxes, they brought an action of *assumpsit* against *Minchin & Willis*

for the value of the whole quantity of the soap, as sold to them; which last action was still pending in this court.

Upon this evidence the jury returned a verdict for the plaintiffs; which the defendant moved the court to set aside, as being against law and evidence.

Longfellow, for the defendant, argued that the contract was not rescinded. There was no fraud or concealment, to vitiate it; and it was not in the power of the referees to set it aside. Nor has it been vacated by the parties themselves. Their assent to the award was at most but an agreement that the soap should be returned or paid for, as they might agree; but they never did agree which; and the plaintiffs made their election to abide by the contract of sale, by sueing for the price. This was an affirmance of the whole contract.

If *Minchin & Willis* had power to rescind the contract, they could not do so, under the circumstances of this case. An insolvent cannot rescind a sale after the goods are in his possession, and the rights of other creditors have attached. 2. *Kent's Com.* 404. 6. *D. & E.* 80. 3. *Bos. & Pul.* 119. But they have not attempted it; and if they had, it must have been rescinded *in toto*, and the property delivered, as re-sold, or all is void.

Fessenden and *Deblois*, on the other side, said that the whole inducement to the contract was the benefit of the debentures as on *Madeira* wine, of which the plaintiffs had been deprived by the misconduct of the vendors in entering it as *Fayal* wine. Its legal character was then changed, and the plaintiffs had therefore a perfect right to rescind the contract. The wine being in the government stores, and not in the actual custody of either party, the possession, in law, followed the right; and the acceptance of the award by both parties was a perfect rescinding of the contract. *Slate v. Field* 5. *D. & E.* 511. *Atkins v. Barwick* 1. *Stra.* 165.

The award being in the alternative, to return the soap or pay for it, *Minchin & Willis* elected the former, by not complying with the latter. For in such case the election belongs to the debtor, or vendee, and it must be made immediately, or it is lost. 1. *Dane's Abr.* 98. *McNitt v. Clark* 7. *Johns.* 465. *Thompson v. Ketcham* 8. *Johns.* 189. *Doug.* 15.

And the rescinding was total. The plaintiffs replevied all they could find, and brought *assumpsit* for the residue. It might have been trover, for the whole; but they waived the tort and charged the party in contract, for what they could not otherwise obtain; which they well might do.

MELLEN, C. J. delivered the opinion of the Court.

The statement of a few general principles and the application of them to the case before us, we apprehend will conduct us directly to a satisfactory result. When a sale or exchange of articles is legally rescinded on account of fraud in one of the parties, the whole thereby becomes nullified *ab initio;* and, of course, the property sold or exchanged is considered as having never been changed, in respect to the parties themselves, or their creditors. This principle is not contested. On the contrary when the sale or exchange is fairly and honestly made and perfected by delivery, the property is completely changed in the articles which are the subject of the sale or exchange; and if, after this, the parties agree to give up the bargain, as it is often expressed, and place things as they stood before it was made, this object can only be effected by what, in legal contemplation, amounts to a re-sale or re-exchange; and whatever was necessary to constitute the original sale or exchange a legal transfer of the property from one of the parties to the other, is equally necessary to constitute a legal re-sale or re-exchange. The legal requisites of a perfect sale or exchange of personal property was a subject of critical examination in the case of *Lanfear v. Sumner* 17. *Mass.* 100; in which principles and authorities were carefully examined by Mr. Justice *Jackson*. He observes, in giving the opinion of the court, that the general rule is perfectly settled and established, that "the delivery of possession is necessary in a conveyance of personal chattels, as against every one but the vendor. In that case certain goods were sold, but before they came to the possession of the vendee, they were attached as the property of the vendor; and the creditor who was considered as a purchaser, by the judgment of the court, was considered as entitled to hold the goods. That case was similar to this in many respects.

Let us now apply these principles to the present case. The report states that there was no fraud in the contract of exchange, and there was an actual delivery of the soap to *Minchin & Willis*, and a constructive possession of the wine by the plaintiffs; and there was therefore, by the exchange, a transfer of the property of the soap to *Minchin & Willis*. In this posture of affairs, for the reasons mentioned in the report, there was some dissatisfaction on the part of the plaintiffs, which led to the submission and the award; and this award was agreed to by the parties. We must construe its effect upon legal principles. The award, though agreed to by the parties, did not, in law, amount to a rescinding of the original contract, but only to an agreement to make a re-exchange. But if it amounted to a re-exchange, it was never perfected by a delivery of the soap to the plaintiffs, and of course, it did not re-transfer the property of it to them. We do not perceive that the cause stands on a better or different ground in respect to the plaintiffs, in consequence of that part of the award which gave an election to *Minchin & Willis* to return the soap or pay for it at the market price. By returning it before any attachment, they would have perfected the plaintiffs' title; but they did not return it; and by omitting so to do, as they immediately should have done, they elected to consider themselves as purchasers of it, and as such to pay for it at the market price. The attaching creditors found the soap in the possession of *Minchin & Willis*, and were strangers to the transactions between them and the plaintiffs, and had a good right to attach the soap to secure themselves.

Some proceedings on the part of the plaintiffs, in sueing for the price of the soap, in their action against *Minchin & Willis*, on the same day on which the present action was commenced, have been relied on as confessions of the Messrs. *Quincy*, that they considered the soap as belonging to *Minchin & Willis*. It was certainly competent proof for the jury to examine, and is in aid of the construction we have given; but we do not rely particularly on this circumstance; because, for the other reasons which have been stated, we are all of opinion that the verdict is against evidence, on the law applicable to the case.

Verdict set aside and a new trial granted.

O'Brien *vs.* Dunlap.

Where several issues are made up and tried in the same cause, some of which are found against the "party prevailing," he is still entitled to his full costs upon all the issues, by the provisions of *Stat.* 1821, *ch.* 59, *sec.* 17.

In this case, which was trespass *quare clausum fregit*, the defendant pleaded several pleas, resulting in issues to the country, all of which were found against him, except one; and judgment being rendered in his favor for costs, he taxed, among other items, the fees of the witnesses summoned to support the issues found against him. The clerk allowed the costs as taxed; from which decision the plaintiff appealed to the court.

The Chief Justice, before whom the cause was tried, after hearing the question argued by *Longfellow* and *Mitchell* for the plaintiff, and *Orr* and *Greenleaf* for the defendant, certified his opinion as follows.

As to the general principle relied on by way of objection to the annexed bill by the plaintiff's counsel, viz. that no costs ought to be taxed by the defendant for witnesses who were summoned to establish those issues which were found for the plaintiff; though according to the practice in the English courts it would be good, as I conceive, yet no such discrimination has ever been made by our courts; and it is excluded by the provisions of our statute. The "prevailing party" is entitled to his costs, generally; not merely on the issues found for him. I have consulted my brethren, and they agree with me. It is true, the court will sometimes disallow costs when witnesses attend unnecessarily as to time, and are summoned in extravagant numbers; but in this case fraudulent or oppressive intentions are not to be presumed, as the whole defence was arranged under the direction of distinguished counsel; and the issues to be proved required ancient and numerous witnesses. I feel bound, therefore, to affirm the decision of the clerk.

TITCOMB *vs.* THOMAS.

A bill of exchange payable to the order of the drawer, and not indorsed, may be assigned, for a valuable consideration, by delivery only; and for the benefit of the assignee an action lies against the acceptor, in the name of the drawer, as on a bill payable to himself.

The interest of one of several joint assignees of such bill may be transferred to the others by delivery of the bill, and payment by them of his share of the money due upon it.

THIS was an action of *assumpsit* on a bill of exchange drawn by the plaintiff on the defendant, payable to the plaintiff's own order, no other payee being named, and accepted in writing by the defendant. The bill was drawn and accepted at *Baltimore*, *August* 31, 1826, where the parties then were, though both belonged to *Portland;* and it was not indorsed by the plaintiff. The action was commenced *Dec.* 7, 1826, for the benefit of Messrs. *Lawrence & Co.* and *Dexter & Almy*, as appeared by an indorsement on the writ, who claimed the bill as assignees, and had caused it to be protested for nonpayment.

The defendant, at the opening of the cause before the Chief Justice, moved its dismissal from the docket; founding the motion on a paper under the hand and seal of *Titcomb*, filed at the first term in the court below, in which he disclaimed the suit, forbade its prosecution, and released the defendant from all demands.

The counsel for the plaintiff, to shew that the bill was the property of the persons claiming it as assignees, called one *Patterson* as a witness, who was objected to on the ground of his interest, as developed in the course of his testimony.

He testified that the firm of *Titcomb & Sumner*, of whom the nominal plaintiff was one, having failed in business, the assignees above mentioned, and the firm of *Lambert & Patterson*, of which the witness was one, being creditors of *Titcomb & Sumner*, agreed to share equally in the loss and gain of an attempt to obtain payment of their demands. In pursuance of this agreement the witness followed *Titcomb* to *Baltimore*, arrested him there in a suit for a portion of

their demands, amounting to about 1400 dollars, and imprisoned him in close gaol. A negotiation was then opened between him and the defendant, who was in *Baltimore*, which resulted in an agreement that the defendant should give his acceptances for the whole amount of the demands in *Patterson's* hands, being $2732 21. The bills were accordingly drawn, in the prison, payable to the order of the plaintiff, accepted by the defendant, and by him delivered to *Patterson*, in presence of *Titcomb*, and with his consent. The notes against *Titcomb & Sumner* were at the same time delivered by the witness to the defendant, who wished to receive them, as he said, for his own security; but they were not indorsed. Neither were the bills of exchange indorsed by *Titcomb*, the witness having forgotten to have it done. *Titcomb* was then discharged from prison. He further testified that no bail was offered or refused; that of the demands in his possession, 1654 dollars were then due and payable; and that no measures were adopted to enforce payment, beyond the ordinary course of law. After his return to *Boston*, he delivered all the drafts to the Messrs. *Lawrence;* and before the first draft fell due, having heard that payment would be declined, he agreed to sell out his interest in them all, in order to be a witness in any action that might be brought respecting them; and received 597 dollars in full of *Lambert & Patterson's* demand against *Titcomb;* but no writing was made till *June* 19, 1827, after this action was brought, when he executed a proper deed of assignment, transferring to the other creditors all his interest in the drafts.

Hereupon it was contended for the defendant,—1st, That *Patterson* was not a competent witness, because of his interest; for previous to the bringing of the action he had only agreed to transfer his interest in the bills, the assignment not having been made till since the action was pending; and if the plaintiff does not succeed in this suit, the defendant will have a remedy, for his costs and damages, against all the persons who caused it to be commenced against him, of whom the witness was one.—2d, That there was no consideration for the bills, they being mere accommodation paper, on which the original party can have no action The old notes being delivered to the defendant gave him no new rights, because they were paid by the new

negotiable paper; and also not being indorsed, they gave the defendant no claim beyond what he would have had on a count for money lent.—3d, That the suit was subject to the control of *Titcomb;* both for the foregoing reasons, and because the bills were obtained from him by duress, and under circumstances of severity which left him no liberty of choice.

The Chief Justice overruled these objections, but reserved them for the consideration of the court, a verdict being, by his direction, found for the plaintiff.

Fessenden and *Deblois* for the plaintiff.

Orr, *Greenleaf* and *Willis* for the defendant.

Mellen C. J. delivered the opinion of the Court.

The first question is whether *Patterson* was a competent witness. The firm of *Lambert & Patterson*, of which the witness is one, were originally creditors of *Titcomb & Sumner;* yet it appears by the report that the present action is brought for the benefit of certain other creditors, whose names are mentioned in the special memorandum or certificate on the back of the writ. It appears also that before the commencement of the action, the full amount of the demand of *Lambert & Patterson* was paid to them by the creditors for whose use the suit was instituted, though a formal release and assignment was not executed till several months after. Upon receiving payment of their demand, they ceased to have any interest in the same, or in the success of this prosecution; for it does not appear that any one is chargeable with the expense of it, but those who claim to recover the amount sued for, in the name of *Titcomb*, or his equitable assignees. Our opinion therefore is that *Patterson* was a competent witness, and properly admitted as such.

The second question is whether, upon the facts developed in his testimony, the action ought to have been dismissed from the docket, in consequence of *Titcomb's* disavowal and discharge. The bill of exchange declared on, for some reason or other, was not indorsed by *Titcomb;* but if the property of the bill was fairly and on good consideration assigned or transferred to the prosecuting creditors, it is

the duty of the court to protect their equitable rights, and not suffer them to be sported with, or sacrificed by the assignor, at his pleasure. On this point it would be superfluous to cite authorities.

We proceed therefore to the third question, which is whether a legal right of action has been fairly and equitably assigned to the persons before mentioned, on a valuable consideration. An assignment of a demand need not be in writing; it may be made by delivery. See *Vose v. Handy* 2. *Greenl.* 322, and the cases there collected. In the present case the bill, when signed by the defendant, was delivered to *Patterson* the witness, who was then agent for all concerned, in the presence of *Titcomb*, to whose order it was made payable, and with his consent. These facts certainly shew a legal assignment, and *Titcomb's* immediate discharge from prison, in consequence, was a good and valuable consideration for it.

The next question is whether there was a good and sufficient consideration for the defendant's acceptance? To this question the answer is obvious. The defendant came forward in the nature of a surety for his friend, to procure his liberation from imprisonment, and he was liberated. This was itself a legal consideration, surely as binding as a promise in consideration of forbearance. It is the same species of consideration which gives force and effect to the promise which a man makes, when he signs a promissory note as surety for his neighbor, or indorses his paper. The promissee or creditor gives delay, and the debtor gains by it; and this is the consideration on the part of principal and surety. This is familiar law. The act of giving up the notes by *Patterson* to *Titcomb*, was also a consideration for the draft; and beyond this, these notes were delivered to the defendant, at his request, he saying he should want them for his security, *Titcomb* assenting. This was an assignment of them. After all this, such an objection should not have been heard. As to *Titcomb's* supposed right to control or defeat this action, on the alleged ground of duress, illegal exactions, and oppression, it is enough to say that there is not a particle of proof to establish the fact, or warrant the imputation. *Judgment on the verdict.*

DODGE *vs.* BARTOL & ALS.

The owner of a vessel is not liable to contribution for the jettison of goods laden on deck.

THIS was an action of the case against the defendants as owners of the schooner *Charles*, for not delivering 160 barrels of flour shipped at *Georgetown* for *Portsmouth*, for which the master signed bills of lading in the usual form, and with the usual saving of the dangers of the seas; and by which it appeared that twenty barrels were shipped to go under deck at 35 cents per barrel, and one hundred and forty were shipped to go on deck, at half that price for freight. It was tried before the Chief Justice at the last *November* term.

It appeared that in coming over *Nantucket* shoal, in bad weather, and with a heavy sea, the vessel struck, and was in such danger as to render it necessary, for the preservation of the lives of the crew, and for the safety of the vessel and cargo, to throw some part of the latter overboard; and accordingly the whole of the deck load, and twenty barrels from the hold, being the plaintiff's flour, were thrown over, whereby the vessel and the rest of the cargo were saved. The value of the twenty barrels under deck was afterwards settled for in the general average, leaving only the deck load in controversy.

The defendants insisted that they were absolved from liability for the loss of the goods shipped on deck; both by the general principles of the law merchant, and by the usage and custom of America.

To prove that it was the general usage here for the owner of goods shipped on deck, to bear the whole loss if they were necessarily thrown overboard, the defendants called several merchants, two of whom were members of the insurance company by which the schooner was insured by the year, and which had paid its proportion of the loss of the twenty barrels under deck; who were objected to, on the ground of interest; but the policy having expired. they were admitted as competent witnesses. For the purpose of ascertaining the amount

of damages, the Chief Justice directed a verdict to be returned for the plaintiff, reserving, for the consideration of the court, the questions raised at the trial. He also instructed the jury to consider and answer, whether there was a general usage for coasting vessels, employed between this place and the southern States, to carry deck loads when occasion offered, if not deeply laden, and no objection made;—and whether there was such a general usage among merchants and shippers, that the owner of a deck load cannot maintain an action against owners and freighters, for their proportion of the loss occasioned by throwing it overboard for the preservation of the vessel and cargo; such usage being so generally established among merchants, as to have the force of law;—both which questions the jury answered in the affirmative.

The plaintiff objected that evidence of a negative usage ought not to have been admitted; and that the finding of the jury upon the second question was against the weight of evidence in the case; but as the cause was decided upon other grounds, the arguments on this point are omitted.

Greenleaf, for the defendants, contended that the owners of the vessel were not liable to contribution for the jettison of goods laden on deck. 1. On principle; because they go on half freight; and the effect will be to make the owners insurers at half premium, and this too, where the risk is greatest.

2. Upon authority. To this point the writers of all civilized nations concur. *Stevens on Average* 14. *Commercial Code of France b.* 2, *art.* 421. *Pothier on Mar. Contr.* 67. *sec.* 118. *Ord. de la Marine art.* 13. *Du jet. Jacobsen's Sea-laws* 234. *Consulat. cap.* 183. *Smith & al. v. Wright & al.* 1. *Caines* 43. *Lenox v. United Ins. Co.* 3. *Johns. Ca.* 178. *Wolcott v. Eagle Ins. Co.* 4. *Pick.* 429. *Phillips on Ins.* 333. 2. *Dane's Abr.* 327. The only exception is found in *Valin's* commentary on the 13th article of the *Ordin. de la Marine*, in which he states that this rule does not apply to boats and small vessels, which sail from port to port, where it is customary to lade goods on the deck, as well as in the hold. But this exception must be taken with reference to the navigation of the rivers and shores of *France* only, by small craft and open boats;

and not to our coast navigation, which encounters all the perils of a foreign voyage. It has never been recognized in England; and in the general revision of commercial law under Napoleon, this exception was wholly omitted.

3. By the usage, both of Europe; *Pothier Mar. Contr.* 67. *Abbot on Shipping* 393; and of America; as was testified by merchants in *Smith & al. v. Wright & al.* 1. *Caines* 44. and also in the case at bar.

Longfellow, for the plaintiff, founded his argument on the exception stated by *Valin*, which, he contended, was applicable to every case where the usage was to carry on deck. Such usage in this case, is abundantly proved, and not controverted. The liability attaches itself to the vessel in regard to all goods lawfully on board. But goods on deck are not lawfully there, unless justified by the usage of the trade. The master must not overload his vessel. The hold is the full measure of her capacity, and when this is exceeded, it is the fault of the master, who alone is liable. Such is the general law; and on this principle all the rules exempting the owners of the vessel are founded. The owners shall not be liable for a violation of law by the master, to which the shippers themselves were accessary. But where the capacity of the vessel, the nature of the employment, and the well known and universal custom of the trade, all authorize the carrying of goods on deck, it is equivalent to a special contract by the owners themselves, for each voyage, by which they ought to be bound. In such case, the goods on deck are lawfully there, as part of the cargo, to all of which the contract for safe carriage justly extends. *Ord. de la Marine, art.* 12, 14. *Phillips on Ins.* 332.

Weston J. delivered the opinion of the Court.

The claim of the plaintiff against the defendants, as general owners, must be predicated upon one of two grounds; that fault or negligence, in the discharge of his duties, is imputable to the master; or that they are liable upon the principles of contribution, or general average. It is in evidence that the jettison, by which the plaintiff's loss was occasioned, was justified by the highest necessity; nor is it

pretended that the property could have been preserved, by any exertion on the part of the master or mariners.

On the question of contribution, the commercial code of France provides, that the effects laden on the deck of the vessel, contribute, if saved. If they be thrown overboard, or damaged by the jettison, the owner is not admitted to make a demand of contribution; his only remedy is against the master. By the Ordinance of the marine, no contribution can be demanded for goods on deck, which have been thrown overboard or damaged; saving to the owners their remedy against the master. It would seem, from these authorities, that the shipper might look to the master for his indemnity; and if so, the owner might also be holden, as liable for his default. *Pothier*, in his treatise on maritime contracts, *Art.* 2, *sec.* 118, explains the reason of this; which is, he says, because it is the master's fault to overload the ship, if there was no room below deck for the goods; or if there was, it was his fault that he did not stow them there. In the present case, there was no such fault in the master, of which the shipper has any right to complain. His goods were laden on deck, by his express permission and assent; and he paid but half freight therefor. *Valin*, in his commentary on the Ordinance, says, this rule does not apply to boats and small vessels, which sail from port to port; where it is customary to load goods on deck, as well as in the hold. Admitting this exception of *Valin* to be the law of this country, we do not perceive that it can fairly be applied to the case under consideration. Boats and small vessels are classed together; and by the latter we think ought to be understood such as ply from one port to the next adjoining port, or for short distances along the coast. We cannot find that the exception of *Valin* has been adopted in this country; and if it is to be considered as qualifying the law here, it cannot extend to vessels, like the one in question, nor to voyages of the magnitude and importance of that, in which she was employed by the plaintiff.

The general law, that jettison from the deck presents no case for contribution, has been recognized in New York, and in Massachusetts.

There can, we think, be little doubt, that in the excepted cases

stated by *Valin*, depending on a usage to load on deck, as well as in the hold, full freight was paid for the whole goods. Indeed, from the limited nature of the navigation, those laden on deck might be nearly or quite as safe, as those laden in the hold ; and this may have constituted the principal reason for the exception. But in the case before us, goods on deck would be as much exposed, as in a foreign voyage. If the shipper has less protection, he pays less freight. He knows the increased hazard ; and he deliberately assumes it. If he be entitled to contribution, and if his case be within the exception of *Valin*, he would lose no more by the jettison, than those whose goods are in the hold ; although the latter pay twice as much for their carriage. If the owner of the vessel alone contributes, for which no usage, exception, or authority has been cited, there seems to be no reason why he should not have full freight, for this increased hazard. The half freight, stipulated by the shipper, strongly indicates that this was, and ought to be regarded, as a case within the general law.

Placing our opinion upon this ground, we do not consider that the particular usage of the port of *Portland*, proved at the trial, in accordance with this principle, can affect the case. It did not require this support; and the decision must have been the same, if it had not been adduced. The determination, therefore, of the question as to the competency of the witnesses objected to, becomes unnecessary. But as by law the owners are not liable, for the same reasons the insurers are not, and thus they are competent witnesses ; although their testimony has no influence in the decision of the cause.

By the general maritime law, this is not a case for contribution. If this is by usage an excepted case, the burden of proof is upon the plaintiff to show it. The defendants are not bound, nor is it necessary for them, to prove a usage corresponding with the law.

Phillips, in his treatise on insurance, page 333, commenting upon the exception of *Valin* to the rule stated in the thirteenth article of the Ordinance, says, upon the principle of this exception, if it be the usage of the trade to carry part of the cargo on deck, a jettison therefrom is a subject of contribution. But he cites no authority, which supports this position to the extent stated. In whaling voyages, he

adds, it is the practice "to adjust, upon the principle of general average, oil thrown overboard from the deck, where it is carried for a short time, after being put in casks, before it can properly and safely be stowed in the hold." This usage and practice, in regard to these voyages, arises from the particular nature of the business; and as it applies to every part of the cargo, which must all undergo the same process, it is equal in its application. It does not extend to goods carried on deck for the voyage; but to such as are to be carried below deck, in their transit to their destination in the hold. If, by the usage, the goods are to be carried on deck for the voyage, this exception, even according to *Phillips*, does not uniformly apply; for he states, in the same paragraph, that it is usual to carry on deck a part of the cargo of a vessel loaded with lumber, but that it does not appear to be the practice to contribute for this part of the cargo, if it be thrown overboard. *New trial granted.*

GREEN *vs.* MORSE.

It is not lawful to arrest a debtor, on mesne process, in any case where, after judgment, his body is not liable to be taken in execution.

For executing legal process in an unlawful manner, trespass is the proper remedy.

THIS action, which was trespass and false imprisonment, came before the court upon a case stated by the parties in the court below.

The present defendant, holding a promissory note against the plaintiff for three dollars and interest, dated *Aug.* 25, 1826, and payable on demand, sued out a writ of *capias* or attachment in the usual form, on the 28th of the same month, for the recovery of that sum; and caused the plaintiff to be arrested and imprisoned in the common gaol, till he gave bail for his appearance to answer the suit. And the

question was whether the arrest was lawful; and if not, whether trespass was the proper remedy.

Daveis, for the defendant, justified the arrest. He referred to *Stat.* 1821, *ch.* 63, in which the forms of original and final process were imperatively and absolutely prescribed; leaving no court nor magistrate a discretionary power to vary them, but in the cases specially excepted by law. One of these exceptions is found in *Stat.* 1821, *ch.* 52, *sec.* 19, providing that writs of attachment and executions shall run only against the assets in the hands of an executor or administrator, and not against his body. The other is in *Stat.* 1822, *ch.* 209, providing that no person shall be arrested or committed to prison on any *execution* issued upon any judgment founded on contract, unless the debt or damage in the judgment shall exceed five dollars; and specially authorizes clerks and magistrates so to change the form of such *executions*, as that they shall not run against the body of the debtor. This statute relates only to debts in judgment; it speaks of judgment debtors. Had the legislature intended to affect cases of mesne process, it could easily have found appropriate language.

The legitimate office of a *capias*, at common law, is to compel the party to appear and answer the suit, by arrest of his person. It is only *ad respondendum*. 3. *Bl. Com.* 281. 1. *Tidd's Pr.* 122. In suits for debts less than five dollars, the legislature has restored the *capias* to its original office; and its exigency is exactly satisfied by giving "bail below." Bail to the action is not required. The form of the bail bond on mesne process is not prescribed by statute; and that in common use can readily be adjusted to the requisition of a mere *capias ad respondendum*. The matter of bail is between the debtor and the sheriff, who is justified if he observe the essential provisions of the statute, in cases like the present, by taking nominal pledges. If the arrest is irregular, the course in England is to discharge the defendant, on common bail. *Belifante v. Levy* 2. *Stra.* 1209. *Imlay v. Ellefson* 3. *East* 309. *Belchier v. Gansell* 4. *Burr.* 2502. 2. *Stra.* 782, 943, 1039. 2. *Wils.* 93. *Cowp.* 72. 2. *Bl. Rep.* 809.

But if the defendant is liable, it is not in trespass, but in an action of the case for maliciously holding to bail. *Tarleton v. Fisher Doug.* 676.

Fessenden and *Deblois* for the plaintiff.

WESTON J. delivered the opinion of the Court.

By the first section of the act, for the relief of poor debtors, *Stat.* 1822, *ch.* 209, it is provided, "that no person shall be liable to be arrested or committed to prison on any execution issued upon any judgment founded on contract, or on any execution issued upon any judgment founded on a former judgment rendered in any suit upon contract, unless the debt or damage in the original judgment, shall exceed the sum of five dollars." The declaration in the writ, upon which the body of the present plaintiff was arrested and committed to prison, was upon a note of hand, dated *August 25th*, 1826, for the sum of three dollars; the plaintiff therefore, in that action, knew that the judgment he could recover, as debt or damage, must necessarily be under five dollars; and this is also manifest from the writ itself.

The first question presented is, was the arrest and imprisonment warranted by law? It may be important to inquire for what purpose the body of a debtor is arrested upon mesne process. In England, from whence our laws and forms of judicial proceedings had their origin, the object of the arrest is to compel his appearance in court at the return of the writ; for without his appearance, judgment could not be rendered against him. In this State, as judgments may in all cases, after the service of the writ, be rendered upon his default, there is no occasion for process to compel his appearance merely. The object of the arrest and imprisonment of his body, or admitting him to bail on mesne process here, is, that the creditor may coerce payment, by taking his body in execution. This is the purpose of the arrest; and unless this can be attained, it is unreasonable and unnecessary. It was manifestly the intention of the legislature to exempt the debtor's body from the power and control of his creditor, for debts of this small amount. If liable for arrest for such debts upon mesne process, it cannot be contended that he is not entitled to

bail. And what do bail undertake? That the body of the debtor shall be forthcoming on the execution. For what purpose? That it may be taken and held, until the same be satisfied. But it is admitted that the debtor's body is not liable to be taken upon such executions. It would be a reproach to the law, and a violation of the personal liberty of the citizen, to subject his body to arrest and imprisonment before it can be ascertained whether judgment will be rendered against him, in cases where by law his body cannot be taken in execution of that judgment.

It is contended that the arrest is justified by the statute prescribing the forms of writs. The statute prescribes the form of a *capias* in original writs; but it does not determine in what cases it may be lawfully used. It must be intended to mean that in all cases, where the body of the debtor may be taken to satisfy the execution, it may first be taken on mesne process, for the security of the creditor. The body of a debtor in execution, who has been liberated from prison, upon taking what is called the poor debtor's oath, is exempted from being again taken in execution upon the same judgment. And if this judgment be sued, it has been clearly held that he cannot be taken upon mesne process thereon. In 1. *Pick.* 500, the court say, "if an arrest on mesne process were permitted, the debtor might be obliged to go to jail, which would be virtually a repeal of the statute." And it would be equally so in the case before us. We are well satisfied that the arrest of the plaintiff, at the suit of the defendant, was not warranted by law. Whether an arrest upon mesne process, where the judgment subsequently rendered was less than five dollars, might not be justified, if it could be made to appear that the plaintiff had a reasonable expectation of recovering more, is a question, we are not now called upon to decide.

The second question arising in this cause is, whether trespass is the proper remedy. We are of opinion that it is. It is the proper remedy for executing legal process in an unlawful manner. It lies, if one arrest another not liable to arrest. In *Parsons v. Lloyd*, 3. *Wils.* 341, the plaintiff had been arrested and imprisoned on a *capias* irregularly issued, at the suit of the defendant. Trespass was sustained against him, notwithstanding it was insisted that it should have

been a special action of trespass on the case; and *Nares J.* said that every plaintiff sues out process at his peril. Where the party arrested has merely a personal privilege, as a witness, a juror, or a party attending court, trespass does not lie. But here the exemption was not personal, but general and applicable to all persons whatever. The judgment of the court below is affirmed, with costs.

SHERWOOD *vs.* MARWICK.

Whether an action will lie against a vendor for false and fraudulent representations respecting the ownership and character of the thing sold, where the conveyance was by deed with express covenants upon those points;—*quære.*

One partner cannot render another liable for his fraud, without an actual participation.

The doctrine that a principal is answerable for the fraud of his agent or factor, does not apply to special agents.

The cases in which the court will determine the question of fraud, as an inference of law, the facts being clearly proved or admitted, are those of sale, in which the rights of creditors are concerned, under *Stat.* 13. and 27. *Eliz.* or of sales with intent to defraud creditors, at common law. In other cases of alleged fraud, the imputed intent and *scienter* are subjects for the consideration of the jury.

THIS was a special action of the case, tried before the Chief Justice, upon the general issue, at *November* term 1826.

The writ contained five counts. In two of them the defendant and one *Richard Sutton* were charged with having sold to the plaintiff, who is a British subject, a certain Spanish vessel; and with having, at the time of sale, falsely and fraudulently represented and declared said vessel to be a British vessel, and entitled to be navigated with all the privileges of that character. In another count the defendant alone was charged with having made such false and fraudu-

lent representations and declarations. In another count it was alleged that such declarations and representations were made by *Sutton*, with the connivance and consent of the defendant; and in the other, the defendant was charged with having made them through the agency of *Sutton*.

The only evidence to prove the false representations alleged in the writ, was a deposition formerly given by the defendant *in perpetuam;* and the bill of sale of the vessel. The latter document was the grand bill of sale under seal, in the usual form, executed by *Sutton*, as the attorney of one *William Hillyer*, of the island of *St. Kitts*, the apparent owner of the vessel; which was represented as a British brig, registered at the port of *Sandypoint*, in that island; and it contained covenants that *Hillyer* was the true owner of the brig; that *Sutton* was duly authorized to sell her; and a special warranty against the vendor and his assigns.

The defendant, in the deposition, testified that at *St. Barts*, in 1815, he and *Sutton*, having lost their vessels in a hurricane, agreed to purchase on their joint account a certain brig then ashore, called the *St. Antonio*, sailing under the Spanish flag, and belonging, as he supposed, to Spanish owners at *Havana*. She was sold at auction for 610 dollars, which the defendant paid, and *Sutton* accounted with him for one half. They made the necessary repairs on her, and fitted her for sea; and wishing to send her to a British port, were obliged to obtain British papers for her. *Sutton* accordingly purchased of some person in *St. Barts* a British register, for which he gave about 250 dollars. This register he took over to *St. Kitts*, to have the transfer completed, and when he returned he brought with him another register, in which *Hillyer* was certified to be the true owner of the brig. *Hillyer* came over with him, bringing one *Bates* to command her; but he being prevented, *Hillyer* acted as master, and took *Sutton* and *Marwick* with him to *Antigua;* where she was chartered as a British vessel, and sailed under *Marwick's* command, with a cargo of West India produce, to *New York;* thence back to *Antigua;* and thence to *Portland*. Soon after her arrival here she was sold to the plaintiff by *Sutton*, as the attorney of *Hillyer* by virtue of a power which the latter had given him for that

purpose. But *Hillyer* had no interest in her whatever, his name being used merely to cover the property. She belonged wholly to *Sutton* and *Marwick*. The register brought by *Sutton* purported to be the register of the brig *Anna*, captured by the British brig *Boxer*, and condemned in the Vice Admiralty Court at *Halifax*, as prize of war.

On this evidence the Chief Justice instructed the jury, that if they should be satisfied that the defendant was directly or indirectly concerned in, or assenting to any false or fraudulent representations made by *Sutton;* or was guilty of having made such false or fraudulent representations personally to the plaintiff; then they ought to find for the plaintiff;—but that if they were not satisfied on either of those points, they ought to find for the defendant. And they returned a verdict for the defendant, which was taken subject to the opinion of the court upon the correctness of those instructions.

Fessenden and *Daveis*, for the plaintiff, argued against the verdict, on these grounds.—1. The judge, upon the facts which were uncontradicted, should have instructed the jury that the proof amounted to fraud, and that they therefore were bound to find for the plaintiff. The evidence of fraud was plenary and incontrovertible, *per se*. It was a necessary inference from the deposition and the bill of sale, and could not be avoided. 1. *Burr.* 393. *Hoyt v. Gilman* 8. *Mass.* 337. 1. *Stark. Ev.* 411.

2. Being a case of fraud and covin, it was purely within the province of the court, as a question of law. The province of the jury is to deal with facts. Where these are not in controversy, and the question is fraud or no fraud, the court are bound to declare the legal inferences, without the aid of a jury. *Foxcroft v. Devonshire* 2. *Burr.* 931. *Doe v. Manning* 9. *East* 59. 1. *Stark. Ev.* 427. Such has been the course in cases of fraud under the bankrupt acts. *Linton v. Bartlett* 3. *Wils.* 47. *Wilson v. Day* 2. *Burr.* 827. *Newton v. Chandler* 7. *East* 144. And in cases under *St.* 27. *Eliz. cap.* 4. and 13. *Eliz. cap.* 5. *Edwards v. Harben* 2. *D. & E.* 587. 5. *Taunt.* 212. *Hamilton v. Russell* 1. *Cranch* 309. *Hil-*

dreth v. Sands 2. *Johns. Chan.* 49. Where the fraud depends on the act done, it is to be declared by the court; where it depends on the intent, it is to be found by the jury. 1. *Stark. Ev.* 428. 5. *Cranch* 363. *Sturtevant v. Ballard* 9. *Johns.* 337.

3. This was such a case of fraud as the defendant could not gainsay. 2. *Dane's Abr.* 540. It was compounded of fraud and falshood, in which the defendant confessedly participated, at its foundation. *Pasley v. Freeman* 3. *D. & E.* 53. *Holt's N. P.* 387. 2. *East* 108. 3. *Bos. & Pul.* 371. *Evans v. Bicknell* 6. *Ves.* 182. *Bacon v. Bronson* 7. *Johns. Chan.* 201. *Burrows v. Lock* 10. *Ves.* 470. And proof of fraud in one is imputable to both. *Bayard v. Malcolm* 2. *Johns.* 550. 2. *Dane's Abr. ch.* 59, *art.* 1. 3. *Esp.* 21. *Watson on Partn.* 167. Where two are partners, and one sells the property with fraudulent assertions, and both take the money, both are liable. *Willet v. Chambers Cowp.* 814. 1. *Salk.* 291. 1. *Campb.* 285. *Swan v. Chute* 7. *East* 213. *Boardman v. Gore* 15. *Mass.* 331. 1. *Dane's Abr. ch.* 9, *art.* 6. So is the law as to principal and agent. The principal is liable, though the fraud was committed by the agent alone, and without authority *Paley on Agency* 229. *Hern v. Nichols* 1. *Salk.* 289. *Bull N. P.* 31. 1. *Com. on Contr.* 242. 2. *Stark. Ev.* 472. *Willis v. Martin* 4. *D. & E.* 39. 1. *Str.* 505. 3. *Esp.* 64. 1. *Sch. & Lefr.* 209. 1. *Campb.* 127. *Grammar v. Nixon* 1. *Str.* 653. 1. *Bos. & Pul.* 404. 1. *Bl. Com.* 430.

Longfellow and *Greenleaf*, for the defendant.

These arguments were heard at *May* term 1827; and at this term the opinion of the Court was delivered by

Mellen C. J. The question is whether correct instructions were given to the jury. They were distinct and explicit; referring to them the facts adduced to prove the guilt of the defendant, as charged in the several counts. The cause was fully argued before them, and the counsel addressed them on all the facts, as the proper tribunal to decide them. When such a course of proceeding is pursued, it is, to say the least, an inconvenience, not to say an inconsistency, for the

same counsel, as soon as a verdict is returned, to object to the instructions of the judge, and the order of conducting the cause, and contend that it was not proper for the jury to draw any conclusions from the evidence; but that the court should have interposed and decided on the facts that the defendant was guilty. However, under these circumstances, the cause is now presented to us for consideration. From the evidence, there can be no doubt that the defendant and *Sutton* were guilty of gross fraud and falsehood, after their purchase of the brig, in obtaining a false register, chartering her as a British vessel, and holding up *Hillyer* as the owner, when it appears they were themselves the owners. But none of those facts were the cause of the loss which the plaintiff alleges he has sustained; that was occasioned by an after transaction; that is, the fraudulent sale made by *Sutton* as attorney to *Hillyer*, and the false representations which it is said accompanied that sale. The question submitted to the jury related principally to the alleged connexion of the defendant with this fraud, direct or indirect, and his participation in the fruits of it. The counsel for the plaintiff contend that, from the facts proved, fraud was an inference of law, and that the court should have instructed the jury to find for the plaintiff. Now this is begging the question. When, without the aid of inference, the facts proved in a cause show the defendant to have done those things which render the transaction fraudulent in legal contemplation, then certainly it is the right and duty of the judge to pronounce the law, and decide the cause at once in favor of the party who has been the sufferer; but where there is conflicting proof, or some necessary facts are to be inferred from others which are proved, then it is the province of the jury to decide the cause, under instructions from the judge as to the principles of law which should govern them. In the present case the only proof of fraud was offered by the plaintiff, and arises from the bill of sale and the deposition of the defendant; the facts therein stated are distinct, and as plain as though stated in a special verdict, and we must consider them in the same manner. In the case of *Harwood v. Goodright Cowp.* 87, Lord *Mansfield* in delivering the opinion of the court says, "in considering this special verdict, the duty of the court is to draw a conclusion of law from the facts found by the jury, for

the court cannot presume any fact from the evidence stated. Presumption indeed is one ground of evidence, but the court cannot presume any fact." The inference as to intention is usually one of fact, to be made by a jury; but in such cases, as in some other instances, where the inference necessarily arises from the facts, it is a conclusion of law which the court can deduce from the facts, without the intervention of a jury. 2. *Stark.* 739. Where fraud depends upon the intention of a party, the existence of that intention is usually a matter of fact, which must be found by a jury, who are to decide on questions of *mala fides.* 2. *Stark.* 588. It is true, in the present case, the question submitted to the jury was one not merely of intention, but also of alleged association, connexion, and conspiracy to defraud; but whether such a fraudulent connexion existed, is a question of fact for the decision of the jury. Suppose the plaintiff, instead of the present action, had commenced an action in the nature of conspiracy, against the defendant and *Sutton*, for defrauding him in the sale of the brig; they could not have been found guilty without evidence of such connexion and conspiracy, satisfactory to the jury. A card maker, his wife and family, were indicted for a conspiracy to ruin another card maker. It was proved that each had given money to the apprentices of the prosecutor, towards accomplishing the mischievous design. It was objected that no two of the defendants were ever together when this was done; but the court said that as they were all of one family, and concerned in making cards, this was evidence to go to a jury. *Rex. v. Cope* 1. *Str.* 144. A similar principle was recognized in *Rex. v. Pywell & al.* 1. *Stark.* 402. Now in the case at bar, as there is no direct and positive proof of the defendant's fraudulent connection with *Sutton*, in the false representations made by him, the inference, from the facts proved, that there was such a connexion, is as much a matter for the jury, as the alleged conspiracy in the above mentioned case of *Rex. v. Cope* was. If A. be present when a murder is committed, and takes no measures to prevent it, and neither apprehends the murderer, nor makes hue and cry after him, and the matter be done in private, the circumstance would, it seems, be evidence to a jury, of consent and concurrence on his part. *Foster's Dis.* 3. *s.* 5. 2. *Stark.* 12.

As the deposition of the defendant is the proof relied on by the plaintiff, to establish the fraud on the part of the defendant, he can not deny the facts which it contains; so far as it discloses facts they are proved; but beyond that boundary line the court cannot pronounce any thing as proved. It is true, upon reading the deposition, and examining the narrative he has given of his own misconduct, and connexion with *Sutton*, in the transactions relating to the purchase of the vessel, and giving her a false register, we, laying aside our judicial character, and reasoning as private individuals, may fully believe the defendant was connected with *Sutton* in his fraud, and that all their fraudulent proceedings, from first to last, were known to the defendant, and that he was connected and concerned with *Sutton* in all of them; yet if such connexion and concern in the alleged false representations at the sale of the brig, is matter of inference from the series of facts disclosed in the deposition, the cause was properly submitted to the jury, the tribunal to weigh evidence, draw conclusions, and infer facts. Now by looking into this deposition, it does not appear that the brig was purchased to be sold again; but, on the contrary, that the object was to send her to a British port. Nor is there one word in it showing that the defendant knew that a sale of the brig was intended; or that *Sutton* was to act as attorney of *Hillyer*; or that the sale was made with the defendant's consent and authority, or even his knowledge; all these things, necessary to establish the defendant's guilt, are matters of inference only, which, as judges, it is not our province to notice, and consider as facts, and satisfactory evidence of his fraudulent connexion with *Sutton*. And in this view of the subject, if the execution of the bill of sale by *Sutton* was *ipso facto* a false and fraudulent representation, there is no proof implicating the defendant in the transaction; at least the jury have not drawn a conclusion implicating him. Besides, it is questionable whether an action will lie against a vendor for a false and fraudulent misrepresentation of facts as to ownership and character of the article sold, when the vendor derives his title under a deed containing express covenants as to those particulars. And when there is an absence of all proof on the subject of such representations, except the deed or bill of sale, as in the present case, the doubt seems changed

into a certainty, that the vendee must be considered as relying on the covenants in the bill of sale; and a fraudulent and false representation could not be presumed. There is no need of, or ground for, such presumption. But, in opposition to this view of the cause, the the plaintiff's counsel have contended that, as the defendant and *Sutton* were joint owners of the brig, each is answerable for the acts of the other. The authorities cited to show the application of the principle to the present case, do not extend so far; they relate to the power of one partner to bind another by his contracts; not to cases of tort, where one has been guilty of a fraud committed against a third person, and wholly unknown to the other partner. A fraud committed by one of the partners shall not charge the partnership. *Pierce v. Jackson* 6. *Mass.* 242.

Again, it is contended that the defendant is liable for the fraud of *Sutton*, although he was not conusant of it, or assenting to it at the time, on the ground that a principal is answerable for the fraud of his factor or agent. The cases cited to this point relate to the acts of general agents, in whom a general confidence is reposed; and the reason of the principle is, that as some one must suffer a loss, it is more equitable that he who has reposed this confidence should bear it, than a stranger, who, by means of this confidence, has been induced to part with his property by dealing with such agent; but this reasoning does not apply to the case of special agents. Some of the authorities above cited, are actions against masters for injuries sustained by the acts, misdoings, or negligence of their servants. In this view, none of them seem to be similar to the case at bar. But this is not all. The principle, as stated, is based on an assumed fact, viz. that *Sutton*, in making the sale of the brig, was the authorized agent of the defendant. This fact is denied, and the deposition contains no direct evidence of it; it might or might not be inferred by the jury, from facts proved, as we have before stated; but they have not inferred it; and without this fact, the principle contended for is of no importance.

In conclusion, we would observe that, according to decided cases, it seems that the instances in which fraud has been considered a question of law, and to be decided by the court, are those in which

the rights of creditors were concerned; and the principle appears to have its origin and foundation in the construction which has been given to the statutes of the 13th and 27th of *Elizabeth;* or in the common law as applicable to contracts made with intent to defraud creditors; because it is familiar law, that such contracts are good and binding between the parties. In other cases of alleged fraud, the imputed intent and *scienter* are subjects for the consideration of the jury. On the whole we think there must be

Judgment on the verdict.

GIVEN & UX. *vs.* SIMPSON & AL.

The language of the *Stat.* 1821. *ch.* 50, giving to this court equity jurisdiction in "all cases of trust arising under deeds, wills, *or in the settlement of estates,*" is applicable only to express trusts, arising from the written contracts of the deceased; and not to those implied by law, or growing out of the official character or situation of the executor or administrator.

THIS was a bill in equity. The plaintiffs alleged that they were heirs at law, in right of the wife, of a portion of the estate of *Josiah Simpson*, deceased; of which *Martha Simpson*, one of the defendants, was administratrix; that the personal estate being insufficient to pay the debts, she obtained license to sell so much of the real estate as should be sufficient for that purpose; and advertised it for sale at a certain time and place; at which place, and before the hour expired, certain persons attended, who were ready to have offered a price for part of the land, sufficient to have paid all the debts due, and charges of sale;—but that the administratrix, and one *Henry Minot*, the other defendant, had previously held a sale in a back and unfrequented inclosure of the premises, where the whole estate had been collusively and nominally knocked off to *Minot*, at a low

price, for the use and benefit of the administratrix. Of this fraud and collusion, as well as of the other matters charged, the interrogating part of the bill sought a discovery.

The defendants moved that the bill might be dismissed for want of jurisdiction in the court.

Greenleaf and *Mitchell*, in support of the motion. The bill seeks to charge the administratrix on the ground of fraud, and *Minot* as trustee of the estate. As to the administratrix, it must be dismissed, because the equity jurisdiction of this court does not extend to any case of fraud. Its powers in chancery are imparted by the legislature by express statutes, and dealt with a sparing hand; and have always been understood to be confined to the cases particularly enumerated. *Mountfort v. Hall* 1. *Mass.* 443. *Commonwealth v. Johnson* 8. *Mass.* 87. *Dwight v. Pomroy* 17. *Mass.* 303. *Tirrel v. Merrill ib.* 117. And she cannot be regarded as in any wise a trustee of the land. She had only a naked power to sell, as an attorney. She can have no action for the land; cannot enter on a disseisor; and has not the legal estate. There is therefore no ground to charge *Minot*. As his purchase was absolute in terms, and not made of a trustee, no trust attaches itself to the land in his hands.

The words of the statute may be satisfied, by applying them to cases where the administrator or executor invests the money of the estate in stocks, in his own name, and dies; or where he dies insolvent, having the money in his hands; and the like.

Besides, here is a plain and adequate remedy at law. For the facts charged in the bill, if true, present a case of gross fraud, which would render the sale void, and which might be shown under a writ of entry.

Orr, for the plaintiffs. The words of the statute are broad enough to cover all cases of trusts in the settlement of estates, whether express or implied. Express trusts are provided for in the cases arising under deeds and wills. Unless implied trusts are protected by the other words, the language is senseless. And it is the duty of courts to give them this construction, to extend the remedy, the statute being most beneficially remedial in its character.

The office of executor and administrator is peculiarly a trust. So it is treated by our statute regulating proceedings in Courts of Probate; and by elementary writers. The administrator is trustee for all parties in interest; and the execution of his trust involves every act in which a creditor is concerned. *Godolph. Orph. pt.* 2, 253. *Tollers Ex.* 480. No one, therefore, who purchases of him, can hold free of the trust; because he purchases with notice. Sales of this kind are watched, in equity, with great vigilance; and upon the least connivance, are decreed to be opened, and the estate again set up. 4. *Ves.* 217. 6. *Ves.* 748. *Campbell v. Walker* 5. *Ves.* 678. Equity never permits a trustee to be beneficially interested in a sale made by himself. 5. *Ves.* 707. *Lister v. Lister* 6. *Ves.* 631. And it goes very far to sustain trusts, in favor of the next of kin. *Bennett v. Bachelder* 1. *Ves.* 63. *Nurse v. Finch ib.* 343. 4. *Ves.* 76. *Dover v. Simpson ib.* 651.

This argument having been made at *May* term 1827, and the cause continued under advisement, the opinion of the Court was now delivered by

Mellen C. J. The question submitted for our consideration and decision, arises upon a motion on the part of the defendants, "that the bill of the plaintiffs may be dismissed; because, as they humbly suggest, this court has not jurisdiction of the subject matter thereof; nor has any other court in this State; the same being properly cognizable only in a court of general equity jurisdiction." It is well known that the chancery powers of this court are of a limited nature, as we had occasion to remark in a particular manner, in the case of *Getchell v. Jewett* 4. *Greenl.* 350. Until the year 1818, the only equity jurisdiction confided to the Supreme Judicial Court of Massachusetts, consisted in the authority to interpose and grant relief in cases of forfeited penalties, and of mortgages. On the 10th of *February* of that year, an act was passed giving to that court further chancery powers. The language of the section conferring those powers is this:—"that the Justices of the Supreme Judicial Court shall have power and authority to hear and determine in equity all cases of

trust arising under deeds, wills, or in the settlement of estates; and all cases of contract in writing, where a party claims the specific performance of the same, and in which there may not be a plain, adequate and complete remedy at law." A proviso confines the operation of the act to cases of contract made after the passing of the act. On the 20th of *February* 1821, the foregoing provision was re-enacted by our own legislature giving similar powers to this court. Reasons, satisfactory to successive legislatures in Massachusetts, have prevented the enactment of a law, until very recently, bestowing any equity jurisdiction more extensive than we have mentioned. A peculiar degree of caution has always been manifested on this subject, in the parent Commonwealth; and so far as the public opinion is ascertainable from the language of legislation, the same or greater caution is discoverable in this State. Such being the undoubted facts, it is no more than prudence to proceed with similar caution, in forming our opinion as to the true construction of that part of the section, in virtue of which this court, as it is contended, is authorized to sustain the present bill. No doubt exists as to the meaning of the expression "all cases of trust arising under deeds" and "wills";—but neither of them is applicable to the cause before us. The jurisdiction of the court, if given in the present case, is given in the following words—"or in the settlement of estates." It is understood that this expression has never received any judicial construction in Massachusetts. It is certainly very vague and indefinite language; but we must give it a reasonable construction. In cases somewhat similar, the rule of construction, *noscitur a sociis*, is found useful, and is consequently adopted. Now it is clear that the legislature begins by speaking of trusts created by those having the ownership or legal control of the property. Such is the case of trusts created by deeds and wills; and according to the before mentioned rule, it is reasonable to suppose that they intended, by the words "or in the settlement of estates," trusts created by the same authority. It is contended, however, that all such trusts are embraced under the terms "deeds" and "wills"; and that therefore some more extended construction must be given to the expression "in the settlement of estates," or else it must be rejected as superfluous and unmeaning, having no subjects on which to operate. We need

not pause to examine the merits of this argument, any farther than merely to observe that it has no foundation in fact. There are other subjects, on which the above mentioned expression may operate extensively. It is by no means superfluous or unmeaning, though it should not be considered as extending to implied trusts, arising in the settlement of the estates of persons deceased. By the laws of Massachusetts, in force when the act of *Feb.* 10, 1818, was passed, trusts might be created or declared, and manifested and proved by a writing, signed by the party declaring, assigning or granting such trust. The law did not require that such writing should be sealed; that is, that it should be declared or created by deed; nor does it now, either in Massachusetts or this State. From this it is evident that this court now has no jurisdiction in cases of trusts arising under instruments or writings unsealed, unless it has been given to them by the expression in question, "in the settlement of estates." This vague language may be satisfied by applying it to contracts not under seal, respecting the settlement of estates, whereby trusts are created; and there is therefore no reason for extending its meaning any further; especially as a system, peculiar in itself, is by law established, for regulating and enforcing the settlement of the estates of persons deceased, by the Judges of Probate. The exercise of an original equity jurisdiction by this Court in these cases, would disturb and derange this system, unless expressly confined to those trusts which arise under the contracts in writing of the deceased; that is, to trusts expressly and directly created; not to those implied by law, or growing out of the official situation, or incidental to the official character of an executor or administrator. In the case before us, no trust has been created by the intestate, or either of the defendants, by any writing whatever. But it is said that the law considers every executor and administrator as a trustee for those concerned in the property committed to their care; and denominates the administration a trust. But the same law has prescribed rules for the government of such executor or administrator, and provided numerous guards to insure his accountability. We do not think that the term trusts, in the statute under examination, is to be understood in this indefinite and popular manner. Such a construction would lead to novel and dangerous consequences.

Every debtor is, in one sense, the trustee of his creditor, and is often so considered in a trustee process. So is every man having in his possession the personal effects of another. But to apply the statute to such cases, and extend our chancery jurisdiction so as to embrace them, we apprehend would be to assume the exercise of an authority never delegated to us, nor intended to be delegated. Upon a subject where the legislature has always proceeded with so much caution, we do not deem it safe to advance beyond those boundaries which appear the plainest and best defined.

For the reasons before mentioned in this opinion, we do not feel authorized nor inclined to extend our equity jurisdiction by construction. It is enough for us to take cognizance of those cases which are clearly embraced by the language which the legislature has used in the delegation of our equity powers. More especially should we be on our guard against exercising this jurisdiction in cases where the common law remedies, already provided, are sufficient for the purposes of justice to all who are proved to be sufferers. Now, in the present case, if the facts stated in the bill are true, there is a complete remedy at law. The case, as disclosed in the bill, is one of gross fraud; and in a trial at law, on proof of those facts, the sale would be pronounced fraudulent and void. Nothing can be more plain and certain. Why then should the court sustain this proceeding, and why should this course of proceeding have been adopted? We apprehend that an inspection of the interrogating part of the bill will furnish the answer. From this it is natural to conclude that the plaintiffs are not in possession of proof whereby they can verify the facts stated in the bill, and therefore have resorted to this court as a court of equity, so as, by the interrogating part of the bill, to obtain an answer disclosing the facts on which the bill can be sustained. This course would be perfectly correct in a court of general equity jurisdiction, or in a case where equity jurisdiction is distinctly given to this court. This is not denied. The question then is this. Has this court, limited as its equity jurisdiction is, a power, in such a case, to sustain a bill for discovery? Can we compel an answer to interrogatories, thereby to furnish evidence to support a bill in equity, which

cannot be supported without such evidence be so obtained? We are not aware that any such power has been given to us. Our jurisdiction does not extend to fraud generally, as the jurisdiction of the Court of Chancery, and the Federal Courts does; unless that fraud is practised in respect to trusts, as to which jurisdiction is given us. The bill before us discloses no trust created by deed, will, or any other writing; but only a series of facts on the part of the administratrix, in connexion with the other defendant, which are charged as fraudulent, and intended to injure and destroy the rights of the plaintiffs. Our equity powers do not extend to such a case, and it remains for the legislature, in their wisdom, to decide whether it is proper that they ever should extend so far.

For the reasons above assigned, it is the opinion of the court that the bill before us is not sustainable; of course the motion of the defendants prevails, and the bill is dismissed.

HOLBROOK *vs.* BAKER.

The possession of a personal chattel, by the mortgagor, is not inconsistent with the mortgage, and furnishes, of itself, no conclusive evidence of fraud.

Nor is it a valid objection, by a creditor, against a mortgage of personal chattels, that it is made to cover future advances, if it is also made to secure an existing debt.

A chattel mortgaged, is not liable to be attached or seized in execution for the debt of the mortgagor, the money due to the mortgagee not having been paid, nor legally tendered.

REPLEVIN of a clock. The defendant, who was a constable, pleaded that the property was in one *Peachy*, which was traversed. He had attached the clock, for a debt due to one *Wilson*.

The plaintiff claimed it under a bill of sale, made after *Wilson's* debt accrued, by which *Peachy* conveyed the clock to him in mort-

gage, to secure the sum of fourteen dollars then due, and such further sum as might be due to him at the end of sixty days, within which time it might be redeemed by the mortgagor. The price of the clock was stated at fifty dollars ; and the sum due to the plaintiff had amounted to forty-five dollars, at the time of the attachment, which was before the expiration of the sixty days. The clock was screwed up in *Peachy's* house ; and he made a formal delivery to the plaintiff, by putting his hand on it, and saying he delivered it as his property ; but by permission of the plaintiff it remained in the same place till it was taken by the defendant; who was then duly notified of the mortgage, the plaintiff at the same time observing that the clock would probably satisfy both *Wilson's* debt, and his own. The validity of this conveyance was contested, on the ground that it was without consideration, and void against creditors. All the evidence in relation to the alleged fraud was submitted to the jury ; who were instructed by the Chief Justice that if the conveyance, in their opinion, was without consideration and fraudulent, to find for the defendant ; but if they were of opinion that it was made for a valuable consideration, and was fair and honest, they would find for the plaintiff. And they returned a verdict for the plaintiff ; which was taken subject to the opinion of the court upon the correctness of the instructions given to them.

Daveis and *Morgan*, for the defendant, contended that the bill of sale was fraudulent and void against creditors, because the debt then due was not cancelled, and so the conveyance was without consideration. But they urged strongly the point that actual delivery of the article, and continued possession of the mortgagee, were indispensably necessary to the validity of his title ; and that the distinction between the *pignus* and the *hypotheca* of the Roman law, in respect to the requirement of delivery, which was industriously attempted to be maintained in the great case of *Ryall v. Rolle* 1. *Atk.* 164, had no foundation in principle, and was inconsistent with, and inapplicable to, the English doctrine of mortgage. *Roberts Fraud. Conv.* 555. *Portland Bank v. Stubbs* 6. *Mass.* 422. *Jewett v. Warren* 12. *Mass.* 300. *Gale v. Ward* 14. *Mass.* 352. *Tucker v. Buffington*

15. *Mass.* 477. *Stone v. Grubham* 2. *Bulstr.* 225. *Cadogan v. Kennett Cowp.* 434. *Edwards v. Harben* 2. *D. & E.* 587. *Reed v. Blades* 5. *Taunt.* 212. *Doe v. Manning* 9. *East* 59. *Sturdivant v. Mitchell* 9. *Johns.* 337. *Meeker v. Wilson* 1. *Gal.* 419. 2. *Johns. Chan.* 46. *Hamilton v. Russell* 1. *Cranch* 309. The only exception is the case of a ship mortgaged; and the reason is because the owner rarely, if ever, has possession of the property.

Fessenden and *Deblois*, for the plaintiff, argued in support of his title under the mortgage, that here was no actual fraud, and nothing fictitious in the appearances held out; as the jury have expressly found. If therefore his title is not valid, it must be on the ground of legal and constructive fraud. But this is never imputed where the appearances agree with the actual state of things. Here the possession of the mortgagor is not inconsistent with the title of the mortgagee; for it was part of the contract that it should be so, at least till the expiration of the time of credit. So it was held in the case of a conditional sale; *Edwards v. Harben* 2. *D. & E.* 596; and so in case of goods bought at a sheriff's sale, and left with the debtor out of benevolence. *Kidd v. Rawlinson* 2. *Bos. & Pul.* 59. *Watkins v. Birch* 5. *Taunt.* 823. So of a mortgage of a lease for years. *Lady Lambert's case Shep. Touchst.* 67, and of money borrowed to buy goods, of which a bill of sale is given to the lender for his security. *Bull. N. P.* 258. *Cole v. Daveis* 1. *Ld. Raym.* 724. The same principle of carrying into effect the honest agreement of the parties in the mortgage of chattels, without regard to the actual possession, has been the rule most generally adopted in all cases where this question has arisen. *Jarman v. Woolston* 3. *D. & E.* 620. *Atkinson v. Maling & al.* 2. *D. & E.* 462. *Bamford v. Barron ib.* 594. 10. *Ves.* 145. 1. *Ves.* 348. *Muller v. Morse* 1. *M. & S.* 355. *Meggott v. Mills* 1. *Ld. Raym.* 286. *Barron v. Paxton* 5. *Johns.* 259. *Badlam v. Tucker* 1. *Pick.* 389. *Bartlett v. Williams ib.* 288. *Holmes v. Crane ib.* 609. *Haskell v. Greeley* 3. *Greenl.* 425. And it makes no difference whether the agreement appears on the face of the instrument, or is proved *aliunde*, unless it has been fraudulently concealed. *N. Eng. Mar. Ins. Co. v. Chandler* 16. *Mass.* 279.

After this argument, which was had at *May* term 1827, the court took time for advisement, and its opinion was now delivered by

Mellen C. J. The jury have, by their verdict, settled the question as to the alleged fraud in the conveyance of the clock ; and we are therefore to consider it as having been made fairly and honestly, for the purposes avowed and expressed at the time ; and the only inquiries are, whether the facts relating to the possession of the clock, and the nature of the mortgage of it, furnish any objections to its validity and intended effect. It has been contended that the mortgage was void as against creditors, because *Peachy* remained in possession of the clock. Still, a formal delivery was made, and by agreement of the parties, it was suffered to continue in its usual place in *Peachy's* house. Now it has always been held in Massachusetts and this State, that the possession of the vendor after sale is only evidence of fraud ; but is not such a circumstance as, *per se*, necessarily invalidates the sale. This is the principle in the case of an absolute conveyance ; and surely a more rigid one ought not to be applied to the case of a mortgage of a chattel. This case is not unlike that of *Atkinson v. Maling* 2. *D. & E.* 462. and *Haskell v. Greeley* 3. *Greenl.* 425. But this has ceased to be a point of any importance in the case, inasmuch as the mortgage, notwithstanding the possession remained with *Peachy*, was an honest and *bona fide* transaction.

Another circumstance relied on by way of objection is, that the mortgage was made to secure, not only the fourteen dollars then due from *Peachy* to *Holbrook*, but certain future advances. In answer to this point also, we may refer to the above mentioned case of *Atkinson v. Maling ;* and *Badlam v. Tucker & al.* 1. *Pick.* 389. The verdict puts a negative upon all suggestions of any unfairness or trust between the parties. Besides, the report states that at the time of the attachment, the mortgage, and its object, were distinctly made known to the defendant. Another objection to the defence is, that the attachment was made before the sixty days had expired ; and while only a right of redemption existed in *Peachy ;* the legal property then being in the plaintiff. We know of no law which author-

izes a creditor to attach or seize on execution a right to redeem a chattel. Our statute relates only to rights of redeeming real estate. This is one of the grounds of the opinion of the Court in the before cited case of *Badlam v. Tucker & al.* and the principle is there distinctly laid down as clear and undisputed; at least in those cases where the money due to the mortgagee has not been paid or tendered to him. In every view of the cause we think the instructions of the judge were correct; and there must be

Judgment on the verdict.

STROUT & AL. *vs.* BRADBURY & AL.

If the indorsement of a writ does not contain the whole christian name, and is not objected to by the defendant on that account, the indorser cannot afterwards take advantage of this omission, to avoid his own liability.

Property lawfully in the possession of a deputy sheriff by attachment, cannot be taken out of his possession by another deputy of the same sheriff, under another writ.

Where a defendant, having judgment and execution for his costs, caused certain property to be taken in execution, which was replevied, but the replevin was not pursued;—it was held that his remedy against the indorser of the original writ was not impaired by his omitting to obtain judgment for a return, it appearing that this would have been fruitless, as the property was under a prior attachment.

THIS was a *scire facias* against the defendants, as indorsers of a writ. The plaintiffs declared that they were sued *Feb.* 9, 1825, by *George & Joseph Johnson;* that the writ was indorsed by the present defendants by the name of "*Wm. & O. Bradbury,*" who were partners, doing the business of attornies at law under that name; that at *March* term 1825, the suit against them was discontinued, and they had judgment for their costs; that they sued out execution, and delivered it

to one *Leach*, a deputy sheriff, for service; who made return that he had taken a yoke of oxen and a horse as the property of *Joseph Johnson*, *April* 29, 1825, by order of *Fessenden & Deblois*, attornies to the creditors; which were replevied out of his hands *May* 3, by *Moses Hodgdon*, who gave bond to prosecute, according to law;— that they sued out an *alias* execution *July* 29, 1825, and caused both the debtors to be committed to prison; from which they were discharged upon taking the poor debtor's oath.

The defendants pleaded, first, that the writ against the present plaintiffs was not indorsed with the christian as well as surname of the indorser, according to the statute.

Secondly, that the defence of *Hodgdon's* action of replevin was confided to *Fessenden & Deblois*, the attornies of the plaintiffs, with their assent, and for their benefit; but though *Hodgdon* did not enter his action, yet the plaintiffs' attornies entered no complaint, and obtained no judgment for a return, and commenced no suit upon the bond; nor did they take any other measures to obtain a return of the property seized, or damages therefor; though the property was sufficient to have satisfied the execution.

Thirdly, that *Leach*, by order of the plaintiffs, gave up to *Hodgdon* the goods he had seized in execution, which were sufficient to have satisfied the same.

The plaintiffs replied, first, that the writ was indorsed according to the statute. Secondly, that the oxen and horse, at the time they were taken by *Leach*, were already under an attachment made *March* 16, 1825, by one *Downing*, a deputy sheriff, as the property of *George Johnson*, by virtue of a writ against him at the suit of one *Hayes*; who afterwards recovered judgment, and caused them to be taken and sold on execution, within the thirty days after judgment.

Thirdly, that the property was holden by *Downing*, as before, when *Leach* took it out of his possession.

To these replications the defendants answered by a general demurrer.

Greenleaf, in support of the demurrers, argued to the matter of the indorsement, that its vigor was wholly derived from the statute, which required the entire christian name, without which it was no indorse-

ment at all: And the acquiescence of the other party is not to be regarded merely as a waiver of form; but rather as a waiver of his right to require any indorsement. The statute liability attaches to nothing short of the whole name. *How v. Codman* 4. *Greenl.* 84.

Upon the other pleas he contended that the confiding of the defence of *Hodgdon's* suit to the plaintiff's' attorney, was in the nature of an equitable assignment of the rights of the other party under the bond; and as such was accepted. The plaintiffs, then, having undertaken that matter, and abandoned it, must be understood to have waived their remedy on the indorsers of the writ. *Clark v. Clough* 3. *Greenl.* 357. They have not used the reasonable diligence, by which alone such claims are ripened to perfect rights. *Ruggles v. Ives* 6. *Mass.* 495.

Fessenden and *Deblois*, on the other side, said that the statute did not necessarily require the whole christian name of the attorney; the words were satisfied by reference to the principal alone. But if it did, no one could take advantage of the omission but the party himself for whose benefit the provision was enacted. *Whiting v. Hollister* 2. *Mass.* 102. *Gilbert & al. v. Nantucket Bank* 5. *Mass.* 97.

The ulterior proceedings called for by the other pleas, they insisted, would have been altogether nugatory; for had the property been returned to the plaintiffs, *Downing* would instantly have taken it away, by virtue of his prior attachment. *Walker v. Foxcroft* 2. *Greenl.* 270.

Mellen C. J. delivered the opinion of the Court.

As to the question arising upon the first issue, we would observe that our revised statute *ch.* 59, *sec.* 8, provides "that all original writs issuing out of the Supreme Judicial Court, or Court of Common Pleas, or from a Justice of the peace, shall, before they are served, be indorsed on the back thereof by the plaintiff or plaintiffs, or one of them, with his christian and surname, if he or they are inhabitants of this State, or by his or their agent or attorney, being an inhabitant thereof." In its terms, the above clause does not require the indorsment of the christian and surname of the agent or attorney, though perhaps by a fair construction, the intention was to place both on the

same ground. By their first plea the defendants do not profess to deny that they wrote their name on the writ in the manner stated, but they allege that they did not thereby so indorse it as to render themselves liable under the statute. It is not to be presumed by the court that they made the indorsement in this manner with a view to evade the law. They were satisfied with it as a legal one, and as such we must believe they honestly intended it. An indorsement of a writ is a peculiar species of security, given by a plaintiff, for the costs which a defendant may recover in the cause; and which costs, in certain circumstances, the indorser may be compelled to pay. But being given for the benefit of a defendant, he is considered as satisfied and contented with the indorsement, as it appears on the writ, unless it is objected to at the return term. It does not appear that the present plaintiffs, who were defendants in the original action, made any objection to it, and, of course, we are well warranted in considering it as a contract, binding on one side, and accepted on the other. The first plea is therefore bad and insufficient.

In giving our opinion upon the remaining questions in the cause, we shall merely refer to the pleadings without a particular statement of them, inasmuch as in the argument, they have been considered as involving a general principle only; and such is the fact, and such the basis of our decision. It does not appear that either of the *Johnsons* had any other property than the oxen and horse in question. They were duly attached by *Downing* as the property of *George Johnson* in the suit of *Hayes* against him, *March* 16, 1825; and afterwards, on the 29th of *April* 1825, they were seized by *Leach*, another deputy sheriff, on the execution of the present plaintiffs against both the *Johnsons*, for the said costs; the oxen and horse then being holden by and in the possession of *Downing*, by virtue of his attachment. *Leach*, in his return, says they were supposed to be the property of *Joseph Johnson*. But as *Hayes* pursued his action to judgment, and within thirty days caused the oxen and horse to be sold on his execution, as the property of *George Johnson;* in the absence of all proof of ownership in any one else, we must take it to be the fact that *George Johnson* was the true and lawful owner at the time of the

sale. This brings us to the two points in the cause, the examination of which will readily lead to its decision.

1. While the oxen and horse were holden by *Downing*, under *Hayes's* attachment, they were not liable to seizure on execution by *Leach*. *Walker v. Foxcroft* 2. *Greenl.* 270. and cases there cited. *Leach* was a trespasser in seizing them, and liable in damages to *Downing* for their value, or in repliven for the identical property, if not restored to him.

2. The second point is equally clear. Though *Hodgdon* replevied the oxen and horse from *Leach*, and did not prosecute the action; and though *Leach* did not enter his complaint, and obtain judgment for a return; and the present plaintiffs, through the agency of their counsel, were assenting to this course of proceeding, and the restoration of the property to *Downing;* still those circumstances do not in any manner impair the plaintiffs right to maintain this action. A judgment for a return of the property would have been wholly unavailing; if returned to *Leach*, it must have been restored by him to *Downing*, or damages equal to its value; and this amount must have been ultimately a charge upon the plaintiffs. They have not directly or indirectly yielded any thing to *Hodgdon*, or any one else, which they had a right to retain, or which, if retained, could have been available to them in a pecuniary point of view.

From this general examination of the pleadings and facts, we are perfectly satisfied that the replications are good.

Replication adjudged good.

How, *plaintiff in error vs.* Merrill, *original plaintiff.*

Practice. This court, after the reversal of a justice's judgment, will not remand the cause to him for further proceedings.

If the judgment of an inferior tribunal is reversed for error in its proceedings in the course of the trial, or in the rendition of judgment, the action itself being well laid, a new trial will be ordered at the bar of this court. But not if there is no foundation in the record itself, on which the action can be sustained.

This was originally an action of debt before a justice of the peace, brought by *Merrill*, the clerk of a militia company, to recover a penalty for neglect to appear at a company training. The judgment of the magistrate was reversed on error brought in this court, the offence not having been alleged against the form of the statute.

Fessenden, for the original plaintiff, then moved the court to remand the cause to the magistrate for further proceedings.

But the Court denied the motion; observing that as justices' courts were not held at stated terms, no party could know when to appear, and a *procedendo* would be fruitless, if awarded.

He then moved for a new trial at the bar of this court.

Per Curiam. If an inferior court has decided erroneously, upon the evidence before it, or in the admission or rejection of evidence, and this is suggested for error, and the judgment for that cause is reversed; it has been the practice to order a new trial at the bar of this court, to correct this mistake of the lower court or magistrate, and give the party aggrieved the benefit of a legal trial.

But if the party himself has not stated sufficient matter or cause of action, it is his own fault, and not that of the magistrate or court; and if for such defect the record is brought before us and the judgment reversed, it is not usual to order a *venire facias de novo*; there

being no foundation, in the record itself, on which the cause can be sustained. The defect in the case at bar is radical, going to the basis of the plaintiff's claim; and therefore the

Motion is denied.

WEBSTER & AL. *vs.* DRINKWATER.

The party committing a tort, cannot be charged as on an implied contract, the tort being waived, unless some benefit has actually accrued to him.

Where one, appointed on the part of the United States to superintend the execution of a contract for the building of certain public vessels, through misconstruction of its terms, required the performance of more than was in fact required by the contract;—it was held that he was not personally liable for such excess.

THIS was an action of *assumpsit* for services performed and monies expended; and it was tried before the Chief Justice, upon the general issue.

It appeared that Mr. *Ilsley*, the collector of the customs at *Portland*, being duly authorized by the United States to contract for the building of two revenue cutters, with their boats and barges, made an agreement under seal with the plaintiffs, who undertook, for a certain sum of money, to build and complete the cutters with their boats, to the satisfaction and approbation of the collector, or such person as he should designate and appoint. The collector, on his part, agreed that upon their completion, and the production of a certificate from the person so appointed, that they were built in all respects according to the contract, he would pay the stipulated sum. The agreement was particular as to the size and manner of finishing and furnishing the vessels, and contained a provision respecting the appointment of a person to superintend the building, and certify that the plaintiffs had performed the contract. Under this provision the defendant was ap-

pointed the superintendant ; and upon the completion of the vessels and boats contracted for, he gave them the certificate required, which they produced to the collector, and thereupon received of him the money agreed for, and a further allowance for certain extra bills, of which they claimed payment. At the time of this settlement the plaintiffs said to the collector that they had made a bad bargain, and had done more work on the vessels than they were bound to do by the contract, though no more than the defendant, as superintendant, had insisted was within it ; and that they should apply to Congress for compensation for this extra labor and expense ; but they did not then speak of any pretence of claim against the defendant. A petition was accordingly presented to Congress, but without success.

The labor and materials which formed the subject of the present suit, were proved to have been furnished at the request and under the direction of the defendant, in his capacity of agent of the United States, he insisting, and the plaintiffs denying, that they came within the meaning of the contract.

Upon this evidence, the Chief Justice left it to the jury to determine whether any work had been done, or expenses incurred by the plaintiffs, in building and completing the vessels, not required of them by the contract ; and if so, whether it was done and incurred under an engagement, express or implied, on the part of the defendant, to pay for the same. And they found for the defendant ; certifying, moreover, that some extra work had been done, and expense incurred by the plaintiffs, respecting which the defendant assumed to act as the agent of the United States, without authority, by contending that such work was within the terms of the contract, but which was not so considered by the jury. The counsel for the plaintiffs contended that in consequence of this unlawful assumption, the law raised a promise on the part of the defendant to pay for such extra work and expense ; and the Chief Justice reserved that question for the consideration of the court.

Fessenden and *Deblois*, for the plaintiffs, maintained the position taken at the trial, insisting that in all cases the agent is protected only where he binds his principal, by keeping within the limits of his au-

thority. If he exceeds this, he binds himself. He is estopped to deny that he made the contract for himself, where he had no power to stipulate for another. *Sumner v. Williams & al.* 8. *Mass.* 209. *Liverm. on Agents* 2. *Paley on Agency* 4. *Chitty on Contr.* 64. *Hill v. Brown* 12. *Johns.* 385. *Freeman v. Otis* 9. *Mass.* 273. *Swift v. Hopkins* 13. *Johns.* 313.

And though case will lie, for such pretence of power, as for a tort, yet the party injured may well waive that form of remedy, and proceed as on an implied *assumpsit.* Such is the law in the case of goods tortiously taken; *Hambly v. Trott Cowp.* 372; and of fees illegally exacted; *Clinton v. Strong* 9. *Johns.* 370; and of money extorted; *Ripley & al. v. Gelston ib.* 201. *Foster v. Stewart* 3. *M. & S.* 191. *Lightly v. Colston* 1. *Taunt.* 112. 5. *East* 39. *note. Smith v. Hodgdon* 4. *D. & E.* 217. 2. *Comyn. on Contr.* 29. 558. *Irving v. Wilson* 4. *D. & E.* 485.

Longfellow, for the defendant, replied that in the cases cited on the other side there was a contract made with the defendant, who had not only exceeded his authority; but had actually received money, or derived some other pecuniary benefit from the contract. But here was a written contract made directly with the United States; and the defendant was a known public agent, acting within the matter of his agency, in superintending its execution. *Adams v. Whittelsey* 3. *Conn. Rep.* 560. In the construction of this contract there was a difference of opinion; and the plaintiffs at length adopted the construction of the defendant; but no contract, of any sort, was made with him, and therefore he is not liable. There is no tort to be waived; and if there were, this is not a proper case for such election; which may be made in those cases only, in which a benefit has accrued to the party charged. 1. *Com. on Contr.* 272. 279. 281. *Paley on Agency* 296.

MELLEN C. J. delivered the opinion of the Court.

The question reserved at the request of the plaintiffs' counsel, is whether the law implies a promise on the part of the defendant to pay for certain extra work by them done on the vessel, which the jury have found was beyond the terms of the contract, and such as the defendant, as agent, had no right to require. They have found that what-

ever he did in the premises, was done by him, claiming to act as agent on the part of the United States, though as to such extra work, he exceeded his powers in requiring it; and that he never made any engagement express or implied to pay for it. Still it is contended by the counsel, that in existing circumstances, the law raises a promise to pay this extra expense. It is a principle well settled that a promise is not implied against or without the consent of the person attempted to be charged by it. *Whiting v. Sullivan* 7. *Mass.* 107. And where one is implied, it is because the party intended it should be, or because natural justice plainly requires it, in consideration of some benefit received.

The application of these principles is perfectly familiar in those cases where a man is professedly acting in his own behalf, and receives the benefit which is the consideration of promise implied. The point of inquiry is whether the law is the same when the man is acting in a certain transaction as an authorized superintendant, but in some particular in his demand, exceeds his authority, and yet receives no advantage whatever from those services, for the payment of which it it is contended the law raises a promise; as in the case under consideration.

The terms of the contract, the character in which the defendant was connected with and acted in the transaction we are examining, and, of course, the nature and extent of his authority, were all equally well known to both parties. Both must have supposed that the defendant considered himself as requring no more than he had a right to require, because, after some dispute, his requisitions were complied with. He was the person appointed by consent of all concerned, to superintend the building of the vessel, and see that she should be built in all respects in conformity to the contract. It is not pretended that in the discharge of his duty he did not act fairly and faithfully. On the contrary, the proceedings of the plaintiffs in applying to Congress for some allowance, shew that they did not rely on any engagement or liability on the part of the defendant. From these facts we do not perceive on what grounds a promise can be implied by law. The defendant was in some respects a judge, in business of that kind, and was so considered; and surely his honest opinion and

decision ought not to be considered as subjecting him to an action, as upon an implied promise, because he is found to have transcended his delegated authority in a particular instance. It has, however, been contended by the counsel for the plaintiffs that if an agent, in making a contract, exceed his authority, he must be holden personally as to the amount of the excess; and several of the cases he has cited may be considered as supporting that position, where there is an express undertaking on the part of the agent; and the doctrine so limited, is not contested by the defendant's counsel. But in the case before us there was no express contract, nor even an implied one, on the part of the defendant, as the jury have found; and his character and duty as superintendant, taken in connexion with the manner in which he performed that duty, precludes the idea of a promise implied by law, which could bind him. On what consideration should such a promise be implied? The defendant received no benefit from the services performed beyond the written contract; and the plaintiffs were not bound to perform them, and they never pretended that they were performed on the ground of even a supposed liability on his part. It is urged, however, that the defendant may be fairly held chargeable in this action, upon the well known principle, that in many cases a man may, as it is expressed, waive a tort, and seek his remedy for damages occasioned by it, in an action of *assumpsit*. The general principle is not denied; nor the authority of the cases cited to this point; but their application to the case before us is denied on two grounds;—first, because in all of them except one, the sum sued for had been actually received by the defendant in money, or in services of which he had received the benefit; and in the excepted case the officer received the tonnage duty without any authority of law, and in the same manner had accounted for it to government; an appropriation he had no right to make, and which sum the party suffering could not obtain from government by any legal process. The second reason is that in the present case there has been no tort committed, and so none could be waived. The defendant has merely done what he supposed and believed was his duty, pursuant to the contract, and in the due execution of the powers given him by the collector, and assented to by the plaintiff. Again it has been urged that

a man cannot be permitted to avail himself of his own wrong; this is a correct general principle; but if he have violated his neighbor's property or blasted his reputation, he surely may defend himself against that kind of action which the law does not permit to be sustained for redress of the particular injuries complained of.

The jury having negatived the promise alleged, and the facts, as reported, affording no ground on which the law will imply a promise, we will merely add that the defendant cannot be adjudged answerable in this action. We have given an answer to each of the arguments which have been urged by the plaintiffs' counsel, though we might have omitted it; because some of them could have no bearing upon the facts before us; for it must be distinctly remembered, that the defendant was never the agent on the part of the United States to make a contract with any one; but was merely constituted, by consent of the plaintiffs, an agent for the purpose of superintending the execution of a contract, which had been previously made between them and Mr. Collector *Ilsley*.

We are all of opinion that there must be

Judgment on the verdict.

PIERCE, *ex parte.*

An appeal does not lie from a judgment of the Court of Common Pleas on a complaint against the kindred of a pauper, under *Stat.* 1821, *ch.* 122, *sec.* 5.

THE overseers of the poor of *Poland* complained to the Court of Common Pleas against *Pierce*, as the grandfather of a pauper chargeable to that town, to whose support they alleged that he was of sufficient ability to contribute; and for that purpose prayed process

against him. In that court he moved for a trial of the question of his ability, by the jury; which *Whitman C. J.* overruled, on the ground that it was a question to be determined by the court; and after a hearing, adjudged him of sufficient ability, and entered judgment against him for a weekly payment, till the farther order of the court. From this judgment he claimed an appeal to this court, which was refused in the court below, as not provided for by any statute.

Fessenden now moved for leave to enter the appeal.

Which THE COURT refused, observing that the term "actions," in the statutes granting appeals, was never understood to apply to complaints, and processes not according to the course of the common law; and that in this case, moreover, the statute contemplated farther proceedings, from time to time, in the Court of Common Pleas, to increase or diminish the amount assessed, for which purpose it was necessary that the record should remain in that court.

THAYER & AL. *vs.* MINCHIN & AL.

A debtor, committed by his bail after a return of *non est inventus*, and before *scire facias*, is entitled to the prison limits in the same manner as if committed by order of Court, upon a surrender before judgment in the original suit. And if the creditor does not charge him in execution within fifteen days after such commitment, he may lawfully go at large, the bond for the prison limits having done its office.

Thayer & Hayes sued *Minchin*, who gave bail, in the usual form. At *October* term 1826, they recovered judgment; upon which they immediately took out execution, and gave it to an officer, who re-

turned it *non est inventus*, all the legal measures having been pursued thus far, to fix the bail. After the return of the execution, *Minchin*, who had been absent from the State ever since its date, having returned to *Portland* in *May* 1827, was committed to prison by his bail; and was enlarged by the gaoler upon giving the bond now in suit, reciting his arrest, bail, and commitment, and conditioned that he should remain a true prisoner, within the limits of the gaol yard, until lawfully discharged from said imprisonment, and commit no manner of escape. Within fifteen days after they had committed him to prison, his bail gave due notice thereof to the plaintiffs; and immediately after the expiration of the fifteen days, *Minchin* left the State, into which he had never since returned.

Upon these facts, which were agreed by the parties, they submitted the cause to the judgment of the court.

Megquier, for the plaintiffs, contended that the liability of the defendants on the bond continued till the debtor was legally discharged, either by his being taken in execution, or by his voluntary surrender of himself to the officer, or by being surrendered by his sureties; and that there was no other legal mode of discharge, except payment, or a release by the creditors. It is properly a bond for the debtors' liberties; and ought to be in force, at least fifteen days after notice to the creditors of its execution. But in its terms it is in force till the debtor has obtained his regular discharge in some mode recognized in the law. If it is objected that this would allow the creditors to delay charging him in execution, at their pleasure; it may be replied that it is an inconvenience of the party's own creation, but does not alter the principle.

Richardson, for the defendants, adverted to the *Stat.* 1821. *ch.* 67. regulating bail, which provides that the principal, being surrendered by his bail, before final judgment in a *scire facias* against them, shall be entitled to all the liberties and privileges of the prison limits, under such conditions and restrictions as when committed by order of court. In the latter case he is to remain a prisoner for the space of fifteen days in order to his being taken in execution; which if the creditor

does not cause to be done within that time, he is to be discharged. In the present case, therefore, the bond, at the expiration of fifteen days, had fulfilled its office, and the debtor had the same right to go at large, which he would have had, if he had spent that period in close prison. Unless it receives this construction, he must remain a prisoner forever. If he was properly surrendered, he is entitled to the same privileges with all other principals, when surrendered by their bail. If he was not, the bond is illegal and void.

WESTON J. delivered the opinion of the Court.

By the first section of the act, regulating bail in civil actions, *Stat.* 1821. *ch.* 67. it is provided that "it shall be lawful for the person, who may have become, or may hereafter become bail, to commit in the common gaol in the county where such arrest was made, or in that to which the writ is returnable, the principal for whom he has become bound, leaving with the gaoler or prison keeper of such county, within fifteen days after such commitment, an attested copy of the writ or process whereby the arrest was made, and of the return indorsed; and such gaoler or prison keeper is hereby authorized and required to receive the person so committed into custody, in the same manner as if he had been committed by the officer making the arrest; and the person so committed shall be entitled to the liberties and privileges of the prison limits, upon the same terms and conditions, and under the same restrictions, as are provided where the principal is committed by order of court. And the bail so committing their principal shall ever after be discharged from the bail bond by them given: *Provided however*, that no person shall have the benefit of the foregoing provision of this act, unless he shall have committed his principal as aforesaid, before final judgment upon *scire facias*; and if the commitment shall have been made after the writ of *scire facias* shall have issued, he shall pay the costs of that suit before he shall be discharged: *And provided also*, that any bail, who shall claim a discharge under this section, shall have notified in writing the plaintiff in the original suit, or his attorney, of the time when and the place where the principal has been committed, within fifteen days from the time of such commitment."

By the seventh section of the act for the relief of poor debtors, it is provided that any principal, surrendered by his bail, either on mesne process or action of *scire facias* against the bail, shall, on giving bond similar to that in the same act provided, be released from close confinement, in the same manner as if he had given such bond, after commitment on the original writ or execution. In pursuance of the section first cited, the principal, in the case before us, was committed by his bail; and in virtue of the section last cited, he was relieved from close confinement, on giving bond for the liberty of the yard. The decision of the cause will depend upon the question, whether he was to be regarded as a prisoner, when he departed out of the exterior bounds of the prison limits, or whether the power and authority, under which he was committed, had then ceased to operate upon him.

By the third section of the statute first before cited, it is provided, that if the bail shall bring his principal into court, before judgment is given upon the *scire facias*, and there deliver him to the order of the court, and shall pay the costs which may have then arisen upon the *scire facias*; then the bail shall be discharged; and the principal shall be committed to gaol, there to remain for the space of fifteen days, in order to his being taken in execution. And if the creditor shall not, within fifteen days next after the surrender of the principal, take him in execution, the sheriff shall discharge him, upon his paying the legal prison fees. By the fifth section of the same statute, it is further provided, that if the plaintiff shall not, within fifteen days after the surrender of their principal by the bail upon *scire facias* to the justice before whom the original process was returnable, or if the same shall have been made upon such process, within fifteen days next after final judgment thereon, take the said principal in execution, he shall be discharged, upon paying the legal prison fees.

By the first section, bail may commit their principal at any time, and in any stage of the proceedings, after they become bail, until final judgment is rendered against them upon *scire facias*. And the gaoler or prison keeper is authorized and required to receive the principal thus committed, in the same manner, as if he had been committed by the officer making the arrest. By the fifth section of

the act for regulating prisons, *Stat.* 1821 *ch.* 110, it is provided that no person, imprisoned upon mesne process, shall be held in prison upon such process, above the space of thirty days next after the entering up of final judgment, upon the writ whereby he is committed; unless he shall be continued there, by having his body taken in execution.

In the case before us, at the time of the commitment of the principal, more than thirty days had elapsed, after the rendition of final judgment; and if he was thereupon to be treated by the gaoler, as the law provides, as if committed by the officer making the arrest, he would be entitled forthwith to be discharged. In two cases, specifically provided for as before stated, of a surrender in court upon *scire facias*, or a surrender before a justice upon the same process, the principal was to be committed to prison, there to be held, but upon giving bond entitled to the liberty of the goal yard, for the space of fifteen days, that the creditor might, if he saw fit, charge him in execution. This limitation is not in express terms extended to commitments, like the one in question; but it could never have been intended that the principal should, in such a case, be surrendered, and immediately discharged; and we are satisfied, upon a full consideration of the whole statute, that in commitments by the bail, before *scire facias*, but more than thirty days after final judgment against their principal, he is to be holden for the term of fifteen days from such commitment. He is entitled to the liberty of the yard, upon the same terms, limitations, and restrictions, as if committed after a surrender in court. And if so committed, he has a right to be discharged, if not taken in execution in fifteen days. It is made the duty of bail, in the section under which they acted in this instance, to notify the creditor of the commitment within the fifteen days. Unless this limitation is applied, the imprisonment of the principal may be interminable, if the creditor do not choose to take him in execution. Rather than adopt such a construction, it would he better that the literal interpretation, which entitles him to an immediate discharge, should prevail. But by applying the limitation of fifteen days to this case, we carry into effect the apparent intention of the legislature, and subject the principal to no greater inconvenience, than the law

imposes upon him, if surrendered upon *scire facias*. It results that the principal, not having been, during the fifteen days following his commitment, charged in execution, and the creditors, by reason of the first arrest or subsequent commitment, having no further claim upon his body, might go at large, without being answerable upon his bond to the creditors, as their prisoner.

If the notice, required to be given by the bail, may not prove beneficial to the creditor, as it may be done at any time on the last of the fifteen days, it is for the legislature to make further provision, if necessary, by extending the time during which the debtor may be detained, or shortening the period, within which notice is to be given to the creditor by the bail. *Judgment for the defendants.*

POTTER *Judge &c. vs.* WEBB & ALS.

The plea of payment of a judgment rendered for the penalty of an administrator's bond, should show that the money was paid by virtue of some judgment, or decree, or was otherwise necessarily paid; or it is bad.

THIS was a second *scire facias*, to have further execution of a judgment of this court, rendered at *May* term 1814, for ten thousand dollars, being the penalty of a bond given by *Susanna* and *Joshua Webb*, as administrators of the estate of *Jonathan Webb*, the other defendants, *Lewis* and *Gordon*, being their sureties. See 2. *Greenl.* 257.

The defendants pleaded, first, that they had "fully paid and satisfied the amount of the said judgment." Secondly, that they had "lawfully paid upon said bond, and on account of their liability by virtue of the same, the sum of $10,177, 75 to the heirs and creditors of said estate, and for necessary charges of administering the same." A third plea was made by *Lewis* and *Gordon*, in discharge of their

liability as sureties in the bond, that they had "paid the full amount of the penalty of the same, to the heirs and creditors of said estate, and for the necessary charges of administering the same." And a fourth plea by the sureties stated that they had "paid to the heirs and creditors of said estate, and for the necessary charges of administering the same, the full amount of the judgment aforesaid, *viz.* ten thousand dollars, and the costs of said suit."

To these pleas the plaintiff demurred specially, assigning various causes not necessary to be enumerated.

N. Emery and *Adams*, in support of the demurrers. The first plea is bad, because it does not show when, nor where, nor to whom, the payment of the judgment was made. Nor does it appear, from the other pleas, to whom or for whose benefit the monies were paid. And this is essential; for if it does not appear that payment was made to one entitled to receive it, it is no payment. 5. *Dane's Abr.* 265. Nor do they show any payment of interest on the bond or judgment; which should have been done, interest being payable. *Harris v. Clap & al.* 1. *Mass.* 308. *Pitts v. Tilden* 2. *Mass.* 118. *Warner v. Thurlo* 15. *Mass.* 154. *Show. Parl. Ca.* 15. *Bond v. Hopkins* 1. *Sch. & Lefr.* 434. *Glover v. Heath* 3. *Mass.* 252. 1. *Pick.* 530. *Potter v. Webb* 2. *Greenl.* 257. The third and fourth pleas are also bad, because not pleaded by all the defendants; for all are equally bound. *Bigelow v. Bridge* 8. *Mass* 275. They do not answer the whole declaration. *Seavy v. Blacklin* 11. *Mass.* 543. Defendants cannot sever in pleading except in tort. *Jackson v. Stetson & al.* 15. *Mass.* 54. 6. *Mass.* 444. 5. *Mass.* 196.

Longfellow and *Greenleaf*, for the defendants, replied that the circumstances of time and place were unmeaning formalities in the plea of payment. If the judgment has been paid, the payment must necessarily have been made since its rendition, and before the time of pleading. And this is sufficient; involving also, as it does, the authority of the person to whom payment was made.

They further insisted that no interest was chargeable on the penalty of a bond conditioned, as this was, not for the payment of money, but for the faithful discharge of an office. And if it was, yet in a

scire facias nothing is recoverable but the sum specified in the judgment. *Knox v. Costellow* 3. *Burr.* 1783.

THE COURT, during this argument, suggested a doubt whether as the Judge of Probate is but a trustee of the bond, for the use of all parties interested, it was competent for the defendants, after judgment against them for the penalty, to pay out the amount to creditors, at their pleasure, and show this in bar of a *scire facias*. And afterwards the pleas were adjudged bad, because they did not show that the monies, alleged to have been paid in satisfaction of the judgment, were paid in pursuance of decrees of the Judge of Probate, or of judgments at common law ; or were payments otherwise compulsory upon the defendants.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

OXFORD.

MAY TERM.

1828.

FELLOWS's *case*.

Where a *venire facias* directed the constable to cause a juror to be drawn, not more than twenty, nor less than six days before the sitting of the court; and he made return that the juror was drawn "as above directed," but without date; the return was held sufficient.

So, where the language of the return was—"We have appointed J. C. a juror," &c.; for it shall be intended the language of the town, of which the constable was an inhabitant.

So, where the person drawn as a juror was the constable himself, who served the *venire facias*, and made the return.

So, where the constable styled himself "constable of the town," without saying of what town; the *venire facias* being directed to the constable of the town of *M.*

It is no good cause of challenge, that a juror has been called as a witness for the State, on a former trial of the same indictment, to testify against the general character of the prisoner.

A defendant has no right, in any case, upon the coming in of the traverse jury, to have them polled, and each one separately interrogated as to his assent to the verdict.

FELLOWS was indicted for uttering counterfeit money; and on the return of the traverse jury into court, the foreman delivered a

verdict of guilty, in the usual form. But before it was affirmed, the defendant moved that the jury might be polled, and each juror severally asked on his oath, whether the defendant was guilty or not. This motion was overruled by *Weston J.* before whom the cause was tried ; who directed the clerk to affirm the verdict in the customary mode, by a general inquiry to the whole panel ; the judge instructing them that if any juror dissented from the verdict, he should make it known. To this opinion the defendant filed exceptions.

The defendant also moved at common law for a new trial, because of divers objections to the panel ; all of which are particularly stated in the opinion of the court, which was delivered by

MELLEN C. J. In this case a motion at common law has been filed, and an exception alleged against the decision of the judge who presided at the trial. The object, on both grounds, is to obtain a new trial. In support of the motion at common law several reasons have been urged.

1. That *Alvan Bolster* was not legally returned as a juror ; it not appearing that he was drawn not more than twenty days nor less than six days before the sitting of the court. The return is not dated ; but the constable states therein that he proceeded "as above directed."—It was written at the foot of the *venire*, which contained the legal directions as to the above limitation of time.—The return therefore is good, on the principle, *id certum est quod certum reddi potest.*

2. Because *Joab Churchill* was not drawn or appointed by the selectmen or a major part of them. It appears by the return that in certifying the name of the juror, the constable says, "we have appointed," &c. A similar objection is made against the return of *Charles T. Chase*, as a juror.—The language is inaccurate, but is perfectly intelligible : by the word "we," is meant the town, of which the constable was an inhabitant.

3. Because *John L. Eastman*, a constable of *Fryeburg*, was returned as a juror, and made return himself, that he had duly notified the juror. The answer to this objection is that he was a competent juror, even though not compellable to serve ; and as the object in

view in notifying a juror to attend court, is to insure his attendance, if he should attend without being notified, it is equivalent to legal notice.

4. That the return on the *venire*, directed to the constable of the town of *Mexico*, is imperfect, because the constable did not add to his name the words "constable of the town of *Mexico*;" but only "constable of the town."—They both mean the same thing—the objection amounts to nothing.

5. Because *Farnum Abbot*, one of the jury, had been a witness against the defendant, on a former trial of this cause.—A juror may always be a witness for either party, and still retain his seat as juror; —and a witness may be a legal juror. If prejudiced against the defendant, he might have been objected to at the time of trial; for the fact must have been known to the defendant; the motion admits it; but it is alleged that it was then forgotten.—On full examination of all these objections, even in this stage of the cause, we are clearly of opinion that they have no legal foundation.

But, according to decided cases, some of which have been cited by the Attorney General, the objections, if they had been good at the time of impanelling the jury, could not now be sustained.

The case of *Amherst v. Hadley* 1. *Pick.* 38. is a strong one and in point. There a juror had been drawn more than twenty days before court; and the fact appeared on the return; but it was held to be no reason for a new trial. See the numerous cases there cited. In *Jeffries & al. v. Randall* 14 *Mass.* 205. a juryman, disqualified by statute, sat in the trial; and it does not appear that the fact was known at the time of trial. The court said it was a good cause of challenge; but no ground for setting aside the verdict. In *Walker v. Green.* 3. *Greenl.* 215, the sheriff returned a talesman, *Green* being then one of his deputies. It was held a good cause of challenge; but would not support a motion for a new trial.

As to the exception, it certainly cannot for a moment be sustained. The course of proceeding on the part of the court was according to uniform and immemorial usage in Massachusetts, and our own practice since our separation from that Commonwealth; and we perceive no reason for changing the course, though a different one

may have been in use in other States. It is of no consequence whether the question proposed by the clerk to the jury, as to their affirmation of their verdict, be directed to them jointly or separately; in either case all are called on by way of inquiry, whether, in open court, they consent to the verdict signed, or announced *ore tenus*, by their foreman. If no one objects, all are considered by their silence as expressing their consent. In the present case, it may also be remarked, that in consequence of the motion or request of the defendant's counsel, mentioned in the exception, the judge gave a distinct, cautionary direction to the jury, that if any juror was dissatisfied with the verdict, he should express his dissent. The exception is overruled.

We are all of opinion that the verdict must stand, and sentence be awarded against the defendant.

The *Attorney General*, for the State.

N. Emery and *Fessenden*, for the defendant.

SCOTT & AL. *vs.* WHIPPLE & ALS.

An indenture, in which several persons are represented as parties of the one part, is the deed of as many persons of that part as execute and deliver it, though it is not signed by them all.

THIS was an action of covenant upon a contract to build a mill-dam on the river *St. Croix*, between *Calais* and *St. Stephens*. There were five parties to the indenture, which was so drawn as to give the plaintiffs a right of action against either of the other parties, in severalty. The plaintiffs were parties of the fifth part. The defendants were three of the four persons, parties of the first part. The indenture commenced thus—"Articles of agreement," &c., "between *Asa A. Pond*, *Theodore Jones*, and *William Pike*, all of

Calais, in the county of *Washington*, traders, and *Shelomith S. Whipple*, of the same place, physician, of the first part"—and describes the other parties in the usual form; after which the names of the persons composing the parties of the several parts are not repeated; but they are described as the parties of their respective parts. The indenture was signed and sealed by all the persons named in it, except *Asa A. Pond.*

The defendants pleaded several pleas in bar; and among them the plea of *non est factum;* and thereupon contended that the instrument could have no binding force as their deed, till it was completed by the signature of all the parties therein named. In order that this point might be determined previous to the trial of the other issues, *Preble J.* before whom the cause was tried, ruled it in favor of the defendants, for whom a verdict was accordingly found, subject to the opinion of the court, upon the question whether the omission of the signature of *Pond*, prevented the instrument from being the deed of those who had already executed it.

Greenleaf, for the plaintiffs, argued that the defendants and *Pond* were jointly and severally to be parties of the first part. But if they were not, yet by analogy to the case of partners, it was the deed of such as actually signed. 3. *Dane's Abr.* 600. *sec.* 6. *Gerard v. Basse & al.* 1. *Dall.* 119. 2. *Bos. & Pul.* 338. *Green & al. v. Beals & al.* 2. *Caines* 254. *Clement v. Brush* 3. *Johns. Ca.* 180. 15. *Johns.* 419. *Fletcher v. Dyche* 2. *D. & E.* 32. 1. *Hen. & Munf.* 420. 5. *Johns. Ca.* 35. *Underhill v. Harwood* 10. *Ves.* 225. 4. *Dane's Abr.* 91. 4. *Com. Dig.* 160.

Fessenden, for the defendants, contended that whatever the plaintiffs contracted to do, was to be done as well with *Pond*, as with the others, who relied on the aid and responsibility of him, as well as of each other. It was no contract, till it was completely executed by all the contracting parties. Until then, it was as an escrow in the hands of the plaintiffs, who undertook to obtain all the signatures, but failed.

MELLEN C. J. delivered the opinion of the Court.

Though the five contracting parties in the contract in question are

several contractors, and must sue and be sued as such; still the individuals composing the first and second parties, are joint contractors, and as such must sue and be sued. The principle is perfectly familiar that in case of joint contracts, each contractor is answerable for the performance of the whole. In the case before us, if *Pond* had signed the contract, each of the four persons constituting the first party would have been liable to pay the whole sum stipulated to be paid by that party; and though *Pond* did not sign, still the other three are liable no further, in respect to either of the other four parties, than if he had signed. It is true, if *Pond* had signed, and the other three should be compelled to pay the whole sum, they would have an action for contribution against *Pond;* and perhaps they would have a remedy against him though he did not sign; founded on his original agreement to be concerned equally with *Jones*, *White*, and *Whipple;* but it is not necessary to decide this point. The question of contribution is one in which the plaintiffs have no concern or interest, if they are satisfied with the contract, though unsigned by *Pond.* They might have objected to it originally, had they seen proper, on the ground that the responsibility of four persons is better than that of three; but the contract as signed is satisfactory to the plaintiffs; they have accepted it; and this action is proof of the acceptance. These principles are supported by most of the authorities cited by the plaintiffs' counsel. The present case differs from that of *Stetson v. Patten & al.* 2 *Greenl.* 358. There, no contract whatever existed on the part of the plaintiff; it had been signed by the defendants, but not by the plaintiff or any authorised agent. In the case at bar there was an effectual signature and execution of the contract by all the five parties.

We do not perceive any thing in this case distinguishing it in principle from those to which we have alluded. In several of those, the contractor who did sign, expected that one more would sign also; and such was the case here. But it is contended that the contract or instrument in question must be considered as merely an *escrow*, because it was never signed and sealed by *Pond*, as was originally intended. From the language of the report and the professed object in view in reserving the question submitted for our considera-

tion, we must consider it as admitted that the instrument was delivered by those who did sign and seal it, as their deed; there was no intimation to the contrary in the argument. The contract was treated as one which would have been completed in all respects, and binding on those who executed it, if *Pond* had never been contemplated as a party. Of course, the only question is, whether the omission of *Pond* to sign and seal it, has rendered it not the deed of those who did execute it. In this view it is plain that the argument of the defendants' counsel cannot be sustained;—no instrument can, according to legal principles, be deemed an *escrow* when delivered to the party entitled to receive it, and claiming interests under it. We are all of opinion that the verdict must be set aside, and a

New trial granted.

BRADFORD *vs.* CARY.

The legislature having incorporated certain persons "with their families" into a religious society, it was held that the minor sons, as members of the father's family, became members of the corporation; and continued such after arriving at full age, until they changed their membership in some mode provided by statute.

THIS was an action of the case against the defendant, who being the presiding officer at a meeting of the first parish in *Turner*, refused to receive the plaintiff 's vote, on the ground that he was not a member of that parish.

It was agreed, in a case stated by the parties, that the town of *Turner*, in which the plaintiff was born, and had always dwelt, was incorporated in 1786; that in 1792 a poll-parish was incorporated, composed of citizens of that town and of *Buckfield;* after which the congregational society in *Turner* took the name of the first parish, and ever since continued to act as a territorial parish. In 1805 a

number of persons *with their families*, were incorporated into a religious society, by the name of the Universalist-society in *Turner*. Of these, *Chandler Bradford* the plaintiff's father, was one; the plaintiff being then a member of his family, seventeen years old; and he continued to dwell with his father about ten years more. In the years 1809, 1810 and 1811, the plaintiff was taxed as a member of the first parish; which taxes he paid; after which none were assessed by that parish; their funds, when wanted, being raised in some other manner. In 1818 and 1819 certain individuals of the first parish built a new meeting house, and sold most of the pews, of which the plaintiff purchased one, which he occasionally occupied, when there was no religious service in the universalists' society. He contributed, from time to time, to the support of an occasional preacher, in the latter society, where he usually attended public worship; and purchased a pew in the universalists' meeting house; but he paid nothing to the first parish, nor to the support of its minister, except the taxes before mentioned. He had not acted in any parish meeting for the last twelve years, nor did it appear that he had ever voted in any parish meeting whatever. He professed himself a believer in the doctrines of the universalists.

Upon these facts, among others having no relation to the point upon which the cause was decided, the question of the plaintiff's membership, and consequent right to vote, in the first parish, was submitted to the decision of the court.

N. Emery, for the plaintiff. The act of *Feb.* 16, 1805, incorporating certain persons with their families and estates into the universalists' society in *Turner*, did not work a perpetual restriction on those who were minors, so as to deprive them of their election, when of age, to become members of the first parish. *Lord v. Chamberlain* 2. *Greenl.* 67. The corporate right belonged only to the persons named in the statute; and it died with the person. The word "families" is used with the intent that the polls of males, as they arrived to the age of eighteen, might be taxed, with the estates, to the father. It could never have meant that the sons should be regarded as corporators, on arriving at full age, without some act of their own,

signifying such intention. Such a construction would not be in keeping with the law or the subject of contracts by minors, which at least require ratification, on their coming of age.

By the terms of that act, all who wished to leave or join the society, must do this within a year from the passage of the statute. Here is an election given to some members, but virtually refused to all who were not of age at the end of the year, and thus capable of making an election, if infants were members. So great an injustice and absurdity could not have been intended by the legislature.

But there is nothing in the case, showing that the plaintiff's father ever accepted the act of incorporation. The act itself is not conclusive evidence of this fact. And unless this is established, the defence fails *in limine*.

None of the plaintiff's proceedings in occasionally attending the religious meetings of the universalists, contributing to the pay of their teachers, purchasing a pew in their meeting house, professing their faith, and not attending the meetings of the first parish, prove that he was not a member of the latter. The members of a parish may all change their speculative belief, and yet retain their rights. *Shapleigh v. Gilman* 13. *Mass.* 190. *Const. Maine, art.* 1. *sec.* 3.

On the other hand, the first parish is estopped to deny that he is one of its members, having taxed him as such, with his assent, in three successive years, since he came of age; and one of these having been the last tax ever assessed. *Sparrow v. Wood* 16. *Mass.* 457.

Greenleaf and *Fessenden* for the defendant, maintained the following positions—

1. No person can be a member of two parishes or religious societies at the same time; as it is to be inferred from *Stat.* 1811. *ch.* 6. and *Stat.* 1821. *ch.* 135. See also *Sutton v. Cole* 8. *Mass.* 96. *Minot v. Curtis* 7. *Mass.* 441. *Brunswick v. Dunning ib.* 445. *Jewett v. Burroughs* 15. *Mass.* 464. *Lord v. Chamberlain* 2. *Greenl.* 67.

2. The plaintiff became a member of the universalists' society by the act of incorporation in 1805. The legislature had the same right to constitute him such, though a minor, as had to have made him a member of a municipal corporation; which latter right is under-

stood to be conceded. And this membership he ratified after coming of age.

3. And it has never been lost, nor waived, nor any new parochial rights acquired. After one year from the date of the incorporation, his membership could not be changed but by the legislature, till the passage of *Stat.* 1811. *ch.* 6, which prescribed a particular mode of changing parochial membership; but of this the plaintiff has never availed himself. Since the *Stat.* 1821. *ch.* 135, he could not become a member of the first parish without its consent, of which the case affords no evidence.

His being taxed did not constitute him a member, unless he was liable to taxation. It could not be even *prima facie* evidence, except in an ancient transaction, and in the absence of opposing proof. An erroneous assessment, transcending the legal powers of the assessors, might subject them to an action, but could give the party no rights against the parish. The right to vote depends on the liability to be taxed. *Stat.* 1786. *ch.* 10. *Stat.* 1817. *ch.* 184. *Montague v. Dedham* 4. *Mass.* 269. *Sanger v. Roxbury* 8. *Mass.* 265. *Sparrow v. Wood* 16. *Mass.* 457.

These arguments having been made in writing, in the last vacation, the opinion of the court was now delivered by

Weston J. The question presented for our determination is, whether the plaintiff, at the time his vote was refused by the defendant, was or was not a member of the first parish in *Turner*. This will depend upon the question, whether he ever became a member of the universalists' society in that town, and whether if so, his connexion with that society had ceased, by his return to, and becoming a member of, the first parish.

Counties, towns, and parishes, whether poll or territorial, are corporations instituted for public purposes, civil and ecclesiastical; and have ever been considered as subject to be arranged and modified by the legislative power, at its pleasure. Legislative authority to this extent, is not controverted in the case of *Dartmouth College* 4. *Wheat.* 518. It operates upon persons of full age, without their choice or election; and sometimes against their will. There is no

objection then to its being extended to minors. It was so in fact in territorial, and might be in poll, parishes, if the legislature deemed it expedient thus to prescribe. Indeed they might incorporate a parish, to consist of certain persons named, and their children, from generation to generation, residing, as convenience might require, within certain limits. Their minor children, and such as might afterwards be born, would find themselves in no other condition, than that which is common to all native citizens of Massachusetts, every one of whom is born connected with some religious society. The rights of conscience, and the collateral right of having his ministerial taxes ultimately appropriated to the support of a religious teacher of his choice, upon whose instructions he attends, were secured in that Commonwealth by the constitution. Why then may we not consider all the members of *Chandler Bradford's* family as created members of the universalists' society? Unless this was intended, why use the term family at all? There is no analogy between this case and those provided by the pauper laws, where derivative settlements are necessary to prevent a separation between husband and wife, and between parents and their minor children. The father and head of a family, being constituted a member of a religious society, his wife and minor children, every reasonable indulgence for conscience sake being as necessary in the one case as in the other, would be as much under his direction, as to where they should worship, as if his family had been named. His liability to be taxed, according to the laws of Massachusetts, for the polls of his male children, from sixteen to twenty-one, would be the same. It is a tax imposed not on them, but on him, for the income he is supposed to derive from their earnings; which is as proper a subject of taxation, as income derived from property or other sources.

The families of the corporators named, may be presumed to have been included in the act at their solicitation, as a privilege to them; and in thus choosing for their wives and children, they exercised a prerogative, incident to the relation in which they stood. Their wives had voluntarily united their destiny with their husbands; and the Author of their being had confided their offspring to their care, and had implanted in their bosoms natural affection, to quicken them

in the performance of their parental duties. That the corporators named, were solicitous that each member of their families should participate in the privileges derived from the act, may well be presumed from the desire they must have felt that they should continue to unite with them in public worship; assuming as they did, that they would most probably espouse and profess the religious opinions, in which they had been educated. That this was their intention, as well as that of the legislature, is further supported by the consideration, that the only mode provided by the act, or by any other law then existing, by which any person could become a member of that society, was limited in its operation to the term of one year, after the passage of the act. If the minor children of the persons named were not incorporated, all who became of age after the year, would remain without any connection with the religious society of their parents, in which they were brought up; and whatever might be their option, there existed no legal mode, by which they could be received as such. There was no occasion for a derivative, qualified, and restricted membership. If the family were made members, it must have been with all the privileges appertaining thereto; a right to continue such, and on the part of the male members, to act and vote, upon arriving at the legal age; a right inchoate in minority, consummate at majority. It would be most extraordinary to regard them as members, until the moment arrived when they could act in that capacity, and to seize upon that moment, as the period when their membership should cease and be dissolved.

If this reasoning be correct, the plaintiff, when he became of age, was a member of the universalists' society, whose faith he continued to profess. Has he, since that time, ceased to be a member, by his own act, or by operation of law? Until 1811, when the act respecting public worship and religious freedom passed, no mode existed in his case, except the special one in the act establishing the society, which expired in a year from its date, of which he could avail himself to dissolve the connexion. The condition in which he stood, up to that period, was no greater restriction upon the freedom of his will, or of his right of election, when he attained to years of maturity, than if he had then by law become a member of the territorial

parish. By the general law of 1811, a mode of changing his parochial relations was established; but of that mode he has not availed himself. His attending the congregational meeting, buying a pew in their meeting house, or submitting to be taxed by that society, was not by law equivalent to the mode prescribed. That was not stated by way of example, not inconsistent with other evidence, but was the grant of a new privilege to be exercised in the manner appointed, intended to avoid uncertainty, and to give seasonable notice to all concerned. It is not pretended that the plaintiff has been received a member of the first parish, in conformity with the provisions of the parish act of Maine. It results therefore, that in *April* 1825, the plaintiff was a member of the universalist society, and his vote in the first parish legally and properly refused by the defendant.

There is nothing in the case of *Lord v. Chamberlain*, 2. *Greenl.* 67, inconsistent with this opinion. That case does not apply to a minor, when he arrives at full age, who, by an act of incorporation, has been made a member of a poll parish.

Plaintiff nonsuit.

FARRAR & AL. *vs.* EASTMAN & AL.

Under the statute of 1753, Ancient Charters *ch.* 253, the committee for the sale of the lands of delinquent proprietors, might consist of one person only;—and a designation of the collector, for that purpose, by the name of his office alone, was sufficient.

IN an action of trespass *quare clausum fregit*, the defendants attempted to show title in themselves under a deed from *John Knox*,

collector of taxes for the proprietors of *New-Suncook*, dated *April* 5, 1780, and recorded *May* 8, 1797, conveying a right in the *locus in quo* to *William Knox;* it having been stricken off to him as the highest bidder, at a sale of the lands of delinquent proprietors, for the nonpayment of taxes assessed by the corporation. The deed recited his office of collector, and the sale at public vendue for delinquency in the payment of taxes; and contained a covenant of warranty, in the collector's official capacity, against the original grantee of the right. The authority to make the conveyance was in a vote, passed among various other transactions of the proprietors, at a meeting holden *Nov.* 10, 1779, in these words :—" Voted, that the collector be empowered to give deeds of the lands sold for taxes."

This deed, and the vote of the proprietors, being offered in evidence by the defendants, were rejected by the Chief Justice, before whom the cause was tried; and the question of their admissibility was reserved for the consideration of the court, a verdict being returned for the plaintiffs.

Longfellow, for the defendants, cited the provincial statute of 1753 2. *LL. Mass. app.* 1036, providing that if the taxes assessed by proprietors of lands were not paid, their committee, or the major part of them, might sell at public auction, and convey so much of the delinquent proprietor's right as should be sufficient, &c. And he argued that the statute did not prevent the proprietors from delegating this authority to one person alone; but only required that if the committee consisted of a greater number, a majority of them must concur in the sale. The appointment, therefore, was in conformity with the statute, and the evidence ought to have been admitted.

But if the vote was rightly rejected, the deed itself was admissible to show the date and extent of the defendants' claim. *Robison v. Swett & al.* 3. *Greenl.* 316. Moreover, being more than thirty years old, it was admissible without proof of its execution; *Stockbridge v. West Stockbridge* 14. *Mass.* 257;—and undisturbed possession, during that term, of chattels or lands conveyed by one acting as agent, will be sufficient evidence of his authority. *Gray v. Gardiner* 3. *Mass.* 399. *Knox v. Jenks* 7. *Mass.* 488. *Col-*

man v. Anderson 10. *Mass.* 105. *Pickering v. Fairfield* 11. *Mass.* 227.

Fessenden, for the plaintiffs. The provision of the statute of 1753 is that if any proprietor shall neglect to pay the taxes duly assessed upon his right, "then *the* committee of the proprietors of such common lands, or the major part of such committee, may and are hereby fully empowered, from time to time, at a public vendue to sell" &c. This plainly refers to an existing standing committee, consisting of more than one person; and it must mean that committee to whom payment of the taxes is to be made. What is thus intended is found by reference to the provincial act of 1735, 8. *Geo.* 2. *ch.* 190 of the Ancient Charters, which empowers proprietors "to choose a committee for managing the affairs of the propriety." The persons, therefore, who are authorized to give deeds, are those who were already entrusted with the general affairs of the corporation. Hence the proprietors had no authority to appoint the collector to give deeds; the legislature having placed that power in other hands. This construction is recognized in *Bott v. Perley* 11. *Mass.* 175, and is justified by *Stat.* 1783. *ch.* 39, which revised both the preceding statutes, and directed the committee to make the sale.

Nor ought the deed to have been admitted to show the date and extent of the defendants' claim. It was not, like the deed in *Robison v. Swett & al.* a deed of a distinct parcel in severalty; but was of an undivided portion of a right in common, in the whole township. It could not therefore operate a disseisin of the owner of the right, unless it could also be a disseisin of the other tenants in common, each one being seised *per mie & per tout.*

Neither could any authority in *Knox* be presumed, after any lapse of time, against the evidence in the cause, it being apparent that the proprietors could not confer the power contended for.

The arguments, of which the foregoing is a brief summary of so much as related to the point decided, there being others in the cause, were delivered in writing, in the last vacation; and in this term the opinion of the Court was delivered by

WESTON J. The deed of *John Knox* to *William Knox*, dated

April 5, 1780, under which the defendants claim, having been offered in evidence by them, and having been rejected by the presiding judge, if it was legally admissible, the verdict is to be set aside, and a new trial granted. Both parties trace their title to *Benjamin Ballard*. The deed of *John Knox* purports to convey three fourths of *Ballard's* right; he being delinquent in the payment of taxes, imposed by the propriety of which he was a member. The authority, under which *Knox* acted, is in evidence in the case; and is, it is insisted, void on the face of it, and insufficient, therefore, to give any legal effect or validity whatever to the deed.

The power to sell the shares of delinquent proprietors, is derived from the provincial act of 26. *Geo.* 2, passed in *May* 1753, Ancient Charters, 588. In the second section of this act it is provided, that "every such proprietor, as shall neglect to pay to the collector or treasurer or committee of such propriety, such sum or sums of money, as shall from time to time be duly granted and voted to be raised and levied upon his right and share in such lands, for the space of six months, to those who live in the province, and twelve months to those who live out of the province, after such grant, and his proportion thereof shall be published, in the several Boston weekly newspapers, then the committee of the proprietors of such common lands, or the major part of such committee, may and are hereby fully empowered from time to time, at a public vendue, to sell and convey away so much of such delinquent proprietor's right or share in said common lands, as will be sufficient to pay and satisfy his tax or proportion of such grant, and all reasonable charges attending such sale, to any person that will give most for the same, notice of such sale being given in the said prints forty days at least before hand; and may accordingly execute and give a good deed or deeds of conveyance of the lands so sold, unto the purchaser thereof, to hold in fee simple." By the committee here designated, it is contended, must be understood the committee appointed to manage the prudential concerns of the propriety. There is nothing in the act, which confers upon the committee any powers, except what relateto delinquent taxes. It purports to be in addition to the provincial act of *Anne, ch.*

12, Ancient Charters, 402, directing how meetings of proprietors of lands lying in common may be called. Between the passage of the act last mentioned and the one in question, the provincial act of 8. *Geo.* 2, had passed, entitled an act directing how meetings of proprietors in wharves, or other real estate besides land, may be called. And at meetings thus called, these proprietors were authorized to choose a committee for managing the affairs of the propriety. That the provincial legislature did not consider this act applicable to proprieties of the description now under consideration, although in its general terms broad enough to embrace them, is apparent from the preamble to the act of 1753, which recited that there are sundry tracts of common and undivided lands in the province, lying within no township or precinct, and that no effectual provision had been made by law for calling meetings of such proprietors. It then goes on to prescribe a mode, like that provided for in the act of George the second. This last act principally related to wharves; and might be intended also to include some other species of common property, requiring disbursements for repairs. and producing an annual profit, the management of which might require the care and oversight of a standing committee. Whether proprietors of common and undivided lands, lying without the bounds of any incorporated town or precinct, should or should not have a general committee of this description, would depend upon the views which each propriety might entertain as to what the exigency of their affairs required. We are not therefore satisfied that the committee, authorized to sell by the act of 26. *Geo.* 2, must necessarily be clothed with authority to manage the affairs of the propriety; but that the terms of the act are sufficiently satisfied, by the appointment of a committee in relation to delinquent taxes.

John Knox, it is urged, could not be this committee; because as the act gives the authority to the committee, or the major part of them, the implication clearly is, that it should consist of more than one person. Committees of proprieties, and of other bodies of men, according to popular usage, are generally composed of three or more; and hence the legislature provided that a majority of the committee should

be invested with the powers of the whole. But we perceive nothing in the act, or in public policy, of convenience, which would restrain a propriety from confiding this power to a committee of one, if they deemed it expedient so to do. A committee may be defined to be a person or persons, to whose consideration or determination certain business is referred or confided. The authority under which *John Knox*, who was the collector of the propriety, acted, is a vote of the propriety duly certified, which passed *November* 10, 1779, which is in these words: "Voted that the collector be empowered to give deeds of the land sold for taxes." If a deed, vote, or other transaction, be susceptible of a construction consistent with law and with a rightful authority in the party or parties granting, voting or acting, that construction should prevail. Thus if a deed of land be made, without words of limitation, the law construes it to be for the life of the grantee; but if the grantor had only a life estate in the premises, it shall be deemed for the life of the grantor; that being all which he has lawful authority to grant. "And it is a general rule, that whensoever the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." *Co. Lit.* 42 *a.* It did not appertain to the office of collector to sell and give deeds of delinquent proprietors' shares; but it was competent for the propriety to appoint the person holding that office, a committee for this purpose. They designate *John Knox*, by the name of his office. If the vote had been that the moderator of the meeting should be thus empowered, the person who had been chosen to that office, would have been authorized to act, not as moderator, for no such authority was incident to his office, but as the individual to whom that power was confided, by a designation as clear and unequivocal, as if he had been expressly named. *John Knox* is not named or described in the vote as a committee; but he is empowered by the propriety, who had the right to appoint the committee, to do that which could be done only by a committee. That which they had the right and the power to confide or commit to such person or persons, as they might think proper, they

commit to him. He was then their committee for this purpose. He was empowered to give deeds of lands sold, by which we must understand of such as might be sold, in the manner authorized by law, for taxes. When a power is granted, whatever is necessary to the execution of the power, is also impliedly granted. If he was authorized to give deeds, it was necessary that he should first sell in the mode prescribed by law, and the power to do so is therefore implied.

Thus empowered, *John Knox*, having sold to *William Knox*, he being the highest bidder therefor at public auction, describing himself as the collector of the propriety, and reciting his authority, conveys to him by deed in "his said capacity," that is, as may be legally inferred, the capacity he derives from the vote, three fourths of the right of *Benjamin Ballard*, who is stated to have been delinquent in the payment of taxes. At the close he covenants as collector, to warrant and defend the premises against the claims of the original grantee. What may be the legal effect and operation of this covenant, is a question not now before us. Subsequently to this sale, *William Knox*, and those holding under him, exercised acts of ownership over the part of the right conveyed, and the lots drawn under it; and no evidence appears of any claim or interference of *Ballard*, or his heirs, for almost forty years. It is an ancient transaction; and neither the vote of the propriety, nor the deed under it, are drawn with any attention to legal precision. It is well known, that much of the business of these proprietors was loosely conducted; and after such a lapse of time, and for the purpose of upholding their proceedings, and of titles derived from them, after such long acquiescence, they are to be viewed with great indulgence. Whether in a recent case, greater precision, and a more clear and perfect deduction and pursuance of authority, would not be required, it is not necessary now to decide. It is not essential that all the facts, necessary to sustain and justify the sale, should be recited in the deed. They may be presumed, or proved *aliunde*. Such as do not appear in the records, and among the papers of the propriety, may, and, after such a length of time, will be presumed.

The opinion of the court is, that the deed of *John Knox*, which was rejected at the trial, was by law admissible in evidence. The verdict is therefore set aside, and a new trial granted.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

LINCOLN.

MAY TERM,

1828.

KIMBALL *vs.* PREBLE & ALS.

A bond given for the prison limits by a debtor in execution, under *Stat.* 1822, *ch.* 209, is a valid bond, though it be taken in less than double the amount of the debt and costs.

The delivery of such bond to the gaoler is a good delivery to the obligee.

And if the obligee brings a suit upon the bond, this is an approval of the sureties, equivalent to the approbation of two justices of the *quorum*.

THIS was an action of debt on a bond given for the liberty of the debtor's limits, in the form prescribed by *Stat.* 1822, *ch.* 209, but not in double the amount of the debt and costs; nor was it approved by two justices of the *quorum*, as the statute required. The debtor was not discharged from confinement, by taking the poor debtor's oath, within nine months after the execution of the bond; nor did he surrender himself to the gaoler, and go into close prison, within three days after the expiration of that period; but he remained within the goal yard till the commencement of this action. The bond was kept by the gaoler, till the plaintiff took it for the purpose of bringing this suit.

Kimball *v.* Preble & als.

Upon these facts, in a case stated, the question whether the action was maintainable was submitted to the court.

Barnard, for the plaintiff, contended that he was entitled to this action. Though the bond is not for exactly double the amount of the debt and costs, yet by *Stat.* 1822, *ch.* 209, the gaoler is not now, as he was before the passage of that statute, liable to an action for an escape, for that cause; the act having exempted him from liability in such a case, where the error was owing to accident or mistake. Wherever, therefore, the bond is sufficient to justify the enlargement of the debtor, it is a good bond to the creditor; or he is remediless; contrary to the manifest intent of the legislature.

And the delivery was sufficient. It being the duty of the gaoler to take the bond, he is by law the agent of the creditor to receive it; and his act is ratified by the creditor's receipt of the bond from him, and his resort to this action. 5. *Mass.* 317. 7. *Mass.* 98. 3. *Greenl.* 156. 447. 10. *Mass.* 206. 2. *Mass.* 423. It was not necessary that it should be approved by two justices. The creditor has waived this provision, introduced for his benefit, by accepting the bond. 3. *Mass.* 86. 8. *Mass.* 373. 11. *Mass.* 11. And if it is not conformable to the statute, yet is a good obligation at common law. 7. *Mass.* 200. 9. *Mass.* 221.

Allen, for the defendants, denied the validity of the bond at common law, because it was conditioned for the surrender of the personal liberty of the obligor, to which the common law will not lend its sanctions. It derived its whole vigor from the statute; and must therefore show a compliance with the statute provisions. But in this respect it was materially defective, as it was neither taken in the requisite sum, nor approved by two justices of the *quorum*. Being therefore against the policy and principles of the common law, and not within the statute, it was merely void.

But if not, yet it was not the deed of the defendants, for want of delivery. The case expressly admits that it was not delivered to the obligee, but left with the gaoler.

If, however, the bond should be deemed valid, and perfectly executed, yet upon the authority of *Winthrop v. Dockendorff* 3. *Greenl.*

156. the plaintiff, upon a hearing in equity, is entitled to no more than nominal damages, none having been sustained.

MELLEN C. J. delivered the opinion of the Court.

We are well satisfied that the bond was properly placed in the hands of the gaol keeper, and that a delivery of it by the defendants to him was a delivery of it to the plaintiff, who has received it, and is in this action claiming the benefit of it. This circumstance is also proof of the plaintiff's approbation of the sureties; and his approval is by the 4th section of the act of 1822, *ch.* 209, equivalent to the approbation of two justices of the peace *quorum unus.* Nor do we think that the bond is objectionable, because it was given for a sum less than double the sum for which the debtor was committed; for the 9th section of the act provides, that no sheriff, gaoler or prison keeper shall be liable for an escape, in consequence of allowing the liberty of the gaol yard to a prisoner, on his giving bond therefor, notwithstanding such bond, from accident, mistake or misapprehension, may not have been given for double the sum for which the debtor was imprisoned. In the case before us the bond was for two dollars and ninety six cents less than the true sum, which must have arisen from some error or misapprehension. The bond must therefore be considered good under the statute, or else the creditor could have no remedy, either against the sheriff or gaol keeper, or the sureties, according to the argument of the defendants' counsel. But if the bond could not be good as a statute bond, it would be good at common law; as has been repeatedly decided in the cases cited by the counsel for the plaintiff. According to the agreement of the parties, the defendants must be defaulted.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

KENNEBEC.

JUNE TERM,

1828.

Memorandum. *Preble J.* was not present at this term, nor at the following terms in *Somerset* and *Penobscot;* and on the eighteenth day of *June* resigned his office as one of the Justices of this Court.

LITTLE *vs.* LATHROP.

Where there is no prescription, agreement, or assignment under the statute, whereby the owner of land is bound to maintain a fence, no occupant is obliged to fence against an adjoining close; but in such case, there being no fence, each owner is bound at his peril to keep his cattle on his own close.

Where a tenant is bound by prescription, agreement or assignment under the statute, to maintain a fence against an adjoining close, it is only against such cattle as are *rightfully* on that close;—and in such case, if the fence be not in fact made, the owner of either close, thus adjoining, may distrain the cattle escaping from the adjoining close, and not rightfully there.

The *Stat.* 1821, *ch.* 128, *sec.* 6, is merely in affirmance of the common law.

Whether to leave wild lands unfenced, be not an implied license for all cattle to traverse and browse them, *quære.*

THIS was an action of trespass *quare clausum fregit.* The defendant pleaded the general issue, which was joined. He pleaded secondly, in bar, that he owned two closes adjoining the plaintiff's

close; that at the time of the alleged trespass the close of the plaintiff was uncultivated, and not fenced; that the defendant depastured his cattle on his own close, as he lawfully might; and that they escaped into the close of the plaintiff.

The plaintiff replied that his close was improved; that there was a dispute respecting the partition fence between the closes of the defendant and the plaintiff; and that no assignment had ever been made to either party of his portion of the fence to be maintained.

The defendant rejoined, traversing the fact that the close of the plaintiff was improved, and that there was a dispute respecting the partition fence. And issue was joined on the traverse.

At the trial before *Weston J.* the plaintiff proved his title to the *locus in quo*, and that the defendant's cattle had been depastured there, as alleged in the writ. Upon the second issue much testimony was offered, which the judge left to the jury; instructing them that if, from the evidence, they should be of opinion that the close in question was improved land, designed to be secured as such, although the fences and other obstructions might not at all times be adequate for that purpose, they ought to find for the plaintiff, on both issues: but that if they should be satisfied that the land was suffered to lie common, and was not intended to be improved or cultivated, they ought to find both issues for the defendant. They accordingly found for the defendant; and the question whether the facts pleaded by the defendant in his second plea constituted a good defence to the action, was reserved for the consideration of all the judges.

Allen, for the plaintiff, argued that the defendant was bound to keep his cattle on his own close; unless he had availed himself of the provisions of the statute to compel the plaintiff to maintain his part of the fence, or proved him liable by agreement or prescription. He insisted that on this subject the doctrines of the common law were the law of this State; and referred to *Rust v. Low & al.* 6. *Mass.* 90. *Stackpole v. Healy* 16. *Mass.* 23. *Heath v. Ricker* 2. *Greenl.* 72.

R. Williams, for the defendant, contended, 1st, that the doctrines of the common law on this subject, requiring every man, at his peril, to keep his cattle on his own close, had never been adopted in this country. To prove which he argued from the provisions of the Colony laws, *ch.* 19, 78, and the Province laws, *ch.* 24, 51, 55, 220, 266, and *Stat.* 1785, *ch.* 52, 53. *Stat.* 1788, *ch.* 56, 65. *Stat.* 1799, *ch.* 61. *Stat.* 1804, *ch.* 44; and he insisted that these provisions, requiring every man to maintain his proportion of all fences on his own land, were inconsistent with the notion that the common law was still in force. It would seem to be useless to compel one to fence out his neighbor's cattle, if his neighbor himself was obliged to keep them out.

2. So far as the cases cited on the other side may be understood as indicating that the laws of Massachusetts and this State agree with the common law, they are controlled by the subsequent statute of 1821, *ch.* 128; which may be considered as a revision of the whole law on this subject, and as furnishing all the remedy to be pursued for damages done by the cattle of another. And this statute, *sec.* 6, evidently regards cattle as being lawfully at large on commons and highways. Throwing one's land open, may be considered as an implied license to all others, to depasture it with their cattle. A different construction would be too destructive to the interests of our new settlements, to be admitted for a moment.

3. But the defendant is not liable, even by the principles of the common law. The cattle of a stranger are not distrainable till they have been levant and couchant, which was not the case here. 3. *Bl. Com.* 8. If the owner could not distrain, neither can he have trespass. The defendant also may claim a right of common *pur cause de vicinage*; into which, though he may not put his beasts, yet if they escape, he is not responsible in damages. *Co. Lit.* 122. *a. note g. Bromfield v. Kirber* 11. *Mod.* 72. *Gullet v. Lopes* 13. *East* 348. *Tiringham's case* 4. *Co.* 38. *Sir Miles Corbett's case* 7. *Co.* 5. 3. *Dane's Abr.* 658.

Little *v.* Lathrop.

The argument having been made at the last *June* term, and the cause continued for advisement, the opinion of the Court was now delivered by

MELLEN C. J. The verdict has established the truth of the facts stated in the defendant's plea in bar; viz. that at the time of the alleged trespass, the plaintiff's close was uncultivated and unfenced; and that the defendant's cattle were lawfully depasturing on the adjoining close belonging to him, and thence escaped on to the plaintiff's close, and there consumed the grass, &c. which is the trespass complained of. It does not appear that either of the parties was bound to make or maintain any part of a partition fence in virtue of prescription, agreement or assignment, pursuant to our statute of 1821, *ch.* 44, *sec.* 3. The question is whether, on these facts, the present action is by law maintainable. The important case of *Rust v. Low & al.* 6. *Mass.* 90, which has been cited in the argument, may be considered as containing all the legal principles and distinctions in relation to the subject before us;—a subject respecting which much ancient learning exists; all of which was ably and laboriously investigated by the counsel, and then by the court, in the abovementioned case. From a careful examination of it, the following principles, among others, appear to be recognized and established.

1. At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription.

2. At common law, when a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle, but those which were rightfully in the adjoining close.

3. At common law, a man though not bound to fence against an adjoining close, was still bound at his peril to keep his cattle on his own close, and prevent them from escaping.

4. The legal obligations of the tenants of adjoining lands to make and maintain partition fences, where no prescription exists, and no written agreement has been made, rest on the statute.

5. An assignment pursuant to the statute, imposes the same duty as would result from a prescription.

6. Where there is no prescription or agreement, the provisions of

the statute oblige a tenant, liable to make the partition fence, or any part of it, to fence only as in the case of prescription at common law; that is, against such cattle as are rightfully on the adjoining land.

7. Every person may maintain trespass against the owner of cattle, unless such owner can protect himself by the provisions of the statute, or by a written agreement, or by prescription.

From the foregoing principles, as copied or extracted from the opinion of the court, in *Rust v. Low & al.*, it appears,

1. That where there is no prescription, agreement, or statute-assignment, no tenant is bound to fence against an adjoining close; but in such case, there being no fence, each owner is bound at his peril, to keep his cattle on his own close.

2. When a tenant, for any of the reasons before stated, is bound to fence against an adjoining close, it is only against such cattle as are rightfully in that close; and in such case, if the fence be not in fact made, the owner of either close, thus adjoining, may distrain the cattle escaping from the adjoining close, not rightfully there.

The court also decided in the above case that the third section of the statute of 1788, *ch.* 65, which is similar in all essentials to the sixth section of the statute of this State, *ch.* 128, and all its provisions, so far as they extended, were merely in affirmance of the common law. That cause was decided in 1809; and yet our legislature, who re-enacted the same section in 1821, only adding a clause as to another point, must have known that decision, and the construction given to the before mentioned section; and this is one legislative sanction of it; and the statute of 1825, *ch.* 317, recognizing the right of impounding beasts "for doing damage in the tillage, mowing or other lands of any person under improvement, whether inclosed with a legal and sufficient fence or not, provided such impounding be lawful according to the principles of the common law," is another sanction.

Many of the early statutes commented upon or referred to by the defendant's counsel, in his able argument, would have deserved and received from us a more particular consideration, as well as several of the cases which have been cited, had not the whole subject, as we

have beforementioned, undergone so thorough an examination in the great leading case so often alluded to. Some of the principles he has discussed cannot be applicable here. The case of *Gullet v. Lopes* was a case of adjoining commons; and before the inclosure of the principal part of Axler common, the cattle belonging to the different owners, and depastured on them, had a right, by reason of vicinage, to pass from one common to the other; but such a principle, we apprehend is not admissible here; nor is such a species of common known here. Certainly, if the law is as we have before stated, such a doctrine can have no bearing upon a question like that under consideration between two individuals, each owning his own close in severalty.

It has been urged that the plaintiff's conduct, in leaving his land unfenced, amounts to an implied license; but a license must be pleaded; and if it had been, still it would not alter the case; as the only question submitted is, whether the facts, composing the plea in bar, constitute a good defence.

It is said by the plaintiff's counsel that it it is highly important, in point of principle, that this cause should be decided in favor of the plaintiff; for if not, the consequence will be that every man, owning lands uncultivated, must be exposed to injury by cattle destroying or wounding the young growth, or else be compelled to fence his land with a legal fence of statute height, at an unreasonable expense. And it is said by the counsel for the defendant, that if this action is sustained, it will arrest or at least impede the settlement of our wild lands, and be highly injurious to infant settlements, where cattle must from the necessity of the case, be permitted to range without fences. In either view of the subject there may be many inconveniences, and they are all particularly proper for legislative consideration; but the court has nothing to do but to ascertain, as correctly as it can, what the law of the case is, and then declare it.

It remains for us only to add that on legal principles, as we find them settled and sanctioned by high authority, the defence disclosed in the plea in bar, is not sufficient to defeat the action; and accordingly, pursuant to the agreement of the parties, the

Verdict is set aside and a new trial granted.

BISHOP *vs.* LITTLE.

Where one, upon giving a deed of release and quitclaim, stipulated by parol that "if the deed did not pass and secure the land to the grantee, he would make it good;"—this was taken as a promise to convey a legal and perfect title to the land, and therefore as void, by the statute of frauds.

A parol renewal of such promise, within six years, creates no legal obligation.

THIS case was *assumpsit* for money had and received; and was tried before *Weston J.* at *October* term 1826, upon the general issue, and the plea of the statute of limitations.

It appeared that the plaintiff was a settler upon lands claimed by the Pejepscot proprietors; and that his case, among others, was considered by the commissioners appointed by a resolve of the General Court of Massachusetts, passed *June* 29, 1798, to adjust the controversies between the proprietors and the settlers upon lands claimed by them; and that it was awarded that he should pay $166, and thereupon should receive of the proprietors "a good and sufficient deed" of the land in his possession. This sum being paid *Dec.* 18, 1805 to the defendant, who was the agent of the proprietors, he on that day made and delivered to the plaintiff a deed, reciting the resolve, and his own appointment by the proprietors as their agent to make and execute deeds to the settlers pursuant to the award of the commissioners; and their award of the sum to be paid by the plaintiff; and thereupon proceeding, "by virtue of said vote," to "sell, release, quitclaim and convey" to the plaintiff one hundred acres, "being part of said proprietors' undivided lands," particularly described in the deed. This deed contained no express covenants, and was made in the name of the agent only, professing to act under authority of the vote of the proprietors.

It was proved, though objected to by the defendant, that when the agent of the plaintiff was about to pay the money awarded, and take the deed, he expressed his fears that the title of the proprietors would not include the land possessed by the plaintiff; whereupon the

defendant affirmed that it would; and that if the deed should not have the effect to pass and secure the land to the plaintiff, "he would make it good;" and that by this assurance and promise the plaintiff's agent was induced to pay the money.

The money paid by all the settlers, under this arrangement, was distributed in 1806, among the Pejepscot proprietors, the defendant, who was one, retaining the largest portion for his own share.

Within six years prior to the commencement of this action, it was ascertained that the lands described in the deed made to the plaintiff did not belong to the Pejepscot proprietors, but fell within the limits of the Plymouth patent. And there was sufficient proof of a new promise by the defendant, within the same period.

The jury thereupon found both issues for the plaintiff, assessing damages to the amount of the money paid, with interest from the date of the writ; the parties agreeing that if the parol testimony objected to should be adjudged inadmissible, and if, without it, the action was not supported; or if, with it, the plaintiff was not entitled to recover, the verdict should be set aside, and the plaintiff nonsuited; otherwise judgment should be entered for him.

Orr and *Allen* argued for the defendant. 1. The parties having reduced their contract to writing, the parol evidence was inadmissible. *Paine v. McIntire*, 1. *Mass.* 69. *King v. King*, 7. *Mass.* 496. *Brigham v. Rogers*, 17. *Mass.* 471. *Howes v. Barker*, 3. *Johns.* 498. The recitals in the deed imported covenants that they were true; and these formed a sufficient consideration for the payment of the money. But if not, yet no deed of the proprietors was necessary to pass their title to the plaintiff, for their vote that a certain description of persons, to be designated by their agent, should take, was a sufficient conveyance; the grantee being designated by the deed of the agent. *Springfield v. Miller*, 12. *Mass.* 417. *Mayo v. Libby*, *ib.* 339.

The parol evidence was also inadmissible, by the statute of frauds, it being in effect a contract for the conveyance of land.

2. The money cannot be recovered back as paid for a consideration which has failed. For either the deed contains covenants to

which the plaintiff may resort; or the absence of them is evidence that he agreed to take it without any, and at his own peril. *Watkins v. Otis*, 2. *Pick.* 97. *Gates v. Winslow*, 1 *Mass.* 65. *Wallis v. Wallis*, 4 *Mass.* 136. *Boyd v. Stone*, 11. *Mass.* 342. The defect of title was a common misfortune, not anticipated by the legislature, or the parties. Moreover, if here has been a failure of title, yet it cannot be said that the grantee has derived nothing from his deed, after it has afforded him a quiet possession and permanancy of profits for twenty years.

3. The new promise was not binding, being without consideration to support it. There was originally no legal contract between the defendant personally, and the plaintiff; he having acted as the agent of the corporation. And no moral obligation alone can support a new promise, unless there was once a contract which might have been enforced at law. *Mills v. Wyman* 3. *Pick.* 207.

R. Williams and *A. Belcher*, for the plaintiff. Though the deed is the only evidence of the matters it contains, and is not to be contradicted by parol testimony; yet the evidence objected to was admissible to prove an agreement independent of the deed, and wholly collateral to its stipulations. It was to establish a contract of the defendant that if *that* deed should not be sufficient to effect the intent of the parties, he would make it good. It was *this* promise, and not the deed, which induced the plaintiff to part with his money. *King v. Laindon* 8. *D. & E.* 379. *Davenport v. Mason* 15. *Mass.* 85. No part of this contract could be proved by the deed; nor was the deed, in any sense, the basis of this action.

2. The object of the plaintiff is to recover back his money, paid for a purpose which has never been realized. The commissioners awarded that he should have a "good and sufficient deed"; meaning a deed which should convey the estate; *Porter v. Noyes* 2. *Greenl.* 22; and which this deed did not. It was to be the deed of the proprietors; but this is the deed of the defendant alone. *Stenchfield v. Little* 1. *Greenl.* 231. 2. *Wheat.* 56. 6. *D. & E.* 606. 3. *Bos. & Pul.* 162. *Sugd.* 345. The money was paid under a void authority. Neither the commisssioners nor the defendant,

had power to act upon lands lying, as these were, beyond the limits of the Pejepscot title. 1. *Ld. Raym.* 742. *Lazell v. Miller* 15. *Mass.* 207. *Fowler v. Shearer* 7. *Mass.* 31. It was paid by mistake. The defendant alleged that the plaintiff's farm was within the Pejepscot title; and the plaintiff, supposing it to be true, parted with his money; which he ought to recover back. *Union Bank v. Bank United States* 3. *Mass.* 74. *Garland v. Salem Bank* 9. *Mass.* 408. 2. *Day* 225. *D'Utrick v. Melcher* 1. *Dal.* 428. And if there was no mistake, the representations of the defendant were evidence of fraud in obtaining the money, which he ought therefore to refund; and in this form of action. *Appleton v. Crowninshield* 8. *Mass.* 340. *Smith v. Bromley Doug.* 696. 9. *Johns.* 201. 307. *Bliss v. Negus* 8. *Mass.* 46. *White v. Cuyler* 6. *D. & E.* 176. 1. *New Rep.* 263. 1. *Caines' Ca.* 47. *Bree v. Holbeck Doug.* 654.

3. Nor can the defendant protect himself by the maxim *melior est conditio &c.;* which applies only to monies paid under an illegal contract; 6. *Mass.* 81. 4. *D. & E.* 561. 2. *W. Bl.* 1073;—nor on the ground that he has paid over the money to his principal; for the payment was not made to the corporation, but to individuals, who, in that capacity, were not entitled to receive it.

The argument was made at the last *June* term; and now the opinion of the Court was delivered by

Mellen C. J. Several points made by the counsel in the argument, we shall pass over in giving our opinion, and attend to those only on which the decision is founded. As the deed in the case contains no covenants on the part of the proprietors, and there being no suggestion of fraud on their part as to any facts connected with the conveyance in question, we do not perceive on what principles of law an action could be maintained against them on any implied promise to refund the consideration to the plaintiff, in consequence of the failure, or rather want of title in them, at the time the conveyance was made. To guard against losses consequent on such an event, a purchaser should insist on such covenants as will protect him; and the omission so to do, in the case of a fair sale, is a voluntary acknowledgement that he neither expects or intends to claim a

return of the consideration in any event. The correctness of this principle, if not admitted, seems to be well established—*Boswell vs. Vaughan*, *Cro. Jac.* 196. *Bree v. Holbeck*, *Dougl.* 654. *Johnson v. Johnson*, 3 *Bos. & Pul.* 162. *Gates v. Winslow*, 1 *Mass.* 65. *Wallis v. Wallis*, 4 *Mass.* 523. *Joyce v. Ryan*, 4 *Greenl.* 101. But it is contended that the promise, made by the defendant at the time the deed was delivered, being an express one, furnishes a solid ground on which this action may be maintained, the failure of title having taken place, which was the event on which the promise was to become binding. Waiving the question as to the admissibility of the parol proof objected to, and the liability of the defendant for monies received by him as the agent of the proprietors, and paid over to his principals, before any notice given him not to pay over the same, we will examine the nature of this express promise, and ascertain its legal effect. The report states that the defendant, at the time the deed was delivered, inasmuch as the plaintiff's agent expressed fears as to the validity of the title of the Pejepscot proprietors "promised that if the deed did not have the effect to pass and secure the said land to the plaintiff, he would make it good;" and that the plaintiff, relying on this assurance and promise, was induced to pay his money.—The meaning of the expression "he would make it good," could not have been that he would make that deed good, nor the land good; but that if that deed was not sufficient to convey the title to the land, he would "make it good," that is, that the title should be perfected and legally conveyed; for it must be remembered, at that time no doubt existed on the part of *Little*, or the proprietors, as to the soundness of the proprietary title. It seems to the court that such is the legal import of *Little's* promise; but if it be considered as extending further, and amounting to a promise to indemnify the plaintiff, by way of damages, for the loss of the title, we apprehend the legal ground will not be changed. Considering the promise in either point of view, it is within the statute of frauds; it is either a contract respecting real estate and the conveyance of the same, and then it is void; or else it is a promise to pay the debt or answer for the default of another, and then also it is void; the money when paid to *Little*, being the property of the proprietors; and to them he has,

if not formally, at least substantially accounted. Besides, what consideration was there for the defendant's promise? No possible benefit had accrued or could accrue to him. But waiving this inquiry, the statute of frauds is a bar to the action which we cannot remove.

The case is not changed by the new promise which the jury have found was made by the defendant within six years next before the commencement of the action. It was only a repetition of the original promise, and can have no other effect than to revive that; but being revived, it has no legal obligation, for the reasons before mentioned.

It has been urged that the facts present a case of extreme hardship on the part of the plaintiff; but of this we are not at liberty to take judicial notice; but if we were, we should also direct our attention to those dangers which would be the consequence of leaving written contracts and title deeds subject to the influence of surrounding circumstances at the time of their execution; and of relying on accompanying or subsequent declarations of a grantor or his agent, after the lapse of many years, as independent contracts in relation to the title. To countenance such a principle and proceeding, would be to expose contractors to liabilities and consequences never anticipated, and against which the greatest care and prudence would afford but an uncertain protection.

After the most patient and anxious examination, we are all of opinion that this action cannot be maintained; and accordingly the verdict must be set aside and a nonsuit entered.

Plaintiff nonsuit.

ESTES *vs. The inhabitants of* TROY.

Ten years user of a way by the inhabitants of a town, is not sufficient to oblige them to keep it in repair.

THIS was an action for damages to the plaintiff's horse, through a defective causeway on a road in *Troy;* and it came before the court upon a motion to set aside a nonsuit directed by the Chief Justice, before whom the cause was tried. The evidence of the existence of the road is stated below in the opinion of the court.

H. W. Fuller argued in support of the action, upon the ground that the town had adopted the road as a public way, by opening it, and assigning it to their surveyors from year to year to be kept in repair; and that this was sufficient to estop the inhabitants from denying that it was a public highway. If not, they might always evade the statute, by making the road a few feet distant from its original location; and defraud of his remedy the unfortunate and unsuspecting traveller, thus decoyed into a by-path.

Allen for the defendants.

MELLEN C. J. The principal question in this case, and the only one which we need decide, is whether the alleged injury was sustained on any highway or town way which the defendants were liable to repair. If not, this action is not maintainable. No legal way exists; no record of any appears. The only proof a way *de facto* is that in 1812 a road was opened in the course mentioned, and has been used ever since as a travelled road; and been annually repaired by the surveyors of the town. But in 1822 this road was fenced across in two places; and in 1824 a gate was erected across it, which was continued for one or two months. After a road or way has been opened, continued and travelled for twenty years, without interruption or incumbrances, it may be considered and treated as a public way; for such a user for that term takes away the right of entry of the owners

of the land, and gives the town a right to enter upon and repair it. But in the case before us, the user has so continued only ten years. The owners have exercised dominion over the opened road, and shut it up. This case is a stronger one for the defendants than that of *Todd v. Rome* 2. *Greenl.* 35, or *Rowell v. Montville* 4. *Greenl.* 270. The action cannot be maintained, and the nonsuit is confirmed.

Judgment for defendants.

STANLEY *vs.* PERLEY.

The title of an attaching creditor to the land afterwards taken by extent, is not affected by any knowledge which the officer may have had of the existence of a prior conveyance of the same land, made by the debtor to another person; even though such knowledge may have been communicated to the creditor himself, after the attachment, and before the extent.

In a writ of entry it is competent for the tenant, under the general issue, to disprove the seisin of the demandant, as alleged in the writ, by showing that his grantor had previously conveyed the title to a third person; even though the tenant does not claim under such grantee.

THIS was a writ of entry, sued out *Nov.* 25, 1825, in which the demandant counted on his own seisin. It was tried upon the general issue.

The land in controversy originally belonged to *Sampson Davis*, under whom both parties claimed. It was conveyed by *Davis* to the demandant, by deed dated *September* 7, 1799, and recorded *May* 3, 1800.

On the 6th of *Sept.* 1799, the land was attached by *John Chandler*, in a suit against *Davis*, in which judgment was recovered by the plaintiff, and the attachment followed up by a seasonable extent on part of the land, *July* 4, 1800. The title to this parcel was conveyed by deed of quitclaim from *Chandler* to *Amos Perley*, *June* 25,

1801; and by him, in the same manner, *April* 12, 1803, to *Nathaniel Perley*, father of the tenants, who died in *July* 1824.

On the 9th of *Sept.* 1799, another attachment of the same land was made by *Richard Coburn*, in a suit against *Davis;* in which also judgment was rendered for the plaintiff, and the attachment followed up by a seasonable extent on the residue of the land, *Jan.* 21, 1801. The title of the demandant was known to the officer, previous to the time of this extent. The attorney of *Coburn*, under a power to attend to the levy of his execution, choose an appraiser, and receive seisin and possession, undertook to convey this parcel of land to *Amos Perley*, by deed of quitclaim dated *Jan.* 9, 1802; which he made and executed in his own name, in his capacity of attorney to *Coburn.* This parcel also was included in the deed from *Amos* to *Nathaniel Perley.*

On the 22d of *Oct.* 1799, the same land was attached by *Amos Perley* in a suit against *Davis;* and this attachment also, after judgment for the plaintiff, was followed by a seasonable extent, *Jan.* 21, 1801, on all the land previously taken by *Chandler* and *Coburn*, subject to the incumbrances thereby created, the full amount of which was estimated and deducted by the appraisers. The title of the demandant was known to the officer at the time of this attachment; and to the creditor, at the time of the extent.

The land demanded was a narrow strip, through which was a canal. It had never been inclosed in fence; but the demandant, about fourteen years ago, had extended the side fences of his garden, adjoining the premises, across to the canal, which thus answered the purpose of a rear fence to his garden, and included a small part of the demanded premises. This garden he afterwards sold, and his grantee succeeded him in the occupancy of the land thus included.

The canal was made by the father of the tenants in 1803, to convey water to his mill standing on the premises; and had ever since continued, with the mill, in their exclusive occupancy. The demandant, however, in 1822, inquired of a tenant under *Perley*, by what authority he occupied, stating that he claimed the premises; and in *August* 1823, he forbade one of the tenants to work on the premises, alleging his own claim; and in the autumn of the same year he en-

tered the mill and demanded possession of another occupant under *Perley*, again claiming the premises as his own.

Upon this evidence, at the trial before *Weston J.* it was objected on the part of the demandant, that the extent of *Coburn's* execution was void, because the demandant's title-deed was made and delivered before the attachment, and was recorded, and also known in fact to the officer, before the extent;—that the deed from *Coburn's* attorney to *Amos Perley*, conveyed nothing, being made without sufficient authority, and not executed in the name of the principal;—and that nothing passed to *Amos Perley* by the extent of his execution; because *Davis* had then nothing in the land, his supposed title being taken by the previous attachments; and because, if not, yet the deed of the demandant was known to the officer before the attachment, and to *Perley* before the extent.

On the part of the tenants it was objected that the action was barred by the statute of limitations, the demandant having failed to prove his own seisin within twenty years. And a verdict was taken for the tenants, subject to the opinion of the court upon the evidence in the case, as above stated.

A. Belcher, for the demandant.

Allen, for the tenants.

Mellen C. J. delivered the opinion of the Court.

The title to that part of the demanded premises which is covered by *Chandler's* levy, seems clearly to have been vested in him thereby; because in his suit he caused the land to be attached on the *sixth* day of *September*, 1799, and having recovered judgment against *Davis*, he caused his execution to be levied within thirty days after judgment, and to be seasonably recorded; and the title from *Chandler* has been regularly deduced to *Nathaniel Perley;* and the tenants are his heirs at law. But the title of the demandant is under the deed of *Davis*, bearing date *September* 7, 1799, one day later than *Chandler's* attachment, whose title to the land, on which he extended his execution, has relation back to *September* 6. Thus the tenant's

title is good, as to this part of the premises demanded. As to the residue of the premises, it is equally clear that the tenants have no title in themselves; because, though *Coburn* regularly extended his execution on the same, and caused it to be seasonably recorded, and thereby legally obtained *Davis's* title to the same; still, an inspection of the power of attorney from *Coburn*, clearly shews that his attorney had no kind of authority to make the conveyance to *Amos Perley;* and of course the title to such residue now remains in *Coburn.* The case is in no degree altered by the attachment and levy of *Amos Perley* on the land, as the estate of *Davis*; who then did not own it. As we have just said, it was then the property of *Coburn.*

But there is another ground of defence to be examined. The writ in this case bears date *November* 25, 1825; and the demandant declares on his seisin of the premises in question, within twenty years next before that time. It is competent for the tenants, under the general issue, to disprove this allegation of seisin within that period; though if the demandant had proved it as alleged, it would not be competent for them, on such issue, to prove that he had, since such seisin, conveyed the title to a third person, unless they held under such person; and in the present case, the tenants do not hold under *Coburn. Wolcott v. Knight*, 6 *Mass.* 418.

Does the evidence on the part of the tenants, disprove the alleged seisin of the demandant within twenty years; that is, that he has never been seised since *November* 25, 1805? On this point, the facts are these: The demandant's deed from *Davis*, though dated *September* 7, 1799, was not registered till *May* 3, 1800. Now it appears that prior to that day, viz. *September* 9, 1799, *Coburn* made his attachment, and followed it up by a levy on the land, *January* 21, 1801, which was within thirty days after his judgment; and the execution and return were seasonably recorded, as has been before stated; and his title is good, by relation, from the day of attachment. Thus it appears that no title passed by *Davis's* deed to the demandant; but, on the contrary, *Coburn*, in January 1801, became the owner and actually was seised of the residue under his levy; and we have no proof that since that time the demandant has ever had any

exclusive and adversary possession under his deed. It is true, that in 1822 and 1823, the demandant claimed to own the land demanded, and once entered the mill standing thereon, and demanded possession; but he never obtained it; nor had he then any right of entry.

There is no proof that *Coburn*, at the time of his attachment, had any knowledge of the existence of the demandant's deed from *Davis*. The uncommunicated knowledge of the officer, even if it had existed at the time of the attachment, would not alter the case; but it is not pretended that he knew of the deed at that time. The very object of an attachment is to bind the property attached. It is the incipient step towards acquiring a title; and if this step be fairly taken, and without notice of any existing conveyance from the debtor, it may be lawfully followed by a levy within thirty days after the rendition of judgment, and the title be thus perfected; though at the time of the levy, the creditor may have such notice.

There are some minor questions presented by the report; but according to the view which we have taken of the cause, it is of no importance to examine them. We see no ground on which the motion for a new trial can be sustained; and therefore there must be

Judgment on the verdict

Chandler *vs.* Morton.

The rule that a party to a negotiable note shall not be admitted as a witness to prove it usurious, extends to the maker of an accommodation note; and is applied even where the note had been delivered up to the real debtor, on his giving a recognizance to the creditor for the amount. And its application is not restricted to the case of an innocent indorsee; but is admitted where the usurer himself is a party.

The consideration of a recognizance or statute-acknowledgement of debt, *it seems* may be impeached for usury, even in an action brought by the creditor, against the debtor, for possession of the land taken by extent in satisfaction of the debt.

This was a writ of entry, in which the demandant counted upon his own seisin, and a disseisin by the tenant. Beside the issue of *nul disseisin*, the tenant pleaded that the demandant levied upon the premises an execution which was issued by a justice of the peace, upon a recognizance entered into by the tenant, under the statute respecting the acknowledgement of debts, in which usury was included and taken; and issue was joined upon a traverse of this plea.

At the trial, before *Weston J.* the demandant objected to the introduction of any proof of usury anterior to the recognizance; but this objection was overruled.

The only evidence of title in the demandant was the recognizance, execution, and extent, mentioned in the tenant's plea. The tenant offered to prove that the return of the extent was not made out till more than sixty days after the extent, and after the return day had passed; and that it was false;—but this evidence the Judge excluded.

He further offered as a witness the maker of an accommodation note made for the tenant's benefit, to be indorsed to the demandant, and accordingly indorsed, which afterwards formed part of the basis of the recognizance; to prove that the note so created was usurious. But this testimony, so far as it went to show the note to have been tainted with usury, was also excluded.

A verdict was thereupon taken for the demandant, subject to the opinion of the court upon the admissibility of the rejected testimony.

Allen, for tenant, contended for the admission of the witness, on the ground that the note having been paid and cancelled, the case was no longer within the rule of *Churchill v. Suter*, 4 *Mass.* 162. qualified by *Fox v. Whitney*, 16 *Mass.* 118, which limits the rule of excluding a party to a note from testifying to impeach it, to the case of an innocent indorsee. But here the indorsee himself is a party to the usury. Moreover, the witness was not called to impeach the validity of the note, as against himself; but to prove the subsequent fact of usury in its transfer. *Skilding v. Warren*, 15 *Johns.* 272. 10 *Johns.* 231. *Powell v. Waters*, 17. *Johns.* 180. *Parker v. Hanson*, 7. *Mass.* 470. *Pierce v. Butler*, 14. *Mass.* 312.

To the point that the consideration of the recognizance might be inquired into, he cited *Bridge v. Hubbard*, 15. *Mass.* 100.

A. Belcher, for the demandant.

Weston J. delivered the opinion of the Court.

Notwithstanding the vacillation in the English courts on the question, whether a party to an instrument shall be received as a witness to prove the same to have been originally void; there has been none in Massachusetts, nor in this State, since its separation. By the case of *Churchill v. Suter* it was settled, that a party to a negotiable security shall not be received as a witness to prove the same to have been originally void.

The counsel for the tenant admits the soundness of this principle but insists that it is to be applied only in favor of an innocent holder; and that the demandant in this case, having been a party to the usury, is not within the protection of the rule. And further, that the witness offered, having become a party only for the benefit and accommodation of the tenant, may be received; as the facts would not disclose any turpitude imputable to him. In the case of *Walton v. Shelly*, Lord *Mansfield* predicates his opinion upon the maxim of the civil law, that no one disclosing his own turpitude can be heard; and

Thompson C. J. adverts to the same maxim in *Winter v. Saidler;* as does *Parsons*, C. J. in the case of *Churchill v. Suter.* But the authority of this maxim is not the principal ground upon which the rule is founded, which is that of public policy to facilitate the circulation of negotiable paper, which could not but be greatly checked by the hazard which would attend it, if this rule were not enforced. Besides, the witness offered participated in the legal turpitude of the transaction. With a full knowledge that the other parties meditated a violation of the law, he lent his name as a party to an instrument, which he knew was tainted with usury, and thus aided both the demandant and the tenant in their unlawful purpose.

In the case of *Fox v. Whitney*, 16 *Mass.* 118, a new trial was granted, because the defendant on the record, who was sued as administrator, was received as a witness. The action was upon a negotiable note, by the administrator of the payee against the administrator of one of the makers. The other maker, who had signed the note as a surety, was admitted as a witness to prove the same to have been usurious; and rightfully, as the court held, because the note, though negotiable, had not been negotiated, the action being between the administrators of the original parties. C. J. *Parker* further adds, that no currency had been given to the note, and that there was no innocent indorsee to be prejudiced. From which it is insisted, that it must be understood that the rule is to be applied only in favor of an innocent indorsee. It may be considered as limiting the application of the rule to negotiable paper, when actually negotiated; but it does not decide that such testimony could in any case be admitted, as against an indorsee. The case of *Churchill v. Suter* is cited with approbation; and no intimation is given of a disposition on the part of the court to contravene any of its principles.

In *Skilding v. Warren*, 15 *Johns.* 270, the only point decided, having a bearing upon this question was, that a party to a negotiable instrument is inadmissable as a witness, to show it void at the time of its execution; but that he is competent to testify as to facts subsequently arising. In *Powell v. Waters*, 17 *Johns.* 180, *Smith*, the second indorser, was received as a witness, not to prove the note originally void, or tainted with usury when he indorsed it, but that it

had received its taint in its subsequent negotiation; and this is the ground upon which his competency is expressly placed, by *Spencer* C. J. who delivered the opinion of the court. He says, "the situation in which *Smith* stood, did not incapacitate him from testifying to that fact. He was not asked any question involving his own turpitude, as whether the note which he passed as a good and available note, was void within his knowledge, when he offered it to the plaintiffs; and that I consider to be the precise point on which a majority of this court in *Winton v. Saidler*, rejected the testimony of an indorser. The reasoning of Mr. Justice *Thompson*, who delivered an opinion on that side of the question, proceeds on the maxim that *nemo allegans suam turpitudinem est audiendus;* he considered it as contrary to sound policy and morality, that a party to a negotiable note, should be admitted as a witness to invalidate it; meaning, undoubtedly, to be understood that a person, whose name was on a negotiable paper, and who had thereby contributed to its circulation, should not be heard to say, that the paper thus sanctioned by his name, was tainted when it passed from his hands; but if it receives its taint when it is negotiated to the party plaintiff, by the facts then happening, it is not contrary to public policy or morality, nor would it come within the principle of the decision of *Winton v. Saidler*, to hear the witness as to such facts." Whether the facts would or would not justify the distinction there taken, it is plain that the court did not mean to controvert the rule that a party to a negotiable instrument cannot be a witness to prove the same originally void; but that he was admissible to prove subsequent facts; and to this point they rely upon *Skilding v. Warren* as an authority. It is true, the chief justice says the rule in *Winton v. Saidler* was intended for the protection of *bona fide* holders of negotiable instruments, and doubtless this constituted one of the reasons for the introduction of the rule; but he does not state that it is not to be applied, when the plaintiff may have received the note with a full knowledge of the facts. That no such exception existed in the application of the rule, had been before expressly decided in New York, by the whole court, when chief justice *Spencer* was upon the bench; and in *Powell v. Waters*, he does not call in question the prior decision, nor intimate any change

of opinion on his part. That decision was made in the case of *Mann v. Swaim*, 14. *Johns.* 270. It was there offered to be proved by the indorser, that the note was made upon an usurious contract between him and the plaintiff, for the purpose of being discounted by the plaintiff, at a greater discount than lawful interest. The plaintiff was there, as here, a party to the usury, which was taken for his benefit. The witness was rejected; and it was contended that he should have been received; because the plaintiff was not a *bona fide* holder. But the court refused to sustain the exception. They say, "as a general rule, it has been the established law of this State, that a party to a negotiable note cannot be admitted as a witness to prove it usurious; and there can be no sound reason for varying this rule, when the holder is apprized of the fact of usury. Ignorance with respect to the usury, does not protect the holder. It is equally void in the hands of an innocent *bona fide* holder, as in the hands of one acquainted with the usury; and if so, why should the rules of evidence, to get at the usury, be different? It is highly important that the rules of evidence should be as general as possible. Multiplied exceptions and distinctions generally lead to embarrassment and difficulty in the application of the rule." It would be difficult to adduce a case more exactly parallel with the case before us, than the one last cited.

But in the case of *Churchill v. Suter*, which is the leading authority in Massachusetts, the plaintiff could not be regarded as an innocent and *bona fide* holder. He was a party to the consummation of the usury. It was taken for his benefit; and he enjoyed its fruits. And so *C. J. Parsons* viewed the case, in giving his opinion. After having excluded the testimony, he says it is no longer necessary to decide the second question, which was whether, the testimony being received, it presented a case of usury; but he nevertheless proceeds to a consideration of it, and upon this point says—"a note may be sold at a greater discount than the legal interest, without being usurious. This generally happens when the holder doubts the solidity of the parties holden to pay; and therefore sells it, without his own guaranty, at a greater than the legal discount, on account of the hazard. In the case before the court, the plaintiff took the guaranty of all the persons, who ever had any interest in the note, and even of

the broker. If a sale under these circumstances is not to be considered as usurious, it is not easy to conceive what sale is within the statute."

If there was usury in that case, *Churchill* was the usurer; and the benefit of the rule having been extended to him, proves that it does apply, as has been expressly decided in New York, and is to be enforced, at least in negotiated instruments, although the plaintiff is not a *bona fide* holder.

With regard to the regularity of the levy, we are very clear that parol testimony could not be admitted in this action to contradict the records of the justice, or the return of the officer.

It has become unnecessary to decide the question raised, whether it be competent to impeach the consideration of the recognizance. It may not however be improper to remark that the statute declares void all bonds, contracts, mortgages, and assurances made for the payment of any money lent upon an usurious consideration. If a recognizance be not included under any of these terms, it would be easy in that form to evade the statute, and to enforce the collection of money lent in violation of its provisions.

Judgment on the verdict.

REDINGTON *vs.* FARRAR & AL.

In *assumpsit* against two or more, the plaintiff cannot amend by striking out the name of one of the defendants.

THE motion in this case was briefly spoken to, by *Boutelle* for the plaintiff, and *R. Williams* and *Sprague*, for the defendants; and the opinion of the Court was delivered by

MELLEN C. J. This is an action of *assumpsit* against *Jonathan* and *Isaac Farrar*; and the motion made by the plaintiff is, that he

may have leave to amend by striking out the name of *Isaac Farrar*. This motion is opposed, on the ground that such an amendment is not by law allowable. In actions for torts, and in real actions, such amendments are frequent, and are considered as unobjectionable, according to our practice; but until the decision in the case of *Colcord & al. v. Swan*, 7. *Mass.* 291. the principle was not supposed to extend to actions on contract; certainly it had not been known in practice, so far as our acquaintance with the subject has extended. It appears that in that case the motion was considered by the counsel as a novelty. The English authorities seem to be directly opposed to such a course of proceeding. See 1. *Chit. Pl.* 31. 32. *Chandler v. Parker & al.* 3. *Esp.* 76. *Chiswell v. Ingham*, 1. *Wils.* 89. *Tidd's Practice*, 631.

In principle, a plaintiff may as well amend by changing the nature of the action, as by striking out a defendant in an action founded on contract; and a plaintiff may as well be stricken out, as a defendant. To grant leave to make the proposed amendment, would seem to be to destroy the use and effect of all pleas and objections on account of the improper joinder of parties, and in fact change the law, as it has long been understood and practised. The case of *Colcord & al. v. Swan* was an action of covenant against a man and his wife, and this fact appeared on the record. Her covenant was a perfect nullity; the contract declared on, or rather the covenant set forth, was in law the covenant of the husband only; and this was apparent. The amendment made no change in the real parties to the suit, nor in the legal effect of the declaration; her covenant was void. The court assigned no reasons for their opinion, but merely gave leave to amend, by striking out the name of the wife. The case of *Parsons v. Plaisted & al.* 13. *Mass.* 189. was an action of covenant broken. One of the defendants was a feme covert at the time of making the covenants. A motion was made to strike out her name as a co-defendant, when it was ascertained that she was a married woman; but no order was then taken by the court. Before the next term she died, and at that term her death was suggested, the motion was renewed, and leave was granted on payment of costs. No reasons were assigned by the court; but the mover relied on the case

of *Colcord & al. v. Swan.* Now, admitting that these amendments were by law allowable,—and that is more than we feel warranted in admitting,—those cases are not similar to the present, nor can they be guides on the present occasion. We prefer to follow decided principles, and adhere to long and settled usage. It is better that a plaintiff who has commenced his action erroneously, should be obliged to discontinue it and commence a new one properly, than that the well known rules of pleading should be unnecessarily violated. For these reasons the court are not disposed to relax those rules on the present occasion. It is for the legislature to alter the law, should they think proper. *Motion denied.*

THE GARDINER MANUFACTURING COMPANY *vs.* HEALD.

If a written instrument, purporting to be a deed of partition, is signed by the parties, but not sealed, yet it is not therefore to be treated as a nullity, so far as to admit parol testimony to contradict it.

It seems that a sale of standing trees by parol, though it might bind a subsequent purchaser of the land having notice of the sale, yet without such notice it cannot affect him.

One tenant in common may have *assumpsit* against his co-tenant, who has sold the common property, and received all the money.

If an execution be issued against an absent defendant, without the previous filing of a bond, pursuant to the statute, it cannot be avoided collaterally, but is good till superseded.

THIS was an action of *assumpsit*, for money had and received, and was tried before the Chief Justice upon the general issue.

It appeared that *Solomon Bangs*, *John P. Hunter*, and others, being tenants in common of a large tract of land, the plaintiffs attached *Bangs's* interest in the land, *Sept.* 21, 1824, recovered judgment

against him at *August* term, 1825, and extended their execution seasonably and regularly upon the debtor's undivided estate in the same land. In the winter following, the present defendant entered upon the premises, and cut and carried away a large quantity of pine timber, for the value of their proportion of which the plaintiffs brought this action.

The defendant offered in evidence a writing dated *Jan.* 31, 1824, purporting to be an agreement or deed of division, but not sealed; by which the tenants in common, who were all parties to the instrument, appeared to have assigned the lot numbered fifteen, to *Bangs*, who, by the same instrument, released to them the residue of the tract. The signature of *Bangs* was made by *David Smiley*, as his attorney; whose authority, however, was only by a writen memorandum not under seal.

The defendant also introduced *Hunter* as a witness, who testified that the tract was valuable principally for its timber; that there had been a former division by parol of certain parts of the land, so far as respected the timber growing on it, which was taken off accordingly; that the written agreement of *Jan.* 31, 1824, was the result of a treaty negotiated on several preceding days between the parties, and was intended to apply to the standing timber only, and not the land itself; that *Bangs*, pursuant to this agreement, had, during the same winter, taken the timber from the lot thus assigned to him; that the plaintiffs had notice of this division of the timber soon after their attachment; that the defendant on the 20th of *Sept.* 1825, gave a written notification to the plaintiffs, stating that he was a tenant in common of the whole tract, from which he should cut timber, after forty days then next coming; that he did thereupon cut the timber in question from the lot assigned to him; and that *Bangs* had notice of the division thus made in his behalf, with which he appeared satisfied.

This testimony was objected to, but was admitted by the chief justice, for the purpose of reserving the whole case for the consideration of the court.

The sufficiency of the plaintiffs' extent was objected to, because it appeared from the record that though their action against *Bangs* was continued two terms on account of his absence from the State, into

which it did not appear that he had returned before judgment, yet no bond had been filed with the clerk, pursuant to the statute, previous to the issuing of the execution. This objection was overruled. A verdict was returned for the defendant; which was to be set aside, and judgment entered against him by default, if, in the opinion of the court, the evidence objected to was legally inadmissible, or, being admitted, constituted no bar to the action.

Allen, for the plaintiffs, contended—1. That the remedy was rightly conceived, the action being by one tenant in common against another, for his proportion of the purchase-money arising from the sales of the common property. *Brigham v. Eveleth* 9. *Mass.* 538. *Smith v. Barrow* 2. *D. & E.* 476. 3. *Pick.* 420. 1. *Chitty's Pl.* 26, 27. *Willes* 209. *Cowp.* 419. 8. *D. & E.* 146. 6. *D. & E.* 695.

2. That the instrument of *Jan.* 31, 1824, was inoperative, even as against *Bangs*. It had no effect as a division of the land, not being a deed, nor recorded. Nor had *Smiley* any authority to execute a deed for *Bangs;* nor has he attempted to act in the name of his principal. *Porter v. Hill* 9. *Mass.* 34. *Porter v. Perkins* 5. *Mass.* 233. *Perkins v. Pitts* 11. *Mass.* 125. *Stetson v. Patten* 2. *Greenl.* 358. *Milliken v. Coombs* 1. *Greenl.* 343. *Shep. Touchst.* 56.

3. The testimony of *Hunter* was inadmissible, there being no latent ambiguity in the instrument; and in this writing, such as it was, the whole previous parol treaty was merged. *Brigham v. Rogers* 17. *Mass.* 517. *King v. King* 7. *Mass.* 496. *Kilham v. Richards* 10. *Mass.* 239.

4. The rights of the plaintiffs relate to the moment of their attachment; previous to which they had no notice of any of the transactions proved. If the debtor had conveyed his estate by deed, it would not have bound the plaintiffs without registry, or previous notice; *a fortiori* they are not bound by a transaction *en pais*, relating to real estate, of which they had no knowledge whatever. So far as the agreement of the owners respected standing trees, it was void by the statute of frauds. *Crosby v. Wadsworth* 6. *East.* 601—3.

Boutelle, for the defendant, argued—1. That the action, being for money had and received, was of the nature of a bill in equity; and that therefore the parol testimony was admissible, to reform the writing, and correct a plain mistake. 3. *Stark. Ev.* 1018—19. 1027. *note l.* 1. *Dane's Abr.* 248—9.

2. If not, and the writing is inoperative as a deed, though plainly intended for one, it is merely void, and a nullity; and so the parol testimony is to be received as the only evidence of the facts. 1. *Pick.* 415. *Johnson v. Johnson* 11. *Mass.* 359.

3. The parol agreement, though for the sale of growing trees, is not within the statute of frauds. 1. *Ld. Raym.* 182. 11. *East.* 362. *Warwick v. Bruce* 2. *M. & S.* 205. *Bostwick v. Leach* 3. *Day* 476. 2. *Johns.* 421. *note.* 2. *Stark. Ev.* 599. 1. *Dane's Abr.* 650.

4. And if it were, yet it is taken out by part execution. *Winter v. Brocknell* 8. *East.* 310. *Davenport v. Mason* 15. *Mass.* 85. 92. *Ricker v. Kelley* 1. *Greenl.* 117. 14. *Johns.* 15. *Tucker v. Bass* 5. *Mass.* 164.

WESTON J. delivered the opinion of the Court.

It has not been contended in argument, nor is it true in fact, that any legal partition of the land, from which the timber in question was cut, has been made; so as to convert the estate in common, which *Solomom Bangs* held, into an estate in severalty. The parties in interest could make such partition between themselves, only by deed. The instrument, which purports to be a partition, closes with the words "in witness whereof, we the said *Bangs &c.* have hereunto set our hands and seals"; but no seals were in fact affixed. And if there had been, *David Smiley*, who put the signature of *Bangs* thereto, as his attorney, was not authorized by deed so to do. When therefore the plaintiffs attached the interest of *Bangs* in the land, he held as tenant in common; and his estate duly passed, by the subsequent proceedings, to the plaintiffs.

The defendant insists that what he did was rightfully done, in pursuance of an agreement with *Bangs*, made prior to the attachment.

The agreement was committed to writing, and was signed by the parties assenting. There had been a previous negotiation and treaty in relation to the subject; but the written instrument is the evidence of what was concluded. The parol testimony objected to went to change that which the parties had set forth in writing. By the latter, the land was to be divided, and the timber, as a consequence of that division. By the former, the timber alone was to be divided, and the land to be left undivided.

In the *Countess of Rutland's case*, 5. *Co.* 26, it was resolved that "it would be inconvenient that matters in writing made by advice, and on consideration, and which finally import the certain truth of the agreement of the parties, should be controled by an averment of parties, to be proved by the uncertain testimony of slippery memory; and it would be dangerous to purchasers, and all others, in such cases, if such nude averment against matters in writing should be admitted." And there is no rule of evidence better established, than that parol testimony cannot be received to vary, alter or contradict that which is written. But it is contended, on the part of the counsel for the defendant, that as the written instrument cannot by law operate a partition of the land, as its terms import, it may be rejected as a nullity; and then the parol testimony might be admissible. The rule of law which gives a preference to written evidence, and excludes parol when it comes in competition, is designed to elicit and establish truth. Where the law does not require written evidence, a parol agreement may be enforced. But when agreements are committed to writing, that alone is evidence of what the parties have agreed. And if, through defect of form, or by reason of some positive provision of law, it cannot have the effect intended, it still remains the best evidence of the understanding of the parties. To suffer it to be controverted and changed by "slippery memory," would be an attempt to illustrate that which is more certain, by that which is less so; which is no less contrary to just principles of reasoning, than to law.

If there had been no written evidence in the case, and the parol agreement had been such as it appeared in testimony, it might have

amounted to a license to the defendant, or to a sale of the standing trees, for which it seems *Bangs* had an equivalent, which might perhaps have bound him, or those deriving title from him with notice. But it would be certainly opposed to the policy of the law in relation to real estate, to give effect to such a sale against a purchaser, or an attaching creditor, without notice. In the case before us, the land was valuable principally for its timber; and there is much land of this description in this State. The timber is attached to the realty. It is part of the inheritance. To cut or destroy it, except in a few specified instances, is waste on the part of the tenants for life or years, for which they are answerable to him who has the next estate of inheritance in remainder or reversion. What safety would there be in buying property of this description, if a party without notice might lose the principal value, and perhaps the sole object, of his purchase, if any one might strip the land with impunity, who could prove by parol that the vendor had previously sold the timber to him? It is not pretended that the plaintiffs had notice of any such agreement, prior to their attachment; and they are under no obligation to fulfil any parol contract of their debtor, whatever might be said of a written one, in relation to the timber.

By the notice given by the defendant to the plaintiffs, he is protected from being held answerable to them as a trespasser, for penal damages under the statute to prevent tenants in common and others from committing waste; but if the plaintiffs have been injured, they are not without remedy. If they had an interest in the trees as a part of the realty when attached to the land, when severed therefrom their interest did not cease. If one man enter upon the land of another, and there cut down his trees and sell them, the party injured may waive the trespass, ratify the sale, and maintain *assumpsit* against the wrong doer for the money. And we are satisfied from the authorities cited, that one tenant in common of personal property, as the timber in question was, after it was severed, may maintain *assumpsit* for his proportion against another, who has sold the common property, and received all the money.

In regard to the levy, we are of opinion that it must be deemed effectual in this action. A remedy for the irregularity stated, cannot

be applied in this collateral manner. It must be obtained by *audita querela;* or by motion to the court, by whom the judgment was rendered, to set aside the execution.

Verdict set aside and the defendant defaulted.

HEALD, *adm'r. appellant, vs.* HEALD *& als.*

The statute of limitations applies to civil actions, at common law; and not to a claim made before the Judge of Probate against an administrator, for the rents of real estate occupied by him.

Whether an administrator, who is also an heir at law, is chargeable as administrator for the rents of real estate in his occupancy, without some contract express or implied,—*quære.*

ON the return of a commission issued by the Judge of Probate for this county, upon the petition of *George S. Heald* and others, heirs at law of *Timothy Heald*, deceased, it appeared that *Washington Heald*, the son of the deceased, and administrator on his estate, had occupied his tan yard during one year after his decease, and that the rent was of the value of 250 dollars, for which the other heirs prayed that he might be charged in his administration account.

It was admitted, at the hearing before the Judge of Probate, that there was no express consent of the heirs that he should occupy the tan yard, nor any express agreement on his part to account for the rent. Nor was there any evidence of implied consent, except that it appeared that he occupied the homestead farm, including the tannery, and supported his mother and her five minor children who were all members of his family, from the profits of the farm; and that two or three of the other heirs, who were of age, lived in the same neighborhood, and were not known to have made any objection to his occupancy of the estate.

Upon this evidence the Judge of Probate decreed against the ad-

ministrator, charging him with the rent of the tan yard; from which decree he appealed to this court; assigning for reasons of appeal, that being one the heirs, he had a right to occupy the estate without being liable to account in this manner for the rents; that there was no evidence any consent of the heirs, express or implied, to his occupancy; and that more than eight years having elapsed since he occupied the real estate, the claim was barred by lapse of time.

Boutelle, for the appellant, contended that he must be considered as having occupied the estate in virtue of his legal title; which was as heir, and not as administrator; and that in the latter capacity he had no right to enter and take the profits of real estate; nor did his bond relate to such property of the intestate, but regarded only his personal assets. *Dean v. Dean* 3. *Mass.* 258. *Drinkwater v. Drinkwater* 4. *Mass.* 355. *Hayes v. Jackson* 6. *Mass.* 149. *Gibson v. Farley* 16. *Mass.* 280. At all events he is not liable here, unless he would be answerable in a suit at common law; which cannot be, without some contract, express or implied; and in this case there is neither. *Stearns v. Stearns* 1. *Pick.* 157. *Wyman v. Hook* 2. *Greenl.* 337. The relation of landlord and tenant did not exist.

But if this mode of remedy did exist, it comes in the place of a suit at common law; and ought therefore to be barred by the same lapse of time which bars that kind of remedy. Otherwise, the salutary provisions of the statute of limitations would be defeated.

Orr, for the appellees.

Mellen C. J. delivered the opinion of the Court.

The statute of this state, *ch.* 51, *sec.* 22, under the authority of which the proceedings in this case originated, is similar to that in Massachusetts; which has often been the subject of examination and judicial construction, both before and since our separation from the parent Commonwealth; and it is therefore proper and useful to have respect to those decisions in determining the case before us. It seems well settled that though an administrator has no legal right to enter into possession of the real estate of which his intestate died seised,

because it has descended to his heirs at law ; still, when he does so enter and improve it, he is accountable to those heirs for the rents and profits. If the estate is solvent, they are entitled to the estate itself and its income ; if insolvent, the creditors are only entitled to the *estate of which the intestate died seised ;* and not to the rents and profits after his death ; for these belong to his heirs. *Gibson v. Farley* 16 *Mass.* 280. In the present case the administrator occupied the estate for a year, and the commissioners have reported the amount for which he ought to stand chargeable, and the Judge of Probate has accepted their report and decreed accordingly. The question is whether the decree ought to be affirmed or reversed. We are satisfied that that it ought not to be reversed on the ground that the claim of the heirs has been barred by the statute of limitations. The words of that statute confine its application to civil actions, or common law proceedings. In other cases of special jurisdiction or process, the limitation depends on special provisions ; as in cases of writs of error—petitions for review —grants of administration and the like. The statute under consideration imposes no limitation on the powers of the Judge of Probate *in respect to the time* of exercising his jurisdiction in a case like the present.

As to the merits of the claim of the heirs, we would observe that we are to consider the facts such as to have authorised the exercise of jurisdiction by the Judge of Probate ; both parties appeared before him and were heard ; and the amount of liability was sanctioned by his decree. The statute is silent as to the fact whether the occupation of an administrator, to bring it within the cognizance of the Judge of Probate, must be under a contract express or implied ; though the case in 1 *Pick.* 157, seems to proceed on the ground that such contract is necessary to give the jurisdiction. We do not mean to decide this point, because we think the case furnishes evidence of an implied contract between the heirs and the administrator. There is no proof that he entered and occupied wrongfully ; on the contrary several of the heirs, who were of age, lived in the neighborhood, and must have known and assented to the occupation. The minor children were living on the land. The case furnishes no proof of a claim of right by the administrator ; as in the case of *Wyman vs.*

Hook, 2 *Greenl.* 337, where the person attempted to be charged in *assumpsit* on the ground of an implied promise, entered under a defective levy of an execution, and claimed a right to hold under it as a valid one. It does not appear who was the guardian of the minor children. If the administrator was, and he has any claim for their support during the year he occupied the farm, he must adjust that matter with the Judge of Probate. If any one else was the guardian, he must look to him for satisfaction. On the whole we do not perceive any sound reason for disturbing the decree. And accordingly our opinion is that it must be affirmed, with costs for the appellees, and the cause be remitted to the Judge of Probate for further proceedings in conformity to this decree.

Decree affirmed.

FOSS *vs.* STICKNEY.

Where an execution has been extended on two or more parcels of land, the debtor is not entitled to redeem one of them alone, without the others, even though its value is separately stated in the certificate of the appraisers.

Where a judgment debtor, whose land has been taken by extent, having tendered the money within the year, brings his writ of entry for the land, pursuant to *Stat.* 1821, *ch.* 60, *sec.* 30, it is sufficient that the money be produced and lodged in court at any time before the rendition of judgment.

THIS was a writ of entry. The demandant claimed the premises under a deed from *Joseph North*. The tenant held under a deed from *James Bridge*, who had taken this and two other parcels from *North* by a previous attachment, subsequently perfected by a regular extent. The demandant, within the year, caused the improvements made by the tenant on this particular parcel, and the rents and income thereof, to be ascertained and certified by three justices of the

peace, pursuant to the statute, and tendered to the tenant the value of this parcel with the fixtures, deducting the rents and income thus ascertained; and afterwards, on the same day, tendered another and larger sum, on the ground that the growing crops were his own; both which sums the tenant refused to accept, because they were short of the whole amount of the money at which all the three parcels were appraised and set off. He also objected that the certificates were uncertain, in not stating absolutely the amount at which the land was originally appraised; but merely expressing the amount as stated by the demandant to the justices.

It appeared also that the demandant, after discovering that the premises were under attachment at the time of *North's* conveyance to him, commenced against his grantor an action of covenant, alleging a breach of the covenants of seisin in fee, of good right to sell, and of freedom from incumbrance; in which he afterwards had judgment for full damages and costs, of which a very small part had been satisfied.

At the time of the tender, the demandant offered no deed of release to the tenant; nor was the money tendered brought into court till the time of trial.

Upon this evidence a verdict was taken for the tenant, by consent, subject to the opinion of the court whether, upon these facts, the action was maintainable.

Sprague, for the demandant, adverted to the *Stat.* 1821, *ch.* 60, *sec.* 30, which gives the right to redeem any tenement taken by extent; and argued that where several tenements were so taken, the right to redeem applied to each several tenement, to be exercised at the option of the debtor, or his assigns. A different construction would be fraught with ruin to the assignee of a small parcel of land included in the same appraisement with other estates of great value; to which, if bound to redeem, yet he could not thereby acquire any title.

As to the recovery by the demandant in his action of covenant against *North*, it is plain, from the facts in the case, that it must have been upon the covenant against incumbrances, because no other was broken. The grantor, at the time of the conveyance, was in fact

seised in fee, and his seisin passed by the deed to his grantee. The cases which appear to favor the tenant upon this point, proceed on the ground that nothing passed by the deed. Besides, in those cases the grantee had obtained satisfaction of his judgment; but here he has not; and a judgment in such case, without satisfaction, changes no rights of the parties.

Boutelle, on the other side, contended that as no incumbrance was specially set out in the action against *North*, the judgment must be intended to have been rendered upon the covenant of seisin; and that having made his election to resort to his grantor upon the covenants, he had no right to the character of an assignee. *Porter v. Hill* 9. *Mass.* 34. *Stinson v. Sumner ib.* 143.

The extent, he insisted, created a general lien on all the land taken; like a mortgage on divers parcels for the security of one debt; in which case the whole must be paid, to discharge any one parcel of the lien. *Taylor v. Porter* 7. *Mass.* 355. And the right thus acquired by the creditor, it was not in the power of the debtor, by the assignment of a parcel, to defeat or impair. *Bond v. Bond* 2. *Pick.* 382.

Weston J. delivered the opinion of the Court at the ensuing term in *Somerset*.

Several objections are urged by the tenant to the right of the demandant to recover in this action. The certificates of the justices, it is insisted, do not positively name the amount at which the land was appraised and taken, on the levy of the execution. The justices do state the amount from the information of the demandant. If stated truly, it is unimportant from what source derived. The sum, according to the statement of the demandant, exceeded by a few cents the actual amount of the appraisement; but as this excess is against the demandant, and in favor of the tenant, it is a mistake of which the latter has no right to complain. The tender does not appear to have been embarrassed by any qualification or condition; nor is the right of the demandant impaired by his having made two successive tenders on the same day. It was competent for the tenant to have re-

ceived either. If either was right, more especially if the last was, the rights of the demandant are preserved. The want of the tender of a release prepared by the demandant, as none was required by him to be executed by the tenant, and as this was not assigned as a reason for declining the tender, cannot be sustained as a valid objection. The statute does not require that the money tendered should be brought into court at the first term. It is sufficient if produced and lodged in court, at or before the rendition of judgment.

It is further objected that the demandant, having sued his grantor, upon an alleged breach of his covenant of seisin, and having obtained judgment thereupon, can no longer claim the land against the grantor, or those claiming under him. The covenants set forth in the declaration in that action are, that the grantor was seised in fee of the premises; that they were free of all incumbrances; and that he had good right to sell and convey the same; and it is averred, in general terms, that the grantor had broken each of these covenants. It does not appear what further proceedings intervened, between the entry of the action and the rendition of judgment. Whether the defendant in that action was defaulted, or whether he pleaded to the same, and if he did, whether the pleadings would disclose any more specific and definite averment of an existing incumbrance, is not ascertained by the case as presented. If the judgment was recovered upon the ground of an incumbrance, it constitutes no objection to a recovery in this action. If on the ground of a want of seisin in the grantor, a question is raised whether it should be made to appear that satisfaction had been obtained. In the case of *Porter v. Hill*, cited in the argument, it is stated by the court that when a warrantee, in a *warrantia chartæ*, recovers and has seisin of other lands of the warrantor to the value, he cannot afterwards recover of the warrantor the lands warranted; and that if, therefore, the demandant after his judgment and satisfaction, had sued his grantor for the land, the latter might have defended himself by showing that judgment, which had falsified his deed. The basis of this principle would seem to be the recovery of the warrantee, in the one case, and seisin thereupon of lands of equal value, and in the other, a recovery and satisfaction, which is an equivalent and substitute for a seisin of other lands of the

warrantor. It is true, that in the subsequent case of *Stinson v. Sumner*, the court appear to entertain an opinion, that a recovery of judgment is attended with the same consequences. They refer to, and rely upon, the preceding case of *Porter v. Hill* as an authority for the latter decision, but do not intimate that satisfaction is necessary to preclude the party from demanding and recovering the land; but upon this point, from the view we have taken of the cause, it is not necessary for us to give an opinion.

The great and important objection, upon which the tenant relies to defeat the claim of the demandant is, that a part only of the debt, to satisfy which the land of the debtor was extended upon, has been tendered to him. The right of the demandant is derived from the thirtieth section of the act directing the issuing, extending and serving of executions; which provides that when any tenement or lands shall be taken in execution for debt, it shall and may be lawful to and for the execution debtor, his heirs or assigns, executors or administrators, within the space of one year next following the extending of the execution thereon, to tender to the creditor, or those claiming under him, the debt for which the same tenement was taken, with the charges and disbursements expended in repairing or bettering the same, over and above the rents and profits thereof. Here the legislature manifestly regard the land or tenement taken, as one entire thing; in relation to which the improvement on the one hand, and the rents and profits on the other, are to be estimated. The heirs, assigns, executors and administrators are named as standing in the place of the debtor, in respect to the tenement taken; by which we must understand the whole property, upon which the execution is extended. The debt also for which the same is taken, is treated as a certain and entire sum. The liquidation is to be made, and the sum, that is, that entire sum, to the amount of which the execution was satisfied, is to be certified by three justices, appointed in the manner prescribed, and the amount by them certified to be due upon the execution, for which the land was taken, (not a part of it) is to be tendered by the debtor, or those representing him; and thereupon the creditor is required to release to the debtor or his heirs, what?—the land or tenements so taken in execution. If this be not done, the debtor may recover

possession of the lands so taken in execution, in an action of ejectment. From the beginning to the end of this section, the subject matter of, the levy and the debt satisfied, is treated as entire. By the levy, the debt to the extent of the value of the land is paid, and the creditor holds the land by virtue of his extent; unless the same debt be paid or tendered, within the time limited. If the appraisers made a separate estimate of the different parcels taken in the same, it does not change the legal result. The aggregate value of the parcels is the amount for which the execution is satisfied. That is the debt to be tendered; and the subject matter of the levy is the whole land taken thereby. The attachment, by which a lien may have been created, is entire; so is the judgment, execution, levy and registry, made necessary by law to the validity and completion of the extent. The assignee of part of the land thus taken, and who becomes such between the attachment and the levy, has his remedy upon the covenants of his grantor; or, if he redeem the whole, he may call upon others assenting to such redemption, who are benefited at his expense, for contribution. But without further legislative provision in his behalf, whatever may be the inconvenience to which he may be subjected, he cannot compel the creditor to receive part of his debt and release part of the land taken. If it were otherwise, the creditor might be constrained to relinquish that part, the possession of which might be his principal or only inducement for causing the levy. That part may have appreciated in value, while the other part may have depreciated, by reason of contingencies happening within the year, by which their value might be affected. This is one of the reasons assigned by the court in the case cited from 2. *Pick.* and applies with equal force to the case before us. In that case it is settled in Massachusetts, that the debtor has no right, without the assent of the creditor, to redeem part. This decision was predicated upon a consideration of the rights of the creditor, which would be equally affected, if the assignee of part could redeem against him.

Judgment on the verdict.

The inhabitants of RICHMOND *vs. The inhabitants of* VASSALBOROUGH.

IN a question of domicil, evidence of the party's conduct afterwards as well as before, may be received to ascertain his intention on a particular day.

It is of no importance, in a question of domicil under *Stat.* 1821, *ch.* 122, whether the occupancy of the house in which the pauper dwelt was by right or by wrong.

THE question in this case was upon the domicil of one *Parker Burgis*, a pauper, at the time of the passage of *Stat.* 1821, *ch.* 122. In the autumn of 1818, he removed from *Gardiner* to *Vassalborough*; which place he left after the reaping season in the following year, and returned to *Gardiner*, partly, as he said, because he could obtain provisions and employment better, as he believed, in the latter place; and partly because he was dissatisfied with the conduct of his wife, with whom he was determined never to live again until she should manifest a disposition to behave better. He remained at *Gardiner*, without any satisfactory accounts from his wife, till *April* 1821, supporting himself by various kinds of common labor; during which time, and prior to the passage of the statute, he furnished his family two or three times with some trifling supplies. The wife, in the same year in which her husband left her, went with her two youngest children, there being five others who were minors, to *China*, where she resided till the next spring; when she returned to *Vassalborough*, where, finding an empty house, she went into it without right, and dwelt there, with her two children, till *April* 1821. During this period she once committed adultery; but in *April* 1821, she was reconciled to her husband, who received her and her children to a home which he provided in *Gardiner*, where they dwelt several years. *Burgis* testified that when he left his family, and went to work in *Gardiner*, his resolution as to returning was not absolute, but conditional, as above stated.

All this evidence the Chief Justice left to the jury, in order to determine the pauper's intention. He was requested, by the counsel for the defendants, to instruct the jury that the reconciliation of the parties in *April* 1821, could not operate retrospectively upon the question of domicil; but that they must regard his intention exclusive of any consideration of that fact, and only as it existed on the 21st of *March* 1821, when the statute was enacted. This he declined. But he did instruct them that it was not material whether she occupied the house in *Vassalborough* by right or by wrong; nor whether she was criminal, or not, in the absence of the husband; he having testified that he did not know it till the time of their reconciliation. A verdict was returned for the plaintiffs; which was taken subject to the opinion of the court whether the jury were properly instructed; and whether the instructions requested were properly withheld.

Allen, for the plaintiffs.

Leach and *Sprague*, for the defendants.

MELLEN C. J. delivered the opinion of the Court.

The jury having, upon a consideration of all the evidence, returned a verdict against the defendants, judgment is to be entered thereon, if the instructions given to them were correct, and if those which were requested were improperly withheld. With respect to the instructions given, we perceive no incorrectness. It certainly does not require argument or authorities to shew that the character of the residence and home in a particular town, under the statute of *March* 21, 1821, depends in no degree on the question whether such residence or home was on land, and in a house by permission of the owner; the lawfulness of the possession in such cases is not contemplated by the statute. Nor do we perceive that in the present case the circumstance can have any effect directly or indirectly on the question of domicil; for *Burgis* himself, if conusant of the nature of his wife's entry into and occupation of the house in *Vassalborough*, which she found empty, does not appear to have authorised or consented to it. Neither does the criminality of the wife in the instance

mentioned, alter the case. The court do not look to the virtues or vices of a pauper, or of his wife, in ascertaining the place of his legal settlement. Besides, in respect to the question of intention, her crime could have had no effect, inasmuch as the husband had no knowledge of it until their reconciliation in *April* 1821.

In regard to the inquiry, whether the requested instructions were properly withheld, we would observe that the answer must depend on several facts which we shall notice, and on the principles applicable to them. In the first place, we are perfectly satisfied, that from the time *Burgis* moved into *Vassalborough* in the fall of 1819, to the time he went to *Gardiner*, early in the autumn of the next year, he resided and had his home in *Vassalborough*. The case discloses all those facts necessary to establish this position beyond all doubt. We are equally clear that the temporary residence of the wife in *China*, and change of the place of her residence in *Vassalborough*, both having been her acts merely, without any authority or consent of *Burgis*, had no effect upon his rights and liabilities as an inhabitant of *Vassalborough*. Such a power as this does not belong to a wife; and public policy and the nature of the marriage contract, do not admit of it. The residence and home of *Burgis*, in the town of *Vassalborough*, not having been changed or lost by any act of his wife, our next inquiry is, whether the same consequences were occasioned by the acts of *Burgis* himself, and that by means of those acts, he acquired a settlement in *Gardiner*, by residing and having his home in that town on the day the statute was passed. The case of *Knox v. Waldoborough*, 3. *Greenl.* 455. shews that a residence of a man, even out of the United States, does not change his domicil, where he leaves a home and family in a town in this State, for the purpose of business, or seeking employment. In the case before us, *Burgis* left his wife and children at his home in *Vassalborough*, when he went to *Gardiner* in the fall of 1819. His object in going was two-fold: viz. partly to seek more profitable employment, and partly on account of his being dissatisfied with the conduct of his wife. He did not abandon his family; he furnished them small supplies on two or three occasions, while residing in *Gardiner;* and the case finds that he had

formed no absolute resolution never to return and live with his family. His resolution on this subject, when he went to *Gardiner*, was only conditional, depending on his wife's conduct; and while thus continuing conditional, a reconciliation took place, and, in consequence, he immediately sent to *Vassalborough*, and moved his children and furniture to *Gardiner*. All this took place in *April*. From these facts, it appears that he never absolutely deserted his wife and children, nor ever absolutely resolved so to do; and never having done either, what circumstance is there in this case, which operated to change his home from *Vassalborough* to *Gardiner*, till the actual change of it in *April*, by removing his children and furniture to *Gardiner*, where he and his wife then were? We do not perceive any. The facts of the case are certainly singular, but the legal principles which must decide the cause, are simple and well settled. In numerous cases arising under the statute of 1821, the question of domicil has depended on intention; for instance, as in *Knox v. Waldoborough*. So in the present case. This intention is to be ascertained, in many instances, from various and equivocal facts, which of course are always proper subjects for the consideration of a jury, and from which they may infer what such intention was. All the evidence in the case before us, was submitted to the jury, that they might draw their own conclusions as to the question of intention. Only a portion of the evidence is distinctly reported, because the points reserved had relation merely to the refusal of the judge to give specific instructions, when requested, as to one particular principle; and to the instructions which he did give respecting two other particulars, having nothing to do with the subject of intention. The jury have pronounced their opinion, as to the intentions of *Burgis* in going to and remaining at *Gardiner*. It remains for us to consider whether the requested instructions were properly or improperly withheld. The judge was requested to instruct the jury, "that the reconciliation of the pauper and his wife in *April* 1821, could have no retrospective operation as to the question of domicil, but that they must regard his intention as it existed on the 21st of *March*, 1821, exclusively of all consideration of that fact." There is no doubt but that the jury were to regard the intention as it then existed; but in order to ascertain

what it then was, they might look to facts which took place after that time, in connection with those before. This is allowable, not to change the character or effect of antecedent facts, but for the purpose of learning distinctly what those facts were. Suppose we were this day trying a cause before the jury, and the question was, whether a pauper, when he left the town where he resided in 1820, left it with the intention of returning to his family, or of abandoning them and his home. Surely it would be proper to prove to the jury that the man had never returned or taken any care of his family; and the jury might properly consider these subsequent facts as aiding them in ascertaining what his intention was in the year 1820, when he left his home and family. So in the present case, the jury were authorised to consider the fact of reconciliation in *April*, in connection with the previous conduct of *Burgis*, his conditional resolutions, the continuance of his wife and children in *Vassalborough*, and his small supplies furnished to them, to enable them the better to decide the question of intention and of domicil. This question they have decided, on the evidence before them, and we perceive no sufficient reason for granting a new trial. *Judgment on the verdict.*

PAINE & ALS. *plaintiffs in error, vs.* ROSS.

The town of *W.* when it constituted but one parish, erected a meeting-house; and after several years, divers citizens having in the mean time become members of other parishes, the town, in its municipal capacity raised money to repair the house; which was assessed generally on all the inhabitants. It was holden that this assessment, so far as these citizens were concerned, was illegal.

IN a writ of error brought by the assessors of *Winslow*, to reverse a judgment recovered by *Ross* against them, in an action of trespass, the question was, whether the purpose for which the sum of $463,32 was raised by a vote of the town in 1825, and for which *Ross* was

assessed his proportion, was within the legitimate powers of the town. The trespass consisted in distraining and selling the plaintiff's cow, in *March* 1827, for the nonpayment of the tax.

It appeared from the bill of exceptions, that in the year 1798, the town of *Winslow* erected a meeting house, on a lot of land granted to the town by Col. *Lithgow*, on certain terms not necessary here to be stated, as no question of title to the land was decided. In *Nov.* 1824, the house having no foundation of stone, and being unfinished within, and much dilapidated without, a town meeting was called, "to see if the town will raise money to repair or finish the meeting house in said town; or whether the town will relinquish to the pew-holders the right to the meeting house lot, upon condition that the meeting house shall be finished, or on any other condition; or to see if the town will adopt any measures to prevent the meeting house from going to ruin; and to act and do any thing relative to said subject." This subject was referred to a committee, who reported an estimate of the expense of the exterior repairs of the house, being $463 32, which they deemed it expedient that the town should pay, to fit the house "for religious and town use." This report was accepted, at the meeting in *April* 1825, the money was raised by vote, and a committee appointed to superintend the repairs, with instructions to make any repairs or alterations inside the house, and to finish a room in the south gallery for the transaction of town-business, provided it could be done free of expense to the town.

At a meeting in *Sept.* 1825, the town appointed a committee to give deeds to the purchasers of pews; and subsequently, in 1827, after the repairs were completed, it was voted that all future town meetings should be holden in that house; where they had all been holden, except two, since its erection.

The whole amount expended in repairing and finishing the house was about twenty three hundred dollars; of which about seven hundred were raised by voluntary subscription, and the residue by the sale of pews, and by the amount voted, as above, by the town. No part of this sum was assessed on the quakers.

The original plaintiff became a member of a baptist society in *Fairfax*, in 1812, under the Religious-freedom-act of 1811. There

had been no settled minister, nor parish officers, in *Winslow*, nor monies raised by the town for the support of public worship, since the dissolution of the pastoral relation between the town and the Rev. *Joshua Cushman*, in the year 1814. But the town had always chosen and paid a sexton, whose duty it was to take care of the meeting-house and keep the keys; and had paid, from time to time, divers small bills for repairs.

On these facts *Smith J.* before whom the cause was tried on appeal in the court below, ruled that the tax was illegal; to which the assessors filed a bill of exceptions.

Boutelle, for the plaintiffs in error, contended that all which had been done respecting the house was of a municipal and not of a parochial character; that the house itself was a fixture upon the land of the town; and that the parish had lost its right to the occupancy by *non user*. *Milford v. Godfrey* 1. *Pick.* 91. But if the house was the property of the parish, yet the town might well adopt this method to procure for itself a place for the transaction of its ordinary business. As a parish, it might lawfully rebuild the house,—*Wentworth v. Canton* 3. *Pick.* 344,—in which it had already acquired an easement. *Tucker v. Bass* 5. *Mass.* 164.

The remedy, moreover, is misconceived. The action should have been brought against the town; and not against the assessors; whose doings have been in the forms of law, under a vote of the town; *Cochran v. Camden* 15. *Mass.* 302. *Alna v. Plummer* 3. *Greenl.* 88; and who are expressly protected by *Stat.* 1826, *ch.* 337, *sec.* 1, which was enacted prior to the act complained of as a trespass.

Nor is the plaintiff protected by his certificate, under the Religious-freedom-act; for that act was repealed by *Stat.* 1821, *ch.* 135; and at most it only exempted him from the liability to be taxed in *Winslow* for the support of public worship; but not from contributing to all other public burthens.

R. Williams, for the defendant in error, argued that the parochial was separated from the municipal character of the town, as soon as any of its inhabitants became members of a different denomination;

and that all the property which the town held in its parochial capacity became thereupon vested in the parish. *Dillingham v. Snow & al.* 3. *Mass.* 276. 5. *Mass.* 547. *Jewett v. Burroughs* 15. *Mass.* 464. *Gridley v. Clark & als.* 2. *Pick.* 403. And the repair of the meeting-house, being a parochial service, no one is bound to do it, who is not of the parish. *Whittemore v. Smith & al.* 17. *Mass.* 347. The erection of a room for town business, within the house, does not affect the present case, since it is expressly found to have been done gratuitously.

As to the *Stat.* 1826, *ch.* 337, it applies only to inhabitants of the town or parish, whom the assessors are bound by law to assess. *Gage v. Currier & als.* 4. *Pick.* 399.

MELLEN C. J. delivered the opinion of the Court at the ensuing term in *Somerset.*

It is not necessary in this case to decide or inquire whether the title to the land on which the meeting-house stands is vested in the town of *Winslow*, in their municipal or parochial capacity ; as the title is not in question; and as the legality or illegality of the tax, which is the subject of complaint, has relation only to the meeting-house standing on the land, and to certain repairs and alterations mentioned in the exceptions. It seems to be admitted, as well as decided by several of the cases which have been cited, that a meeting-house, though erected by a town consisting of only one parish, is to be considered as belonging to such town in its parochial capacity, and that the expense of its erection and repairs can be legally assessed only on those inhabitants of the town, who are not exempted from taxation in consequence of being members of some other religious society. These general principles are plain, and have been established and recognized by numerous decisions. *Ross* having become a member of a religious society in *Fairfax*, in the year 1812, in virtue of the act of Massachusetts of 1811, commonly called the "Religious freedom act," is to be considered as still a member of it, though the act was repealed by our legislature in 1821.—The main question then is whether the assessment of the sum of $463,32 was legally made

under the authority of the votes recited in the exceptions; and this question must be decided by the application of legal principles to those votes, and the proceedings under them. In other words, is the assessment legal, on the ground that the room in the southerly end of the meeting-house, which has been prepared and completed as a place for the transaction of the business of the town, and by one of the recited votes appropriated to that purpose, is so far the property of the town or its privilege and easement, as to render the expense of it a proper subject of assessment on all the inhabitants and property of the town?—A town may lawfully raise money for building or purchasing or hiring a town house, and assess and collect it for the purpose of defraying the necessary expense; still the inquiry is whether it has been done, in the case under consideration, for either of those objects, and in such a manner as the law will sanction. The object in view in the arrangements which were made, seems to have been a commendable one; and the exceptions disclose no fact shewing or tending to shew that it was not sought fairly and with pure motives. All the repairs of the meeting-house cost about $2300; of which $700 were voluntarily given; the sale of the pews produced another portion; and the balance, being $463,32 was assessed on the town. It does not appear by the exceptions when the $700 were collected by contribution; probably not until after the vote raising the sum to be assessed. It is important to observe that the committee, in their report accepted in *April* 1825, estimated the expense of repairing the outside of the house, in the manner described by them, at the above sum of $463,32. "Thereupon it was voted to raise and assess the sum of $463,32 to make and complete said repairs." This vote and this sum have no relation to the finishing of any part of the interior; the sum was specially appropriated for another purpose; and one of a purely parochial character. We are not at liberty to view the vote as contemplating any other object; nor could it legally be applied to any other; at least, not to any other than a parochial object. At the same meeting the committee were authorized "to make any repairs or alterations in the inside of the meeting-house, and to fix a room in the southerly gallery to do the town's business in, provided, it shall

be done free from expense to the town." This vote seems to be a direct negative upon the idea that the assessment was designed to defray the expense of the room for the use of the town.

In our investigation of the subject, we have been led to inquire whether the town, in its municipal character, has not, by means of the proceedings under examination, acquired a vested interest in that part of the meeting-house, especially designed for the use of the town, for which the sum assessed on its inhabitants and property at large may be considered as the fair and valuable consideration. But the facts before us will not warrant this construction of the votes and proceedings of the corporation. The warrant for calling the meeting which was holden on the first of *November* 1824, contains no article on the subject; the article was "to see if the town will raise a sum of money to repair or finish the meeting-house in said town; or whether the town will relinquish to the pew holders the right to the meeting-house lot, upon condition that the meeting-house shall be finished, or on any other condition; or to see if the town will adopt any measures to prevent the meeting-house from going to ruin." This article has no relation to any subject, except such as is of a parochial nature; it does not contemplate any arrangement as to a town room in the meeting-house, or a grant to the town, in its municipal capacity, of a perpetual right to use such room for the purpose of transacting town business in it. On the contrary the vote before alluded to, passed in *April* 1825, at an adjournment of the meeting of *November* 1, 1824, evidently looks forward to the aid of voluntary contributions to defray the expense of the contemplated town room; and to such aid, or to the fund arising from the sale of the pews, the inhabitants of the town at large stand indebted for the existence and completion of the room. It certainly was not furnished by means of the assessment. Besides, if we could construe the proceedings of the town as a grant from them, in their parochial capacity, to the town in its municipal character, of a privilege or easement of the kind and for the purposes so often mentioned, still as there was no article in the warrant authorizing such votes and proceedings, it could not be sanctioned as a valid grant.

Several other points were discussed in the argument, which we forbear to notice, because the ground on which we place our decision of the cause renders their examination unnecessary ; but there is one circumstance deserving of attention, as being explanatory of the intentions of the town in voting to raise and assess the before mentioned sum of $463 32 ; which is, that the quakers belonging to the town were not assessed for any part of this sum ; and yet it is difficult to assign any satisfactory reason for excluding and exempting them, and including *Ross*, if the assessment was contemplated as an ordinary municipal measure, to defray an expense incurred, or to be incurred, for the benefit of the inhabitants of the town at large.

We perceive nothing erroneous in the record and proceedings before us, and accordingly the judgment must be affirmed.

Judgment affirmed with costs.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

SOMERSET.

JUNE TERM,

1828.

SOULE'S CASE.

In an indictment against a husband, for an assault and battery upon the wife, she is a competent witness against him.

IN this case the husband was indicted for an aggravated assault and battery upon the wife; and upon the trial, before *Preble J.* at the last term in this county, he admitted the wife as a competent witness for the State; but saved the point for the consideration of all the Judges, at the motion of *Sprague*, of counsel for the defendant, he being convicted.

MELLEN C. J. delivered the opinion of the Court.

In this case the only question is whether the wife of the defendant was properly admitted as a witness against him on the trial, to prove the assault and battery upon her, charged in the indictment. It is well known that, as a general principle, husband and wife are not legal witnesses against each other. Reasons of policy forbid it. And it is believed they are never competent witnesses for each other.

From the general rule some exceptions have been established, founded on the necessity of the case; for instance, if a wife could not be admitted to testify against the husband as to threatened or executed violence and abuse upon her person, he could play the tyrant and the brute at his pleasure, and with perfect security beat, wound and torture her at times and in places when and where no witnesses could be present, nor assistance be obtained. Reasons of policy do not certainly extend so far as, in such cases, to disqualify her from being a witness against him. It is common learning that a wife may exhibit articles of the peace against her husband on oath, and demand and obtain security for his keeping the peace and abstaining from acts of apprehended and threatened violence; and it would seem to be a strange and unreasonable doctrine that she may legally proceed thus far against him, and in so doing perhaps cause his commitment to prison, and yet not be considered as a competent witness to prove the fact that the threatened and apprehended violence had been cruelly committed by him. To reject her when offered as a witness on trial for this purpose, would seem to be nothing less than a legal inconsistency. It is true that the decisions in the English courts have not been uniform on this subject. Lord *Audley's* case 1. *St. Tr.* 387, is familiar to every lawyer; and though it has been doubted, more modern cases have sanctioned and supported it. In *Rex v. Azire* 1. *Str.* 633, Lord *Holt* admitted the wife to testify against her husband. See also 1. *Hale* 301. *Bul. N. P.* 287. 11. *Mod.* 224. *Jagger's* case *East's P. C.* 454. *Mary Mead's* case 1. *Burr.* 542. 2. *Chitty's Cr. L.* 712. These and several other cases shew the principle to be more settled in favor of her admission as a witness. It is difficult to perceive any sound reason why she should not be, in such cases, where other proof can be seldom presumed to exist or be obtainable. So far as the general incompetency of the wife is founded on the idea that her testimony, if received, would tend to destroy domestic peace and introduce discord, animosity and confusion in its place, the principle loses its influence when that peace has already become wearisome to a passionate, despotic and perhaps intoxicated husband, who has done all his power to render the wife unhappy and destroy all mutual affection.

We are satisfied, both from the reason of the thing, and the authorities, that the witness was properly admitted; and accordingly the motion for a new trial is overruled.

HALL'S CASE.

In a complaint under *Stat.* 1821, *ch.* 33, against one for cutting trees on land not his own, it is material to allege that it was without the consent of the owner.

THE record of a summary criminal process before a magistrate having been brought into this court by writ of *certiorari*, it appeared that the defendant had been charged with entering upon land not his own, and cutting and carrying away 100 trees, contrary to the form of the statute entitled, &c. of which being convicted, he was sentenced to pay a fine of forty dollars, and failing to pay it, was committed to prison.

Allen, for the defendant, took exceptions to the record—that no close was described in the complaint;—that the owner was not named;—that it was not alleged that the trees were cut without the license or consent of the owner of the land, nor at any certain time;—and that the magistrate, in the amount of the fine, had exceeded his jurisdiction.

THE COURT said that without deciding upon the validity of all the objections, they were clearly of opinion that the want of an averment in the complaint that the trees were cut by the defendant, without the license or consent of the owner, was fatal. It was necessary that every material fact, constituting the guilt of the defendant, should be distinctly alleged. *Little v. Thompson* 3. *Greenl.* 228.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

PENOBSCOT.

JUNE TERM,

1828.

FISK & AL. *v.* WESTON & *trustee.*

If the trustee in a foreign attachment discloses an assignment of the debt to a third person, who thereupon is made a party to the suit, pursuant to the *Stat.* 1821, *ch.* 61;—the trustee is bound by the result of the ulterior litigation in that suit between the creditor and the assignee, in the same manner as they are, though he had no agency in making up the issue.

IN this case *John P. Boyd*, the trustee, disclosed that he was indebted to *Weston*, upon a contract for the building of a mill, and that he had accepted *Weston's* order to pay the balance, which might be due to him on the contract, to *Mark Trafton*. Hereupon *Trafton* was summoned to become a party to the suit, pursuant to the statute; and an issue being formed to the jury to try the validity of this assignment of the debt to *Trafton*, it was found fraudulent and void.

Gilman and *Greenleaf*, for the trustee, still contended that he ought to be discharged, notwithstanding the verdict. It cannot estop *Boyd*, for he was no party to the issue; he had no right to direct the making of it up, nor to cross examine the witnesses adduced. And without these rights, no party is estopped by a verdict and judgment. The

trustee is bound, at all events, to pay *Trafton* the amount of his acceptance, which is absolute. The only effect of the verdict is to estop *Trafton*, should the plaintiffs sue him as the trustee of *Weston*, from setting up the assignment as a bar.

McGaw, for the plaintiffs.

WESTON J. delivered the opinion of the Court.

As the law in relation to foreign attachment originally stood, the question whether trustee or not, was to be determined by the disclosure of the supposed trustee alone; independent of any collateral inquiry whatever. Thus if he disclosed an assignment of the debt originally due from him to the principal defendant, to a third person, he could not be holden as trustee; but was entitled to be discharged. This afforded facilities to debtors to defraud their creditors by putting, by means of fraudulent assignments, their goods and credits out of the reach of the process of law. To remedy this evil, it is provided by *Stat.* 1821. *ch.* 61. *sec.* 7. that whenever any person summoned as trustee of any debtor, shall, in his answers, disclose an assignment to another, of the goods, effects or credits of the principal in his hands, and the plaintiff in the suit shall object that the assignment ought not to have any effect to defeat his attachment, and the court shall think it just or convenient, they may, for the purpose of trying the validity and effect of the assignment, summon in the person so stated to be assignee, to become a party to the suit. And if upon such summons, the supposed assignee does not appear in person or by attorney, the assignment shall have no effect to defeat the plaintiff's attachment. And upon such assignee becoming a party to the suit, the validity of the assignment, or its effect on the case, shall be tried by the court or the jury; as the case may require. The object of this section plainly is, to determine whether the assignment disclosed ought to prevail against an attaching creditor. As the rights of the assignee could not be affected or precluded by an action between other parties, he was called in and made a party, and a full opportunity given to him to be heard upon the question, in order that he might, without violating the principles of justice,

be bound by the decision. Had the trustee been compelled to litigate this question at his peril, he might have been twice charged. This course of proceeding therefore, was directed for his protection; as well as to benefit the attaching creditor. The validity of the assignment was the point to be determined. If the assignee, upon being notified that he may be received as a party, decline to avail himself of the privilege, it is expressly provided, that the assignment shall have no effect to defeat the plaintiff's attachment. Can it be pretended that if he do appear and become a party to the suit, and upon the trial of the question, the assignment is found to be fraudulent and invalid, that the plaintiff's attachment is nevertheless to be defeated, and the trustee to be discharged? So to adjudge, would be to disregard the manifest intention of this part of the statute, and to render its provisions idle and nugatory. Whether the supposed assignment is regarded as invalid by the default, or in consequence of its being found to be so upon trial, it is no where expressly provided that the trustee shall no longer be held answerable to the assignee. But this results necessarily from the proceedings, and their effect upon the assignee, who becomes, or may become, a party to the suit. And we entertain no doubt that these proceedings, properly pleaded, would be holden to be an effectual bar against any action, subsequently brought by the assignee against the trustee.

It is contended that the rights of the trustee ought not to be affected by a decision of this point, between the assignee and the attaching creditor. And they are not affected. He is a mere stakeholder. So long as he is in no danger of being twice charged, it is supposed to be a matter of indifference to him to which of the parties he is held liable.

In the case before us, the assignment disclosed having been found, upon the trial of the question, not to have been made in good faith, *John P. Boyd* must be adjudged to be the trustee of the principal defendant, according to his disclosure.

PARLIN *vs.* MACOMBER.

In a writ of entry, to a plea that the tenant was not tenant of the freehold, with a disclaimer, the demandant replied that, at the time when, &c. the tenant was in possession of the demanded premises, claiming to hold the same as his own, concluding to the country; and the replication, on special demurrer, was held good.

To a writ of entry in the *per* and *cui*, upon the demandant's own seisin, the tenant pleaded that at the commencement of the action he "was not tenant of the freehold of the premises demanded, or of any part thereof,"—with a disclaimer. The demandant replied that at that time the tenant "was in possession of the demanded premises, claiming to hold the same as his own,"—and concluded to the country. Hereupon the tenant demurred,—because the demandant had not traversed the allegation that he was not tenant of the freehold,—and because he had assumed facts not denied in the plea, and ought to have concluded with an averment, to afford the tenant an opportunity to traverse the new matter.

M'Gaw and *Greenleaf* for the demandant.

Gilman and *Allen* for the tenant.

MELLEN C. J. delivered the opinion of the Court.

The counsel for the tenant contends that the replication is bad; but, if not, that the declaration is; that at all events, the first fault in the pleadings is on the part of the demandant; and that on the demurrer, judgment ought to be rendered for the tenant. Let us first examine the declaration. It is drawn with extreme carelessness. The land demanded is one acre and one third of an acre. It is stated to be the northwest part of a larger tract or piece of land, which has but one side line given. Courses and distances furnish no sort of description of it; but the land demanded lies in *Dover*, adjoining

the north line of the town, and is a part of lot 14 in the 12th range; and is seventeen rods and nine links long, adjoining said town line. From the above descriptive particulars, we apprehend the sheriff might ascertain the premises and deliver seisin and possession; but beyond this, there is a further description which renders all sufficiently certain; for the declaration states that the land demanded is the same which the demandant purchased of *Nathaniel Chamberlain*, on or about the ninth of *June*, 1814. Now, though it does not appear that the deed has ever been recorded, yet as it was made to the demandant, he knows the contents of it, and by inspection of it may see at once the boundaries of the premises in question, and show the sheriff those boundaries, so that he may with certainty execute the writ of *Habere facias possessionem*. As to the tenant, there is no difficulty; he seems to understand what land is demanded, or else he would not so readily have decided for himself that he was not tenant of the freehold of the same at the time of the commencement of the action. We are therefore satisfied that the declaration, though drawn so loosely, is sufficient in law. The plea is technical, and not objected to as to its form; so that the only question is whether the replication is good upon the special demurrer before us.

If the replication had been such as is usually given to a plea of general nontenure, that is, a replication affirming that the defendant, at the commencement of the action, was tenant of the freehold of the premises demanded, it should not have concluded with a verification, but to the country, as is the fact in the present case; so are the forms. Is the replication, then, in substance, one which traverses the matter of the plea? It states that, at the time of the commencement of the action, the tenant was in possession of the demanded premises, claiming them as his own. What more is necessary to constitute a man tenant of the freehold? According to our law, as it now stands, if a defendant in a real action pleads the general issue, it is no admission that he is in possession of the premises demanded; but prior to the passing of the statute alluded to, it had been decided in several cases, by the Supreme Court of Massachusetts, that if in such an action the defendant pleaded the general issue, it was an admission that he was tenant of the freehold; that is, that he was in possession, claim-

ing the premises as his own property. See *Kelleran v. Brown*, 4. *Mass.* 443. *Higbee v. Rice*, 5. *Mass.* 344. *Wolcott v. Knight*, 6. *Mass.* 418. *Pray v. Pierce*, 7. *Mass.* 381. In *Otis v. Warren* 14. *Mass.* 240, the defendant pleaded non-tenure generally. The court, in delivering their opinion, say—"the replication, traversing this plea, is the same with a replication to a disclaimer; and this shows that the two pleas are substantially the same." *Stearns on Real actions* 222. It is true that the replication is argumentative, and not direct and positive; but this is not assigned as a cause of demurrer. As to this character of the replication, the demurrer must be considered as general; and on such a demurrer, matters of form cannot be taken advantage of. *Co. Lit.* 303. 1 *Chit. Plead.* 518, 640, 641, and cases there cited. Upon these principles, and tested by these authorities, the replication appears to us to be good and sufficient, and such is our decision.

Judgment for the plaintiff.

MOODY *vs.* TOWLE.

Where the indorsee of a promissory note has only a lien upon a part of the amount, as collateral security for money due from the promissee; a debt due from the promissee to the maker of the note may be set off against the residue, upon motion, though such debt consists of a judgment recovered in another court.

THIS was *assumpsit* by the plaintiff as indorsee of a promissory note made by the defendant, payable to one *Moor*. The consideration of the note was a contract entered into by *Moor*, to convey to the defendant a patent right to a clapboard machine. Pending this action, the defendant brought an action against *Moor* for the breach of that contract, and had judgment against him as an absent debtor.

by default, in the Court of Common Pleas. At the last *October* term in this county, at the entering up of judgment in this action, the defendant filed a motion, setting forth these facts, and alleging that the note declared on was only negotiated to the plaintiff as collateral security for another debt, and that the beneficial interest in it still belonged to *Moor ;* and thereupon praying that the judgment recovered by him against *Moor*, in the court below, might be set off against the judgment recovered in this court by the present plaintiff.

Greenleaf, in support of the motion, cited 4. *Johns.* 224. 5. *Johns.* 118. *Kendricks v. Judah* 1. *Johns.* 319. *O'Connor v. Murphy* 1. *H. Bl.* 659. *Hatch v. Greene* 12. *Mass.* 195. *Hall v. Ody* 2. *B. & P.* 28.

McGaw argued for the plaintiff.

The Court ordered as follows :—

And now, on motion of the defendant's counsel, and examination of the facts therein stated, which motion is filed in the case, it appears to the court that the sum now due upon the note declared on, amounts to $511 14, and that the plaintiff has an equitable and beneficial interest therein, to the amount of $176 ; leaving a balance in which he has no such interest, amounting to $335 14 ; the interest in which belongs to the said *David B. Moor ;* and it further appears to the court that the said *Towle* at the Court of Common Pleas held at *Bangor* in and for said county of Penobscot, at the *October* term, 1827, recovered a judgment against said *Moor* for the sum of $478 88, the interest on which being added thereto, the whole amounts to $498 03. Whereupon it is ordered by the court here, that the said sum of $335 14 be and the same is hereby set off against so much of the said sum of $498 03 thereby paying and discharging that amount of the defendant's judgment against said *Moor*. And it is thereupon considered by the court that the plaintiff recover of the defendant the sum of $176 and no more ; and that execution issue for that sum accordingly.

TEMPLETON *vs.* CRAM & AL.

An action for breach of a promise of marriage, by a *feme sole*, was compromised by her attorney, after her marriage to another person, by taking the defendant's promissory note, payable to her by her maiden name; the attorney and the defendant being both ignorant of the marriage. In an action by the husband in his own name upon this note, it was held good.

THIS was an action of *assumpsit*, by the husband, upon a promissory note, made to the wife, after marriage, by her maiden name of *Joanna Balch.*

It appeared in a case stated by the parties, that she, being residentin the county of *Middlesex*, in Massachusetts, had commenced an action against *Cram* in this county, for the breach of a promise of marriage; which the attorney soon afterwards received authority to compromise. After this, in the autumn of 1825, she was married to the plaintiff; and in the spring following, one term having intervened since the marriage, that suit was compromised by the note now in controversy, and some others; but at the time of this compromise the fact of this marriage was not known to the attorney, nor to either of the defendants. The attorney thereupon gave *Cram* a receipt in full discharge both of that action, and of all her demands for the same cause. Upon these facts the question whether the action was maintainable, was submitted to the court.

Gilman and *McGaw*, for the defendants, being called on by the court to support the defence, argued that the compromise was void, because it was not mutual; the marriage being a revocation of the authority of the attorney, whose discharge was therefore of no effect. The transaction was with a person not *in esse;* and this material fact, which the other party was legally bound to know, was suppressed.

Greenleaf and *Godfrey*, for the plaintiff.

MELLEN C. J. delivered the opinion of the Court.

It is a very plain principle that a husband may alone maintain an

action upon a promise made to his wife during coverture; and the circumstance relied on by the defendant's counsel, viz. that the note declared on was made payable to *Joanna Balch*, when in fact her name was *Joanna Templeton*, being the wife of the plaintiff, cannot be considered as a valid objection. It was a mere mistake; the counsel, who commenced the action, being ignorant of the marriage, at the time the note was made by the defendants. In legal operation it was a promissory note made payable to *Joanna Templeton* by the name of *Joanna Balch;* and the plaintiff had a right to appropriate the promise to himself, and avail himself of every advantage of it, in the same manner as though it had been made payable, in form, to himself. The note having been given on the settlement of the action which was commenced by the plaintiff's wife, when *sole*, for an injury she had sustained by *Cram's* violation of his promise, the fair compromise of the action was a legal and valuable consideration for the note; and though the attorney's authority to prosecute and compromise the action was terminated by the intermarriage, and by that also the wife's rights in respect to such compromise were transferred to the husband; still, the plaintiff might consent to and ratify the compromise, though made after the intermarriage; and after the termination of the attorney's authority; and his commencement and prosecution of the present action amount to such consent and ratification. As to the discharge given by the attorney, it may be laid out of the case. The facts agreed show that the note was given in satisfaction of the damages sustained by *Cram's* breach of promise; and as such the plaintiff has accepted it. Of course such compromise and satisfaction, without any discharge given, would be a complete bar to another action upon the violated promise. There is no ground for defence. *Defendants defaulted.*

Crane *vs.* Roberts.

R agreed to pay for a quantity of hay, provided *L* should pronounce it merchantable; and *L* pronounced it "a fair lot, say merchantable; not quite so good as I expected; the outside of the bundles some damaged by the weather." *Held*, that *R* was not bound.

This was *assumpsit* upon a written contract made at *Bangor*, for the delivery of from fifty to seventy tons of hay to the defendant in *Boston*, for which he agreed to pay the plaintiff twenty dollars per ton. It was further agreed "that Mr. *Joseph R. Lumbert* shall examine the hay now remaining here, and ready to be shipped, and if he pronounces it a merchantable lot of hay, then this agreement shall be binding on both parties; but should he pronounce it an inferior lot, then this shall be null and void."

The plaintiff produced *Lumbert's* letter, addressed to the defendant, in these terms:—"I have examined the hay agreeable to request of yourself and Mr. *Crane*, and must pronounce it a fair lot, say merchantable, although not quite so good as I expected; the lot opposite *Bangor*, some of it, rather coarse, partially covered with boards, the outside of the bundles damaged some. The lot down at *Stone's* place is not under cover as Mr. *Hatch* stated; the outside of the bundles damaged some by the weather. This lot was, before screwed, of a superior quality." This letter, *Weston J.* before whom the cause was tried, did not consider as pronouncing the hay to be merchantable, within the terms of the contract; and directed a nonsuit, with leave to move the court to set it aside.

McGaw for the plaintiff.

Greenleaf and *Sprague* for defendant.

Mellen C. J. in delivering the opinion of the court, observed that though *Lumbert's* letter was far from being explicit, and free from obscurity, yet they must regard the whole letter together, and not a

part only, as the expression of his opinion; and if the decision which he at first seemed to have given in favor of the plaintiff, was qualified and neutralized by what followed, the letter was, at best, but an equivocal approbation of the hay as merchantable. The qualifying language must have been used for some purpose; and some of the facts stated certainly negatived the approbation cautiously stated in the beginning. If part of a quantity of hay is *damaged*, the whole quantity cannot, with any propriety, be said to be *merchantable*. On such doubtful and contradictory evidence, the plaintiff cannot recover.

Plaintiff nonsuit.

CHAMBERLAIN *vs.* HARROD.

The purchase of a ship, in a foreign port, by the master, is generally to be considered as made for the benefit of the owners, if they elect so to regard it.

THIS was *assumpsit* for one fourth part of the earnings of the brig *Levant*, and for one fourth part of her value; with a count for money had and received.

The plaintiff owned one fourth of the brig, of which the defendant was master; the other three fourths belonging to *Theophilus Sanborn*. On the 9th of *August*, 1819, the plaintiff, being indebted to *Winslow Lewis & Co.* of *Boston* in $555 73, for cordage and ship chandlery for his part of the vessel, gave them his two promissory notes, payable at six and twelve months; to secure the payment of which, on the 25th of *November* following, he gave them a bond creating a lien on his quarter of the brig, and empowering them, in default of payment, to take possession of, and sell his part of the vessel, to raise the money to pay the notes.

The vessel, having been sent on a freighting voyage, arrived at *Philadelphia* from *New Orleans* early in *April* 1821; and was immediately advertised to sail again for the latter port on the 12th. On the 16th of *April*, *W. Lewis & Co.* having heard of her arrival, wrote to *C. Hathaway & Co.* their correspondents in *Philadelphia*, inclosing an order on the defendant for one fourth part of the earnings of the brig, and requesting a copy of her accounts. On the same day they wrote to the defendant on the same subject; and observed that presuming she had done well, they were willing she should go once more to *New Orleans*, before a sale of her was made. In the mean time the defendant had appointed, as agents and consignees of the vessel, *Lewis, Haven & Co.* merchants in *Philadelphia*; who had received her freight money for the last voyage, amounting to $1924 68; and had paid his draft of $1136 58, on them in favor of a house in *New Orleans*, on account of the owners; and disbursed for him, up to the 14th of *May*, $1435, to fit her for the voyage hereafter mentioned; leaving due to them a balance of $646 90. *Hathaway & Co.* were unable to communicate with the defendant till *April* 26, on which day he wrote to *W. Lewis & Co.* acknowledging the receipt of their letter of the 16th, and stating that when he was about to sail for *New Orleans* agreeably to his advertisment, without freight, he had accepted an offer of a charter of the vessel for *South America*, on a voyage which would not be less than eight months, and might be twelve, if, as was contemplated, the brig should go to the *Mediterranean*;—that the charter and loading commenced that day, the vessel having that morning come from the carpenter's hands;—that he should close and forward the accounts as soon as possible;—that on the arrival of the brig at *Philadelphia*, there were about $800 due her;—that Capt. *Sanborn* had drawn $1200 from him at *New Orleans*, which he presumed was on account of the owners of the vessel, according to their interest in her, &c. On the following day, being *April* 27th, the vessel was chartered by the defendant to *Richard Bayley*, for a voyage to *South America*, *Europe*, and back to the *United States*; the charterer stipulating that the defendant should command her. On the 1st of *May*, *W. Lewis & Co.*

replied to the defendant's letter of *April* 26, refusing any consent to the proposed voyage, and insisting on payment of their debt; stating that they would sell the plaintiff's quarter part for $1500 at credit; or would assign to the defendant, the charterer, or any one else, their notes and bond with a policy of $1600 on the vessel from *Dec.* 10, 1820, to *Dec.* 10, 1821, for an approved draft at four months; with liberty to withhold one fourth of the charter till they were reimbursed; and that if neither of these was done, they should stop the vessel; referring him to their correspondents *C. Hathaway & Co.*; to whom they wrote on the same day to the same effect, annexing a statement of their demands, and requesting them, if the debt was not secured or paid in one of those modes, to hand the demands to an attorney, and cause the vessel to be attached. This letter was followed by the transmission of the bond, to which a power of attorney was subjoined from *W. Lewis & Co.* to *C. Hathaway*, dated *May* 8, authorising him to recover and receive the amount of the debt, and, if need be, to take possession of, and sell the plaintiff's quarter part of the brig, and to do all which the constituents could do concerning their claim.

The vessel being laden, and ready for sea, the plaintiff's interest in her was attached at the suit of *W. Lewis & Co.*; and after a few days detention, on the 14th of *May*, *Bayley*, the charterer, paid the amount of their debt, and took from *Hathaway* an assignment of the notes and bond to himself; by virtue of which he on the same day conveyed the plaintiff's fourth part of the brig to the defendant, for the consideration of 800 dollars. The defendant on the same day bottomed one quarter of the brig to *Lewis, Haven & Co.* for $779. 60, being the amount paid by *Bayley* to relieve the vessel from the attachment, adding the plaintiff's quarter part of the disbursements made to the vessel in *Philadelphia*; and on the same day drew on the plaintiff at forty days after date, in their favor, that being the longest time they said they would allow, for $821.63, being the sum abovementioned, with interest and costs; taking their obligation, that on payment of the draft by the plaintiff, at its maturity, they would cancel the bond, and convey the fourth part of the vessel again to him, by virtue of a power of attorney, left with them by the defendant for

that purpose. All these arrangements were made by advice of counsel, to enable the defendant to raise the money on bottomry of the brig.

On the same day the defendant addressed a letter to the plaintiff, stating that he had become the purchaser of one quarter of the brig for 800 dollars, and offering to retransfer it to the plaintiff, on payment of the draft. This draft was accepted by the plaintiff on the sixth of *June*, but was never paid.

Insurance was effected by *Lewis, Haven & Co.* to cover their advances on the bottomry bond of the defendant; which the defendant paid to them, about ten months afterwards, on the return of the vessel.

Upon these facts a verdict was returned by consent for the plaintiff; the parties agreeing that if the court should be of opinion that the action was maintained, the extent of the defendant's liability should be ascertained by assessors, to be appointed by the court, and the verdict be amended according to their report; but if not, or if nothing should be found due to the plaintiff, the verdict should be set aside, and a nonsuit entered.

Allen, for the defendant, insisted that the sale of the vessel was valid, vesting the property absolutely in him; and that therefore he was not accountable to the plaintiff, either for her value, or her earnings. The employment of the vessel, in the manner the defendant employed her, was assented to by *Sanborn*, the major owner; which rendered the consent of the plaintiff, or his dissent, of no importance. If the plaintiff would have protected his interest, he should have pursued the course provided in the admiralty, in cases of recusant owners. *Abbot on Shipping*, 84—86. 106. The defendant therefore was fully authorized to make the contract which he made with *Bayley*, for the charter of the vessel, involving the necessity of repairs so extensive as to absorb all the funds in his hands, the vessel being a freighting ship, and no better offer presenting. *Abbot*, 113. 132. He was not bound to retain sufficient funds to discharge the lien which the plaintiff had created on his part of the vessel; it being no part of his general duty as master; and if it were, yet here

he had no knowledge of the fact. All the consequences of this want of notice to the defendant are chargeable to the plaintiff alone.

The master is not to be considered as the general agent of the owners, while his ship is in a domestic port, and within their reach, as was the case here. This agency arises only from necessity, and ceases with the necessity which created it. He was therefore, in the present case, at liberty to act for himself. The relation, moreover, of master and owner was dissolved, as between him and the plaintiff, by the sale of the vessel to *Bayley;* and this too, by the plaintiff's own act, the power to sell having emanated from himself. But if it had then subsisted, it would not have authorized the defendant to bind his owner by a purchase of this kind. *Oliver v. The Newburyport Ins. Co.* 3. *Mass.* 51. *Sawyer v. Maine F. & Mar. Ins. Co.* 12. *Mass.* 291. Had the vessel been lost, the defendant must have sustained the loss alone; and the plaintiff, therefore, ought not to participate in the gain. *Appleton v. Crowninshield* 3. *Mass.* 443. 8. *Mass.* 483.

But if the plaintiff was at liberty to claim the benefit of the defendant's purchase, or not, at his election, yet he was bound first to refund the money paid by the defendant, which he has never yet done; and to make his election afterwards, in a reasonable time. 5. *Dane's Abr.* 177. 188.

Greenleaf and *Williamson*, for the plaintiff, to the point that the case fell within the general authority of the master, cited *Marshall on Ins.* 500. *Abbot,* 132. 273. *Douglas v. Moody & al.* 9. *Mass.* 551. *Dodge v. The Union Ins. Co.* 17. *Mass.* 471. *McMasters v. Shoolbred* 1. *Esp.* 237. *Milles v. Fletcher Doug.* 230.—And they insisted that a shipmaster, being in fact a trustee of the property confided to him, could not become the purchaser of that property for his own benefit. In equity this is the general rule. *Campbell v. Walker* 5. *Ves.* 678. 13. *Ves.* 601. *Ex parte Lacy* 6. *Ves.* 627. *Ex parte Bennett* 10. *Ves.* 393. 2. *Roberts on Wills, app.* 6, *note.* 1. *Sch. & Lefr.* 379. *Atto. Gen. v. Ld. Dudley, Cooper* 146. 2. *Mason,* 533. If the purchase is ever permitted to stand, the trustee is holden to account for the profits;—*Whitecote v. Lawrence & al.* 3. *Ves.*

740; and the property may be resold, at the option of *cestui que trust*. *Lister v. Lister* 6. *Ves.* 631. And these principles are recognized in trusts arising under the marine law. *Barker v. Mar. Ins. Co.* 2. *Mason* 369. *Church v. Mar. Ins. Co.* 1. *Mason* 344. *Hayman v. Molton & al.* 5. *Esp.* 65. 68. *note.*

They further contended that the extensive repairs put on the vessel at *Philadelphia*, to fit her for so long a voyage, were not imposed by any urgency of the case, nor necessary for the regular employment of the ship; and that therefore the defendant was justly responsible for the consequences of such dissipation of the funds in his hands. 1 *Johns.* 106. *Laws of the Hanse towns, Art.* 3. 1. *Pet. Adm. app.* 97. *The Aurora* 1. *Wheat.* 96. But if such repairs were necessary, they might have been paid for out of the freight money remaining in the defendant's hands;—*Lane v. Penniman & tr.* 4. *Mass.* 91; or funds might have been raised on the credit of future freights, by way of *respondentia*;—1. *Wheat.* 96—or, by hypothecation of the vessel. *Hussey v. Christie & al.* 9. *East* 426. *Abbot*, 151. *note. Laws of Wisbuy, Art.* 45. 65. *Laws of Hanse towns Art.* 60. 9. *Johns.* 29. 1. *Pet. Adm.* 37. *Ib. app.* 88. 111. And for this purpose *Philadelphia* may be regarded as a foreign port, the owner being resident in *Maine*; as an Irish port, or a port in the island of *Jersey*, is to a resident in England. *Menetone v. Gibbons Abbot* 171. 4. *Rob. Adm.* 1. *Jacobsen's Sea laws*, 363.

Lastly, they argued that the defendant had derived no title to the plaintiff's part of the vessel, the bill of sale not being made in the name of the principal, but of *Bayley*, who acted under a power from *Hathaway*; and that the authority of the latter did not extend beyond the collection of the debt, unless a sale could be effected for fifteen hundred dollars. Nor had he any thing more than a mere personal trust, without the power of substitution.

The opinion of the Court was afterwards read, as drawn up by

Weston J. The question presented is, whether the defendant is or is not chargeable, upon the evidence detailed in the case before us. The vessel, the fourth part of which is in controversy, had been a voyage to *New Orleans*, had sailed thence to *Philadelphia*, and

was again destined by the owners to take freight for the former port; in regard to which the defendant, as master, had been advised and directed. At what time in the month of *April*, 1821, she arrived at *Philadelphia* does not appear; but it must have been early in the month; as she was advertised again to sail for *New Orleans*, on the twelfth. By the letter of the defendant of the twenty-sixth of the same month to *Winslow Lewis & Co.* it appears that he was advised, on his arrival at *Philadelphia*, that they were the agents of the plaintiff; but notwithstanding the charter party had then been agreed on, although not formally executed, long enough to have the repairs completed, as the letter states that the vessel had come from the carpenter's hands, and had commenced loading the morning of its date, that letter contains the first information to *Lewis & Co.* of the charter he had accepted, and of the entire change in the destination of the vessel. He does not profess to have had authority from either of the owners for this measure; stating that he did not know whether they would like it; but presumed to enter into the contract, as he could not avail himself of their advice. By the course of the mails, an answer to a letter from *Philadelphia* to *Boston* might be received in a week from its date, at *Philadelphia*. If a delay for this short period might have defeated the agreement, it was at least the duty of the defendant to have given to *Lewis & Co.* the earliest advices of what had been agreed. But this he neglected to do, until, from the intervention of their agents at *Philadelphia*, he must have been aware that they would learn from them what had been done, if he not furnish the information himself. The net freight earned by the vessel from *New Orleans* to *Philadelphia*, as appears by *Haven's* deposition, exceeded nineteen hundred dollars. In the defendant's letter before alluded to, it is stated that Capt. *Sanborn* had drawn twelve hundred dollars of the freight earned, in behalf, it must be presumed, of his relative, the owner of three fourths of the vessel, and had directed him to take the orders of *Lewis & Co.* as to the disposition of the plaintiff's part of the freight. For this part *Lewis & Co.* had drawn on the defendant; with the receipt of which they would have been satisfied. The course pursued by the defendant, was not only a different one from that ordered by the owners; but *Lewis & Co.* by their letter

to the defendant of *May* first, protested against the measure, unless their demand was paid. Under these circumstances, nothing short of the positive direction of the major owner could have justified the defendant; and no such direction is in evidence, or pretended in the case. *Lewis & Co.* finding themselves disappointed in the expectation of receiving the plaintiff's proportion of the earnings of the vessel, the preceding voyage, determined to take measures through their agents at *Philadelphia*, for the collection of their demand.

The transfer to and by *Bayley*, and the title of the defendant derived therefrom, depended upon the bond given by the plaintiff to *Lewis & Co.* and upon their authority to *Hathaway & Co.* dated *May* first. By the power, *Hathaway* was to demand, and by legal means to recover and receive, the amount of the two notes mentioned in the bottomry, and, if need be, to take possession of and to sell the quarter part of the brig. This gave him no authority to assign and transfer the instruments; that was derived from the letter of instructions, and was to be done for a specific purpose. By these instructions, if he sold, it was not to be for a less sum than fifteen hundred dollars; but as this limitation does not appear in the power, the title of a purchaser under it, without notice of the limitation, would be unaffected by it. But the agent did not sell the brig. The power therefore may be laid out of the case; as he did not act under that instrument. He sold and assigned the bond and the notes. Under what circumstances was he authorized to do this? A part of the letter of *Lewis & Co.* of *May* first, will determine this question. It is in these words: "Capt. *Harrod*, the charterer, or any one else, who may be disposed to advance the amount of the annexed demand, shall have for their security the bottomry bond, which we will warrant and defend, and the policy of insurance on said quarter, say sixteen hundred dollars, from the tenth of *December*, 1820, to the tenth of *December*, 1821, at noon, at sea or in port, and they shall withhold one fourth part of the charter of said brig, until they are fully reimbursed." *Lewis & Co.* were unwilling to sacrifice the interest of the plaintiff; and they guarded against it. The agent must have assigned in the faith that these terms would be complied with. *Bayley* declined making the advances, and giving credit therefor.

But the defendant, under the advice of counsel, took a transfer of the fourth part of the brig, for the express purpose of acquiring authority to raise the necessary funds, by a bottomry, to be executed by himself. The assignment to *Bayley*, the payment by him to the attorney of *Lewis & Co.* the sale by *Bayley* to the defendant, and the acknowledgement of *Lewis, Haven & Co.* of the receipt of a bottomry bond from him, all bear date on the same day.

In *Church v. The Marine Ins. Co.* 1. *Mason* 344. *Story J.* expresses a strong doubt whether the master, even at a judicial sale, can purchase on his own account; but he is very clear that he cannot purchase for his own benefit, at a sale which he has had any agency in directing.

There is no evidence that *Lewis, Haven & Co.* were pressing for their advances, on account of the repairs; or that they would have have interposed any obstacle to the sailing of the vessel. For advancing the sum, necessary to liberate her from attachment, they could have taken an assignment of the bottomry, given by the plaintiff to *W. Lewis & Co.* to be held until reimbursed by the charter; which would have been in accordance with the instructions of *W. Lewis & Co.* to their agents. They might have been, however, unwilling to do this, unless their previous advances were also included in the bond; and the course pursued by the defendant might have been deemed by him, until he thought proper to set up an adverse and independent title of his own, to be in furtherance of the plaintiff's interest; the vessel being thus relieved from detention, and placed in a condition to prosecute a voyage, believed to be beneficial to the owners. In point of fact, nothing was raised from the defendant's funds; *Lewis, Haven & Co.* not being paid until after the return of the vessel; when the fourth part of her earnings, she having been on charter between ten and eleven months, was sufficient for their reimbursement.

If, in these proceedings, the defendant contemplated a benefit to himself, at the expense of the plaintiff, and that from a necessity which he had created without authority; it would be a violation of duty to the plaintiff, inconsistent with the relation existing between

them, and with the terms under which *W. Lewis & Co.* would agree to assign their securities, of which he was fully informed.

There are two grounds, upon which the defendant may be considered as having purchased in trust for the plaintiff, at his election. In the first place, a purchase by the master is generally to be considered as made for the benefit of the owners, if they determine so to regard it. This principle is recognized by some of the authorities cited in this cause; and arises from the relations of trust and confidence, which exist between the parties. In the second place, he may be presumed to have assented to purchase on account of the plaintiff. He knew that *Hathaway & Co.* were authorized to assign the instruments only as collateral security, to be held until the earnings of the fourth part of the brig might reimburse the advances made. His offer to reconvey to the plaintiff, shows also that he considered himself as acting in his behalf. The election of the plaintiff to regard the purchase of the defendant as having been made in trust for him, is evinced as well by his acceptance of the defendant's draft, as by his bringing this action. The failure of the plaintiff to pay that draft, did not deprive him of his interest in the vessel, or justify the defendant in claiming to hold it thereafter in his own right. *Haven*, in his deposition, says that forty days was the period limited in the defendant's draft, by the direction of his house, as the longest to which they would accede. It is not easy to perceive the necessity for this limitation. The term of credit given by them to the defendant on his bond, does not appear. They caused, however, their bottomry interest to be insured, and received the amount from the defendant on the return of the vessel; and it may be presumed that payment on her return was originally stipulated. If we are to understand the forty days, as the longest period within which they would be satisfied to receive their advances and cancel their bond, without exacting marine interest, it could certainly have been of no importance to them by whose hand the bond might subsequently be paid. Their bottomry and insurance was ample security to them; and they were in fact paid from the subsequent earnings of the plaintiff's fourth part, under the charter party. If the defendant purchased in trust, as he must under the circumstances be held to have done, it does

not appear that he has at any time made any advances whatever from his own funds; the fourth part of the charter, on the voyage he performed, exceeding the amount of the bottomry by him executed. There was no occason then for the restricted period of forty days within which to hold the plaintiff to make payment, under the penalty of forfeiting his interest. There is no evidence, that when the defendant finally paid the bond, there was any deficiency in the earnings of the vessel, which might render it necessary for him to draw on the plaintiff for any sum whatever.

The opinion of the court is, that the defendant is by law accountable to the plaintiff for the earnings of the fourth part of the brig *Levant*, he being allowed for the amount of the bottomry bond to *Lewis, Haven & Co.* and for all necessary charges and disbursements; that assessors be appointed to liquidate the amount; and that the verdict be amended according to their award.

The inhabitants of DOVER *vs. The inhabitants of* PARIS.

A notice that *S. and his family* are chargeable as paupers, the only subject of expense being one of his sons, who was alluded to in the notice, but not named, was held to be insufficient.

THIS was *assumpsit* for supplies furnished to *John Stetson* and family, alleged to have their settlement in *Paris*. The supplies consisted of monies paid for surgical aid to his son, and of articles furnished expressly for the son's maintenance while sick. The question was upon the sufficiency of the notice, which was in these words;—"*Dover, Oct.* 11, 1825. Gentlemen, You are hereby notified that one *John Stetson* and family lately from your town, have become chargeable to this town. One of his sons is under the care of a surgeon, with a *caries* of the lower and posterior portion of the thigh bone, attended with great inflammation about the knee joint. All

expenses arising on their account are charged to the town of *Paris*, from the first day of *July* last." Which was duly signed by the overseers. This notice was delivered to one of the overseers of *Paris*, who promised immediately to ascertain whether *Stetson* belonged to that town, and write to *Dover* the result. But no answer was ever returned.

The cause was tried before *Weston J.* who thought the notice insufficient, and nonsuited the plaintiffs, with leave to move the court to set the nonsuit aside.

McGaw, for the plaintiffs, insisted that the notice at least included the father and son; which was sufficient for the present purpose; though he conceded it could extend no farther. *Embden v. Augusta* 12. *Mass.* 307. *Shutesbury v. Oxford* 16. *Mass.* 102. *Bangor v. Deer Isle* 1. *Greenl.* 329.

Godfrey, for the defendants.

Weston J. delivered the opinion of the Court.

The question presented to our consideration is, whether the notice given, to which no answer was returned, is sufficiently certain and definite to conclude the town notified. The notice states that *John Stetson* and family had become chargeable to the plaintiffs. It is agreed that the expenditures, for which a reimbursment is sought in this action, were incurred for the relief of one of the sons of *John Stetson*, who had become diseased in the manner stated in the notice; part arising from the payment of the bills of the surgeon who attended him, and part for supplies furnished to the father, for the express purpose of being administered to the son. The son then was the pauper relieved, and he, and not the father, was the party liable to be removed. Upon the authority of the cases of *Embden v. Augusta*, and of *Bangor v. Deer Isle*, cited in the argument, and upon the principles and for the reasons therein stated, which it is unnecessary here to repeat, we are of opinion that the notice in this case is insufficient, and the nonsuit is therefore confirmed, with costs for the defendants.

Webster's case.

An indictment not certified to be "*a true bill,*" though signed by the foreman of the grand jury, is bad.

The indictment in this case, which was found in the Common Pleas, for an assault and battery, was drawn and certified in the usual form, except that at the bottom of the indictment, and immediately before the signature of the foreman of the grand jury, the words "*a true bill*" were omitted. And after conviction, the defendant moved in arrest of judgment, for that there was no legal evidence that the indictment was a true bill.

The *Attorney General* and *Godfrey*, for the State.

Gilman, *McGaw* and *Greenleaf*, for the defendant.

Mellen C. J. delivered the opinion of the Court.

The objection to the indictment in this case is, that, though it is signed by the foreman of the grand jury, his signature is not preceded by the usual words, "a true bill." On account of this omission, the motion in arrest of judgment under consideration, was filed; and we are now to decide whether it is sustainable on legal principles. Our course of proceedings in relation to the finding of indictments, is different from that pursued in England, and of course no cases similar to the present are to be found in the decisions of their courts. According to the practice there, indictments are drawn and preferred to the grand jury in the name of the king, but at the suit of any private prosecutor. When they have heard the evidence, if they think it a groundless accusation, they indorse on the back of the bill, "not a true bill," or "not found." If they are satisfied of the truth of the accusation, they indorse upon it "a true bill;" and the indictment is then said to be found; and the party then stands indicted. 4. *Bl. Com.* 303. 306. In Massachusetts, and this State, the customary

practice is, after a complaint is made to the grand jury, for them to hear the evidence in support of it; and if they agree to find a bill, an indictment is thereupon drawn by the Attorney General, or County Attorney, in legal form, against the party accused, describing the offence of which they accuse him; when delivered to them it is signed in the customary manner by the foreman, thus, "A true bill. A. B. Foreman." It is afterwards, in the presence of the jury, and in open court, presented to the clerk and regularly placed on the files. It is believed, and seems to have been admitted, that such has been the uniform practice from time immemorial. In England, we presume, an indictment must be found and certified in the manner before mentioned, or it would not be sanctioned as legal; because such is their settled practice, and such their common law on the subject. The same reasoning leads to the conclusion, that the long, uninterrupted and uniform practice in the parent commonwealth, and continued in this State, which we have also mentioned, may justly be considered as our common law on the subject; and there is as much propriety in adhering to settled usage in one case, as in the other. There is no use in changing proceedings, especially in those instances where the change would disturb those particulars which have acquired the character of essentials and legal principles; and that, too, in criminal prosecutions. It is a well established doctrine that none of the statutes of *jeofails* extend to indictments, or proceedings in criminal cases. A defective indictment is not cured by verdict. 7. *Dane. ch.* 221. *a.* 17. *s.* 10. If the omitted words, "A true bill," are necessary to render the indictment good and legal, then the defendant's objection is as available to him on a motion in arrest of judgment, as it could have been in any earlier stage of the cause. The verdict has not cured the defect. The legal evidence that an indictment has been regularly found by the grand jury, has uniformly been deemed to consist in two particulars; 1. the certificate that it is a true bill; 2. the signing of this certificate by the foreman, in his official capacity. In the case before us, this certificate is wanting When the foreman signs a bill as foreman, with the certificate, or the words, "A true bill," prefixed, he evidently professes to act as the

proper organ of the grand jury; but when the words, which we call a certificate, are not prefixed, the signature of the foreman does not necessarily import any thing more than his own opinion. Of what use would be the name of the register of deeds at the foot of a paper, said to be a copy of a recorded deed, if unaccompanied by an attestation that it is a true copy of record? His mere name, though signed officially, would not make the paper legal evidence. A verdict in a civil action is always signed by the foreman officially, thus, "A. B. foreman;" but the court never considers that as sufficient of itself; for when the verdict is affirmed, the assent of each juror is given in open court; and it cannot be affirmed without it. In fact, in the case of indictments, had not immemorial and uniform usage established it as common law in England and in this State, that the attestation of the foreman, in the manner before mentioned, should be legal evidence of the truth of the bill, it would be necessary for each member of the grand jury, who voted in favor of the bill, to sanction it as true, by his own individual signature; but such a mode of proceeding would disclose the opinions of the jurors for and against a bill, and thereby often lead to unpleasant and injurious consequences. We are not disposed to change the course of practice, or introduce any new principles in regard to the subject under consideration. It is true, that this decision may seem to favor form more than substance; but we must remember that in criminal proceedings, more strictness has always been applied, than in civil, as we have observed respecting the statutes of *jeofails*. If we in one instance dispense with a compliance with established forms, in cases of indictment, we may and probably must, in others, when no good reason can be assigned for commencing the innovation. It is well settled, that the word "murder," in an indictment for murder, and the word "burglariously," in an indictment for burglary, are essential in the description of those offences; an indictment would be bad without them, though it contained a description of the offence in the very terms which are employed in an accurate definition of it. No court, however, would sustain an indictment so informal, though every man must, at first view,

know what was the meaning of the grand jury, in the descriptive language used by them.

We are all of opinion that the motion must prevail; and accordingly the *Judgment is arrested.*

WATERSTON & AL. *vs.* GETCHELL.

R agreed to cut all the timber from certain lands of *W*, and transport it to *W's* mill, to be sawed into boards, of which *R* was to receive a certain proportion; and further agreed that the ownership of the timber should remain with *W*, till certain debts of *R* were paid, and all parts of the agreement were fulfilled. It was *held* that this was a valid agreement; and that a sale of part of the logs, after they were taken from the land, to a purchaser having notice of the terms of the contract, conveyed no title, against the owner of the land.

THIS was an action of trespass for taking and carrying away fifty pine mill logs. The defendant claimed them by purchase from one *Joseph Robinson*. In a case stated by the parties it was agreed that the logs were originally cut on land of the plaintiffs, in the winter of 1825—6. On the 12th of *December* 1825, the plaintiffs and *Robinson* entered into a contract, by which they granted him permission to enter upon a tract of their land, and cut and carry therefrom all the pine timber suitable for boards; *Robinson* agreeing to deliver the same, to them or their agent, "at the places and for the purposes following, viz:—The one fourth part in the boom, near the mill of the said *W & als.* at *Stillwater*, free of expense, and for the use of the said *W & als.*;—the other three fourths at *Pea-cove*, in the *Penobscot* river, for the uses and on the conditions following, viz,—the said *W & als.* to receive the logs, transport them to their mill, saw and deliver to the said *Robinson*, within a reasonable time, three fourths of the boards made from the logs so left or delivered at *Pea-cove*, and pay forty cents per thousand, for each remaining thousand, as

their proportion of stumpage ;—the timber while at *Pea-cove* to be at the risk of the said *Robinson;* also, the expense, if any, of getting logs from the rocks, islands and falls of *Stillwater.*" The agreement further proceeded as follows :—" And it is further agreed by the said *Robinson*, that if they fail to remove from the premises aforesaid, all the pine timber of the description aforesaid, then the said *Robinson* is to pay to the said *W & als.* a sum equivalent to one fourth part of the value of such remaining timber. And it is further agreed and understood that the ownership of all the timber so cut, how or whereever situated, shall be and continue in the hands of the said *W & als.* until all sums due them, and to *William Emerson* of *Bangor*, from the said *Robinson*, shall be paid and discharged, and all the conditions of this agreement fulfilled."

Under this agreement the logs in controversy, with others, were cut. Afterwards, pursuant to a new agreement touching the place of delivery, *Robinson* conveyed the logs down the *Penobscot* river to the upper pond at *Oldtown*-falls, and there delivered them to the plaintiffs' agent, who caused them to be run down to the lower falls at *Oldtown*, for the purpose of being sawed at the plaintiffs' mills. The defendant, knowing the terms of the contract, without the knowledge of the plaintiffs, took and carried away the logs sued for, which would make 15,791 feet of boards, and were worth eight dollars per thousand, in the log.

The parties agreed that if the defendant was liable for the whole value of the logs mentioned in the plaintiffs' declaration, judgment should go against him, upon default, for one hundred and seven dollars ;—and that if the action was maintainable only for a part of the value, then judgment should be entered for that part ;—otherwise, the plaintiffs agreed to become nonsuit.

Gilman, for the plaintiffs.

Allen, for the defendant.

Mellen C. J. delivered the opinion of the Court.

It appears that the logs in question were cut on the plaintiffs' land, and taken and carried away by the defendant. Of course he is

responsible in damages, unless he acquired a title to them by his purchase of *Robinson*. Whether he did acquire one, as to all, or any part of the specified quantity, is the question to be decided; and the decision must depend on the construction of the special contract between *Robinson* and the plaintiffs.

As to the one fourth part of the logs, mentioned in the agreement, there can be no doubt. *Robinson* had nothing to do with them but to haul and deliver them at a certain place, for the use of the plaintiffs; and he did so deliver them to their agent at the upper pond, at *Oldtown* falls. As to the remaining three fourths, he was by the contract to deliver them also to the plaintiffs, at a certain place, where they were to receive them, transport them to their own mills, and saw them; and within a reasonable time, deliver to *Robinson* three fourths of the boards made from them. This quantity of logs was also carried to the plaintiffs' mills by their agent, for the purpose of being there sawed. It was also expressly agreed by the plaintiffs and *Robinson*, that the ownership of all timber so cut, how or whereever situated, should be and continue in the hands of the plaintiffs, till all the conditions of the agreement should be complied with, and all monies due to them, and *William Emerson*, should be paid; and it does not appear that such conditions have been complied with, or such sums paid. This provision in the contract was well known to the defendant, at the time he committed the alleged trespass. From these terms of the contract, thus stated, it is evident that *Robinson* was not a part owner of the logs, nor an agent to sell them; they belonged to the plaintiffs; and he was to be compensated for his labor in cutting and hauling the logs, by a certain proportion of the boards, to be made from them. As to these, the plaintiffs had a reasonable time allowed, within which to deliver them; but to prevent all misapprehension dispute or eventual loss, it was agreed that the ownership should continue in the plaintiffs as before mentioned. Now, without deciding whether a purchaser of the logs from *Robinson*, without notice of the terms and condition of the agreement, could be protected, it is manifest that the defendant, having notice at the time, could gain no title, nor exercise any control or right over the property, beyond those which *Robinson* himself had and could

exercise; and he had expressly bound himself to exercise none. We are of opinion that the action is well maintained, for the value of all the logs taken, and according to the agreement of the parties, a default must be entered, and judgment for the plaintiffs for one hundred and seven dollars.

SAWTEL, *plaintiff in error*, *vs.* DAVIS.

The forms of militia returns, prescribed and furnished by the Adjutant General, pursuant to the act of Congress of 1792, *sec.* 6, are of the same binding force as if they were contained in the act itself.

The day on which the name of a person, coming to reside within the bounds of a militia company, is placed on the muster roll, should be entered in the proper column on the roll. And parol evidence is not admissible to supply the omission of such entry.

ERROR to reverse the judgment of a justice of the peace, rendered in action of the debt against the defendant, for neglect to appear properly armed and equipped, at the annual militia inspection.

It appeared, from the record sent up in the case, that the company to which the defendant belonged had never been furnished with a book of enrolment, nor was any offered in evidence. To show that the defendant was duly enrolled, the plaintiff, who was clerk of the company, offered a list of names, entitled "Company Roll," and certified by him on the back, as clerk, to be a correct roll of the company for the year 1826; and further offered parol evidence, to show that the name of the defendant had been entered on the list four days before the day of inspection; and that the list was intended and had been used, for the purpose of registering the names of persons liable to do military duty, coming to reside within the limits of the company; and that the "corrected roll," which was also pro-

duced, containing the name of the defendant, and his deficiency in equipments, was made by transferring the names from the list entitled the "company roll." And the plaintiff contended that the appearance of the defendant, at the training, cured any defects in the mode of enrolment. But the magistrate rejected the parol evidence, as inadmissible; and gave judgment for the defendant, for want of legal proof of his enrolment in the company. To which the plaintiff filed a bill of exceptions. The errors assigned were all founded on the rejection of the parol testimony.

Allen, for the plaintiff in error, contended that the magistrate ought to have admitted the roll, though it did not prove the whole case; and that parol proof was admissible to show the time when the name of the defendant was actually entered on the roll, it being the best, and indeed the only direct evidence of the fact. If the roll was not kept in the customary form, yet it was substantially good. The *Stat.* 1821. *ch.* 164. reciting the act of Congress, of 1792, *sec.* 6, which requires the Adjutant General to furnish blanks and forms to the militia, was directory merely, not absolving the captains from the duty of keeping a roll of their men, as required by other sections of the statute, nor releasing the men from the liability to do military duty.

McGaw, for the defendant in error.

Mellen C. J. delivered the opinion of the Court.

By the record, which has been certified to us by the magistrate before whom the original action was tried, it appears that he rendered judgment in favor of the defendant; and upon inspection of the exceptions filed on the day of trial, and duly allowed, we are to determine whether there is error in the proceedings. The 6th *sect.* of the act of Congress which is recited by way of preamble to the act of *Maine*, *Stat.* 1821, *ch.* 164, declares that there shall be an Adjutant General appointed in each State, a part of whose duty it shall be "to furnish blank forms of different returns that may be required, and to explain the principles on which they should be made." The 12th *sect.* of said act declares it to be the duty of the captain or commanding offi-

cer of each company "to keep a fair and exact roll of the company, together with the state of the arms and equipments belonging to each man; which roll he shall annually revise in the month of *May*, and correct the same from time to time, as the state of, and alterations in the company may require." The section enumerates many other duties which he is directed to perform; but, in the present case, it is not important to notice them. In the form furnished by the Adjutant General, as the form of a return of an enrolment, there is a column, designated as the one in which the time when any citizen shall be enrolled shall be entered; and another column in which the time of a citizen's disenrolment shall be entered. So also in the form of the record of the roll, a column is provided, in which the "time of additional enrolments, made after the *Tuesday* following the second *Monday* of *September*," is to be inserted. The evident object of these provisions is to prevent all mistake or misrecollection, by preserving the evidence of facts in writing. These forms thus furnished are to be considered as binding as though they had been contained in the act itself; and it is the duty of all concerned to conform to them. By examination of the record before us, it appears that the plaintiff offered as evidence, a list of names called "Company Roll," certified by the clerk as a correct one, and on which was borne the defendant's name; and offered parol evidence, to shew that his name had been recorded on the list, four days, at least, before the day of inspection; and that the corrected roll of the company, which was produced with the name of the defendant thereon, was made by transferring to it the names found on the list. This parol evidence so offered, was rejected as inadmissible to prove an enrolment, and to this decision of the justice, the exception was filed. Why was this parol evidence necessary? Because the clerk had omitted his duty by neglecting to record the day when the defendant was enrolled. By the document offered in evidence, it did not appear that he had been enrolled so long as to be liable to do military duty in the company; and yet by law, the day of his enrolment should have been recorded, according to the form prescribed by the Adjutant General. A man is not permitted in a court of justice to take advantage of his own wrong or neglect of duty. Our opinion

is, that the parol evidence offered, was not admissible to prove a legal enrolment. The decision of the justice was given upon the offer to introduce the list or company roll, accompanied by parol testimony to show a fact as to the time of enrolment, which ought to have appeared in the appointed column. We think his decision was correct. There is no error in the record, and accordingly the judgment is affirmed with costs for defendant.

HARWOOD & AL. *plaintiffs in error, vs.* ROBERTS, *original plaintiff.*

In an action against two of four joint and several promissors, if it is shown in the writ that four promised, it is material also to show that the other two are dead, or otherwise incapable of being sued; or it will be bad, and may be reversed on error.

IN a writ of error to reverse a judgment of the Court of Common Pleas, in an action of *assumpsit* brought by *Roberts*, as indorsee of a promissory note, it appeared, from the declaration, that the note was signed by four persons, jointly and severally, and that the action was against two only, no reason appearing on the record why the other two were not joined. Judgment was rendered upon default, against the two who were sued, and who brought this writ of error.

McGaw, for the plaintiffs in error, cited *King v. Hobbs Yelv.* 27 *in notis.* 2 *Taunt.* 254. 2 *Hen. v. Munf.* 61. *Robinson v. Mead* 7 *Mass.* 353. *Streatfield v. Halliday*, 3 *D. & E.* 782. 2 *East*, 312. 1 *Chitty's Pl.* 27. 6 *East*, 85.

Williamson, for the defendant in error, admitted the general principle that the suit in such cases should be against all, or one only; but contended that as the objection was not taken in abatement, and it did not appear on the record that the others were living, and within the jurisdiction of the court, the legal presumption now is that they

were not. *Scott v. Goodwin* 1 *Bos. & Pul.* 67. *Cabell v. Vaughan* 1 *Saund.* 291. *note* 4. 1 *Chitty's Pl.* 24. *Barstow v. Fosset*, 11 *Mass.* 250. 8 *Mass.* 480. *Abbot v. Smith*, 5 *Burr.* 2615.

MELLEN C. J. delivered the opinion of the Court.

It appears by inspection of the record, that the note declared on was signed by four persons ; the action is against two of them only. It is a familiar principle that where a promissory note or bond is signed by three or more persons, who thereby contract jointly and severally, the creditor may sue all in one action, or may sue each one severally ; but he cannot sue two and omit the others ; for in such case they are sued neither jointly, nor severally, as they promised. Had the defendants pleaded the misjoinder, in the original action, in abatement, it is admitted that the plea would have been fatal to the action; but as this was not done, the counsel contends that it is now too late for the plaintiffs in error make the objection. This would certainly be true, if the original plaintiff had not in his declaration set forth the fact that the then defendants, together with two other persons, made the note on which the suit is founded. This being the case, it was not necessary to plead it in abatement ; such plea would only have informed the court of a fact which the plaintiff himself had spread upon the record. This is a plain principle. 5 *Burr.* 2614. *Homer v. Moor*, there cited. 1 *Saund.* 291. *b. n.* 4. *Yelv.* 27. *n.* 1, and cases there collected. The principal question seems to be whether, inasmuch as the plaintiff is perfectly silent in his declaration as to the fact of the life or death of the two promissors, not sued, the court are to presume them to be living, or to be dead. It is settled by many cases that when a defendant pleads in abatement that another person was a co-promissor with the defendant, he must go on and aver that he was living when the action was commenced, and ought to have been joined in the suit ;—see 1 *Saund.* 291. *b. note* 2. *Yelv.* 27. *n.* 1 ;—for pleas in abatement are not to be favored, but construed strictly. As to the form of declaring in such a case as the present, the authorities seem somewhat at variance. 1 *Saund.* 291. *note* 2. But in *Blackwell v. Ashton Styl.* 50, it was decided that if the joint obligor be dead, the regular and

proper manner of declaring is to aver his death. So in *King v. Young & al.* 2 *Anst.* 448. where there was no averment of the death of the two who were not sued, the declaration was held bad on demurrer. So in *South v. Tanner & al.* 2. *Taunt.* 254. *Letwyche & al. v. Berkley* 1. *Hen. & Munf.* 61. *Newell v. Wood* 1. *Munf.* 555. We thus perceive that the weight of authority is decidedly in favor of the plaintiffs in error; and our opinion is, that as the original plaintiff stated in his declaration, that two persons, besides the defendants, were co-promissors in the note declared on, the declaration is fatally bad, for want of an averment that those persons were dead at the time of the commencement of the action. There seems to be no more reason for obliging a defendant, in a plea in abatement, after averring that there was a co-promissor who is not sued, to go on and aver his life, than there is for obliging a plaintiff who discloses in his declaration that there was a co-promissor who is not sued, to go on and aver his death. The averment of life is essential to the sufficiency of the plea; and the averment of death to the sufficiency of the declaration. *Judgment reversed.*

CROCKET & AL. *vs.* ROSS & UX.

A *feme sole*, being summoned as trustee in a foreign attachment, took husband *pendente lite*, and afterwards disclosed, and was adjudged trustee. On *scire facias* brought against the husband and wife, to have execution *de bonis propriis*, they pleaded that at the time when, &c. she had no goods, effects or credits of the principal in her hands; and on general demurrer the plea was held bad.

THE question in this case arose upon the sufficiency of the defendants' plea; and is clearly stated in the opinion of the Court, which was delivered by

WESTON J. By the act concerning foreign attachment, *Stat.* 1821. *ch.* 61. *sec.* 9. it is provided that where any trustee has come

into court, upon the original process, and been examined upon oath; and upon such examination, it has appeared to the court, that such trustee had goods, effects or credits of the principal in his hands, at the time of serving the original writ, such trustee shall not be again examined upon the *scire facias*, but judgment shall be rendered upon his examination had as aforesaid.

The wife of *James Ross* was summoned, *dum sola*, but disclosed in the original suit, after her marriage, without the aid and assistance of her husband; so far as appears from the record. They now, upon the *scire facias*, plead in bar that the wife had not, at the time of the service of the trustee process upon her, any goods, effects or credits of the principal in her hands and possession. To this plea there is a general demurrer and joinder. The counsel for the defendants insists that the declaration is bad, and if so, whatever may be the legal objection to the plea, the action cannot be maintained. The exception taken to the declaration is, that as the rights and interest of the husband were to be affected by the judgment against the wife, it should not have been rendered without citing him in to aid and assist her; and that these proceedings, not being according to the course of the common law, the judgment is not to be considered as binding until reversed, but as void and inoperative, and liable to be impeached collaterally.

By law the husband succeeds to the rights and liabilities of the wife. He takes her and her circumstances together. Her personal chattels, and her *choses* in action, which he chooses to reduce to possession, become his absolutely, as do the rents and profits of her real estate, during the coverture; and if there be issue of the marriage, capable of inheriting the estate, during his life, if he survive her. This sufficiently shows that the common law regards with favor the interests of the husband. But on the other hand, he assumes, by the coverture, the obligation of paying her debts, and of being answerable during the coverture for her liabilities. At the time of the marriage, she having been summoned as trustee, was liable to have judgment rendered against her as such. She entered into the connexion by her own voluntary act; and could not thereby abate the process of the attaching creditor against her, or subject him to the delay or ex-

pense of calling a new party before the court; even by a plea in abatement.

If a *feme sole* plaintiff, pending her suit, marry, the defendant may by a plea, filed at the earliest opportunity, abate it. But if a *feme sole* defendant marry, she cannot, nor can her husband, in consequence of that act, claim to have the suit abated. It must progress; and the rights of the husband are implicated by the judgment. It may be presumed in such case, as it may be also in this, that the wife, who retains all her prudence and intelligence, although many of her civil rights are merged in, and yield to, the paramount rights of her husband, will avail herself of his advice and direction in the management of her defence, and that he will be stimulated by a regard to his own interest, to interpose in her behalf; and to protect her, if by law she may be protected, from a loss, which he himself must sustain. But be this as it may, the law has its course; and he is bound to abide the consequences. We see nothing to distinguish this case from any other in which a *feme sole* defendant may become covert before judgment. If there be any difference, this is a case in which her continued personal agency is more especially necessary. It is an appeal to her conscience, which she alone can answer. She must disclose facts within her knowledge, which can be verified by the oath of no other person than herself. From this view of the case, we are unable to perceive any error in the judgment. But if the judgment were erroneous, it will bind both husband and wife until reversed. The action, upon which it was founded, was commenced by writ, and is enforced by execution; according to the course of the common law. And if the collateral judgment against the trustee is preceded by a trial of a peculiar character; yet it is incident and accessory to the judgment against the principal; is liable to be reversed by the same process, and has equal validity, until reversed.

Plea in bar adjudged bad.

Chandler and *Parks* for the plaintiffs.

Allen for the defendants.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

HANCOCK.

JUNE TERM,

1828.

Memorandum. The Hon. *Albion K. Parris* was appointed one of the Justices of this Court, *June* 25, 1828, but did not take his seat during this circuit.

CLOUGH *vs.* TENNEY.

Case, and not trespass, is the proper form of remedy for a father, for the offence of debauching his daughter, where the injury was done in the house of another.

If one of two counts be bad, and a general verdict be rendered for the plaintiff, the court will not intend that the evidence supported the good count alone; but will arrest the judgment, on motion.

THIS was an action of trespass, in which the first count was for breaking and entering the plaintiff's house, and there assaulting and debauching his daughter; and the second was only for debauching the daughter, *per quod servitium amisit.* After verdict for the plaintiff, the defendant moved in arrest of judgment, on the ground that the second count, to which alone the evidence applied, was in trespas *vi et armis*, the proper remedy being an action of the case; the judge certifying that the evidence on the part of the plaintiff went in support of the first count only, the injury having been done not in his house, but elsewhere.

Abbot, in support of the motion, argued that the subject matter of the second count would not sustain an action of trespass; and though the form used in this action is such, yet there are many authorities to show that it is considered an action of the case. Thus it may be laid with a *quod cum*, which is not allowable in trespass. 2. *Salk.* 636. The plea of the statute of limitations is not guilty within six years; 2. *Burr.* 753. 6. *East* 387;—but within four years, as in trespass. 2. *Salk.* 424. The injury may be laid *diversis diebus*, &c. 6. *East* 391;—and the plaintiff is entitled to full costs, though he should recover less than forty shillings. 3. *Wils.* 319. 1. *Salk.* 206.

The *gist* of the action is the loss of service. 5. *D. & E.* 360. 3. *Burr.* 1878. No action lies by the father, merely for assaulting and debauching his child. It must be laid for breaking and entering his house, the residue being matter of aggravation. 2. *Ld. Raym.* 1032. 5. *East* 45. A license to enter would be a bar to the action; and without proof of the trespass, the action could not be supported. 1. *Tidd's Pr.* 6. 2. *Chitty's Pl.* 264. *McFadzen v. Olivant* 6. *East* 390. *Bennett v. Alcott* 2. *D. & E.* 167. 168. *Reeves' Dom. Rel.* 293. *Adams v. Hemmenway* 1. *Mass.* 145.

Deane, for the plaintiff, argued that the counts were well joined, because the pleadings, evidence, and judgment, proper to each, were the same. And he insisted that the objection, reduced to its elements, amounted only to this, that as to the first count, the verdict was against evidence; in which case the proper course would have been a motion to set aside the verdict; which is now too late.

He also contended that by the most approved authorities, and the better reason, where there were good and bad counts in the same writ, a general verdict for the plaintiff was supported by the good counts. *Wolcott v. Colman* 2. *Conn. Rep.* 324.

Weston J. delivered the opinion of the Court at the ensuing term in *Washington*.

This action is in form an action of trespass *vi et armis*, and contains two counts. The first is *quare clausum*, for breaking and enter-

ing the plaintiff's house, and there assaulting his daughter, *Lydia Clough*, and getting her with child, whereby he lost her service. The second is for assaulting the daughter, and getting her with child, whereby he lost her service; without alleging that the defendant broke and entered the defendant's house, and there did the injury. A motion is filed in arrest of judgment, upon the ground that the injury set forth in the second count, to which alone it is averred the evidence applied, being in its nature consequential, the proper remedy is case, and not trespass *vi et armis*. The judge, who presided at the trial, has certified from his notes, that the evidence adduced went in support of the second count only; it appearing that the seduction took place, not in the house of the plaintiff, but elsewhere.

The legal ground upon which the parent, or he who stands in the place of the parent, is permitted to recover damages against the seducer is, a real or supposed loss of service on his part, occasioned by the injury. This being the consequential and not the direct effect of the seduction, according to the distinctions now well settled between case and trespass, redress must be sought in the form of an action on the case. Where, however, the injury has been done in the house of the plaintiff, an action of trespass *quare clausum* may be sustained; in which damages may be recovered for the unlawful acts which followed, by way of aggravation. And it is well settled that where there has been an actual breaking of the plaintiff's close, damages may be recovered for many acts consequent thereupon, for which, if they had stood alone, case would have been the proper remedy.

In looking into the old authorities, it is observable, that these distinctions are often overlooked; and actions of trespass have been sustained for injuries which, according to more modern decisions, were the proper foundation for actions on the case. Since the time of Lord *Mansfield*, the boundaries between these actions have been more accurately marked, and more strictly defined, and the necessity of adhering to them been illustrated and enforced. And the more modern authorities upon this point, have been received, and regarded as law, in Massachusetts, and in this State. We are aware that the ground upon which this motion is urged, does not go to the merits or justice of the

case; but as the forms of judicial proceedings are in so many instances essential to the due administration of justice, great injury would arise to the community by relaxing them. It would occasion a want of precision in practice, which would overturn the rules of pleading, which, although abounding in technicalities, are admirably adapted to present clearly the point in issue between the parties. For these reasons, we are constrained to sustain the motion, and to arrest the judgment. We must have come to the same result, independent of the certificate of the judge, a general verdict being returned, and one of the counts being bad. *Judgment arrested.*

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

WALDO.

JULY TERM,

1828.

LOTHROP, *plaintiff in error, vs.* MUZZY, *original plaintiff.*

A judgment debtor, whose goods have been seized and sold on execution, does not stand in the relation of vendor to the purchaser. And therefore, not being liable on any implied warranty, he is a competent witness in any suit between other persons respecting the goods.

ERROR to reverse a judgment of the Court of Common Pleas, in an action of trespass *de bonis asportatis.*

It appeared, from the record sent up, that *Muzzy*, a constable of the town of *Searsmont*, having in his hands an execution in favor of one *Tilden*, against *John Jones*, seized and sold at vendue a certain quantity of hay; which, after the sale, and before delivery to the purchaser, *Lothrop* claimed and took away, as his own; which was the trespass here complained of. At the trial, before *Perham J.* the plaintiff offered *Jones* as a witness; to whose admissibility the defendant objected; though it appeared that the original execution was fully discharged by the creditor's attorney, and that the creditor, in consideration of the proceeds of the hay, had released *Jones* from all liability respecting the hay, and discharged the execution; and that

Muzzy also had released him from all liability on that account. The Judge overruled the objection, and admitted the witness; to which the defendant filed exceptions.

Crosby, for the plaintiff in error, contended that *Jones* was interested, notwithstanding the releases; for if the property was his own, the proceeds would go the payment of his debt, and the surplus to himself; the officer being but a trustee. 12. *Mass.* 411. 1. *Phil. Ev.* 50. *note (b.)* 1. *N. Hamp. Rep.* 189. He stood in the place of a vendor, who is not a competent witness in an action against the vendee upon a warranty of title. 6. *Johns.* 5.

And his interest was not released, there being no act of his own. The discharge of the execution did not remove it; for considered alone, independent of the hay, it entitled the debtor to the immediate restoration of the property taken.

The verdict also, he insisted, might be evidence for *Jones*, either in a suit of his own against the officer for the surplus proceeds; or in an action by *Lothrop* against *Jones* for the value of the hay, as so much money paid for his use.

J. Williamson, for the defendant in error.

The opinion of the Court was read at the sittings after term, in *September* following, as drawn up by

Mellen C. J. The only question specially presented on the exceptions filed in the court below, and to which the arguments of the counsel have been directed, is whether *John Jones* was a competent witness, and properly admitted. The cases cited from the New York and New Hampshire Reports, to shew that the vendor of a chattel, by the very act of selling it as his own, becomes a warrantor, without any special warranty, and that he is therefore an interested and incompetent witness in support of the title of the vendee, seem to be inapplicable to the case under consideration. *Jones*, the witness, does not stand in the character of a vendor of the hay. He never sold it to *Muzzy*, nor to any one else; of course he has never subjected himself to the obligations of an express or implied warranty. Whatever property he once had in the hay, has been devested by an adversary

process, valid and binding on him without and against his consent. On this ground, therefore, he cannot be considered as an incompetent witness. A grantor or vendor without warranty is always a good witness. *Busby v. Greenslate* 1. *Str.* 445. *Twombly v. Henley* 4. *Mass.* 441. It has been urged, however, that *Jones* was interested on another ground; namely, that if *Tilden's* judgment and execution were not legally discharged by *Williamson*, as his attorney, then *Jones* was interested to establish the ownership of the hay in himself, at the time of its seizure and sale on execution, so as by means of such sale to satisfy the execution; and if the judgment and execution were discharged by the attorney then the damages recovered by *Muzzy* would in fact belong to *Jones*, and he could recover them of him on the ground of his being a mere trustee of *Jones* to the amount of such damages. This argument rests on the assumed principle that the verdict in the present action would be legal evidence, by which *Jones* in any future action between other parties might realize and secure to himself all the advantages and rights which he anticipates and expects. But would such be the case? Should *Lothrop* sue *Tilden* and *Muzzy*, in an action of trespass for taking and disposing of the hay, the verdict in this action would be no evidence in that; or should he sue *Jones* alone, or jointly with *Tilden* and *Muzzy*, or with either of them, in such action of trespass; in either case the law would be the same. So if *Jones* should sue *Muzzy*, on the ground of his holding the damages recovered, as his trustee, the verdict in this case could not be legal evidence for him. In all the cases above supposed, the parties would be different from those now before the court. It is a general rule, that a verdict is evidence only between the same parties, or such as claim under the same parties. And *Ch. B. Gilbert* lays it down, "that nobody can take benefit by a verdict, who had not been prejudiced by it, had it gone contrary." And a stranger cannot give a verdict in evidence, even against one who was a party to the former suit. 1. *Phil. Evid.* 249. 250. *Burgess v. Lane & al.* 3. *Greenl.* 165. It is perfectly clear that *Jones* cannot in any manner be prejudiced by the verdict in the case at bar. It is true that he may have testified under the influence of wishes, and perhaps of strong feelings, in favor of the original plain-

tiff; and on that account his testimony might have been liable to suspicion and doubt; but this was a proper subject for the consideration of the jury, and could not operate to exclude him as incompetent. In the view we have taken, no further allusion is necessary to the several releases executed at the trial.

We perceive no error in the record and proceedings before us; and accordingly the judgment is affirmed, with costs for the defendant in error.

CROSBY *vs.* ALLYN.

An actual entry, by the officer, on real estate, seems not to be necessary to constitute a valid attachment.

An attachment of "all the debtor's right, title and interest in any real estate in the town of *B.*" is a good attachment of his tenancy in common in a particular tract in that town.

The lien created by attachment of a tenancy in common follows the estate, if it be changed from common to several property pending the attachment.

THIS was a writ of entry for possession of a parcel of land in *Belfast*, to which both parties claimed title as judgment creditors, under several extents, against one *Ezra Ryan*.

In a case stated by the parties, it appeared that *Ryan*, being tenant in common of an undivided portion of a tract of land, preferred his petition for partition thereof, according to the statute. Pending this petition, *Allyn* caused all *Ryan's* right, title and interest to real estate in *Belfast* and *Thorndike*," to be attached. At *November* term 1826, the proceedings in partition were closed, and *Ryan's* portion of the estate set off in severalty; and at *March* term, 1827, *Allyn* had judgment in his suit, and forthwith caused his execution to be seasonably and regularly extended, by metes and bounds, on the

whole portion, thus set off to *Ryan*. In *January*, 1827, after partition was made, and before *Allyn's* judgment, *Crosby* caused the specific parcel set off to *Ryan* in severalty to be attached ; and at the *July* term following obtained judgment, and caused his execution to be seasonably and regularly extended on a part of the same land, constituting the premises now demanded, of which *Allyn* was then in the actual possession. And the question which was the better title, was submitted to the court.

Crosby, pro se, contended that the sheriff's return on the writ in the tenant's suit was void, because it did not appear that he had entered on the land, or done any act respecting it. And something, he argued, analogous to seizure or manucaption, was necessary, to constitute a valid attachment of real estate, and to prevent the frauds which otherwise might be perpetrated with facility. *Bridge v. Sparhawk*, 3 *Dane's Abr.* 85. *Shove v. Dow*, 13 *Mass.* 529. In *Perrin v. Leverett*, 13 *Mass.* 128, the sheriff went as near to the estate as he could, it being a pew, in a locked meeting-house.

The return is also void for uncertainty. It should be at least so certain that another officer may find the land, and another creditor know how to avoid it. The rule respecting certainty in deeds of bargain and sale, or other conveyance, is here strictly in point. *Worthington v. Hylyer*, 4 *Mass.* 205.

But if the attachment was good, yet it was only of an undivided interest in the land; and the execution could only be extended on what was attached. If the thing attached was no longer in existence, the tenant's title commenced with the extent, there being nothing prior to which it could have relation ; and this being subsequent to the demandant's attachment, the latter has priority, as the elder lien.

Allyn, pro se, said that the right of the attaching creditor still existed, partaking of all the modifications which qualified the title of the debtor, between the time of the attachment, and the extent ; whether it were an inchoate title, subsequently perfected ; or a concurrent title to the whole of the land, afterwards converted, by due process of law, into an exclusive right to part. Analogous to this principle is the case of an attachment of a right in equity of re-

demption, where the lien still attaches to the fee, after payment of the mortgage. *Foster v. Mellen*, 10 *Mass.* 421.

But if it were not so, yet *Ryan* is bound by the extent; and therefore the demandant is concluded also, being privy in estate, and claiming under him. *Varnum v. Abbot & als.* 12 *Mass.* 474.

MELLEN C. J. delivered the opinion of the Court.

Ryan was once the undisputed owner of the demanded premises, and both parties claim under him by attachment and levy. As the attachment in the suit of *Allyn* was made prior to that in the suit of *Crosby*, and as the execution was levied within thirty days after judgment, and seasonably recorded, it is evident that the tenant has the better title, if all proceedings were regular in relation to it. The *first* objection made by the demandant is that it does not appear, by the return on the original writ, that the officer who served it ever entered on the land to make the attachment. It has often been made a question whether, in such a case, a *pedis possessio* is necessary. As attachments are not required to be recorded or made known until the return of the writ, it seems to have been by many considered as an unmeaning ceremony and perfectly useless; and so it appeared to the court in *Perrin v. Leverett*. No case has decided what ceremony, if any, is necessary to constitute an attachment of real estate; but, whatever it is, the officer states that he did attach the estate of *Ryan*; and nothing more is said in the return on the demandant's writ against *Ryan*; and we must therefore, as the return stands, consider that the attachment was made in the usual manner, and as creating that lien which the statute recognizes and protects, as binding on the estate attached. We therefore overrule this objection.

The demandant's second objection is that the return is void, for uncertainty as to the description of the real estate attached. The language of the return is less accurate than usual;—"all the right, title and interest the within named *Ezra Ryan* has to real estate in *Belfast* and *Thorndike*." Such a general description, however, in a deed from *Ryan* to the creditor, would have been effectual to convey all his estate in those towns. A description may be general, or it may

be special; and in both cases it may be perfectly intelligible. The object in view was to create the statute lien upon all those lands in the two towns to which *Ryan* had a title; and the demandant's objection seems to be removed by the application of the principle, "*id certum est quod certum reddi potest.*" This objection must be overruled.

The third objection is, that as *Ryan* was a tenant in common, at the time the tenant's attachment was made of a tract of land, of which the premises demanded are a part; and as *Ryan's* share, being the demanded premises, was assigned to him in severalty by judgment of court after the attachment, and before the levy of the tenant's execution, the attachment was thereby dissolved; because *Ryan's* interest or title in common had disappeared; and it is further contended that the tenant's levy on the several property of *Ryan* can have no legal connexion with the attachment. If such is the legal result, then it follows that the demandant has the better title; because his attachment was prior to the tenant's levy, and it was seasonably perfected by the regular levy of his execution. Let us examine this argument. Before partition, *Ryan's* property was bound by the attachment; because the lien extended over the whole tract; in every part of which he was interested as tenant in common. By the partition, his estate was not increased or lessened; but it was severed from the residue of the tract, and known by boundaries of its own; and then the lien created by the attachment was limited to the part assigned to him. During all these proceedings, however, he continued owner of the legal estate. No inference can, therefore, be drawn against the continuance of the lien, from the language of the statute cited, respecting the attachment of an equity of redemption. The lien followed the estate, in its change from common to several property. Besides, it would be a singular principle of law, that would give a tenant in common, the power of dissolving an attachment of his title in common, by obtaining partition before his creditor could obtain judgment against him. The tenant's execution was properly extended on the several property. If the tenant could have defeated the partition in respect to the share of *Ryan*, by virtue of the attachment, still he has elected to consider it valid, by levying on the demanded premises.

after the partition was completed; and as to the tenant and those claiming under him, as *Crosby* does, the levy is good, according to case of *Varnum v. Abbot & al.* This objection, we think, must share the fate of the others.

On the whole, our opinion is, that the action is not by law maintainable; and according to the agreement of the parties, the demandant must be called.

CASES

IN THE

SUPREME JUDICIAL COURT

FOR THE COUNTY OF

YORK.

APRIL TERM,

1829.

SEWALL & ALS. *vs.* RIDLON.

It is no valid objection to an ancient record of partition by petition, under *Stat.* 1783, *ch.* 41, and *Stat.* 1786, *ch.* 53, that no interlocutory judgment was formally entered, if it appears that notice was regularly given, and no one appeared to object, and that thereupon commissioners were appointed to make partition.

It is not necessary that commissioners, appointed to make partition under the statutes, should be inhabitants of the county in which the lands lie.

Proceedings in partition, in the Supreme Judicial Court, by petition pursuant to the statutes, may lawfully be in any county in the State, if no person appears to contest the title of the petitioner, or if the controversy is an issue of law. But when an issue of fact is joined, the record is to be remitted for trial of the issue, to the county where the lands lie.

But if the trial is in any other county, and without consent of parties, yet the judgment will not be void for want of jurisdiction; but will be good till avoided by writ of error.

THIS was a petition for partition of a tract of land in *Hollis*, in this county, to which the respondent pleaded his sole seisin. At the trial before *Parris J.* at the last *September* term, the petitioners, in

proof of their title, offered in evidence the record of proceedings in the Supreme Judicial Court of Massachusetts, in a process by petition for partition, preferred by *Patrick Tracy & als.* in *Suffolk*, at *February* term, 1788, against persons unknown; in which the court ordered notice, returnable in *Essex* at the *June* term ensuing; at which time "no one appearing to object thereto," the court appointed commissioners, one of whom was *Robert Southgate, Esq.* of *Scarborough*, in the county of *Cumberland*, to make partition; and at the following *December* term in *Essex*, the warrant being returned, the court ordered that it "be accepted, and that the same be recorded." No formal judgment, interlocutory or final, appeared to have been entered. The tract of which partition was prayed for, was described as "the plantation called *Little-falls*, containing about thirty six square miles, bounded on the head or northwest end of the town of *Biddeford*, and carries that breadth being four miles, adjoining *Saco* river, to the river called the little *Ossipee*;—excepting the several lots adjoining *Saco* river, which Maj. *William Phillips*, in his lifetime, by deed, conveyed to *Tyng*, *Russell*, *Leverett* and *Pattershall*, now in the actual tenure and occupation of their several heirs and assigns; and some small tracts laid out by virtue of grants made by the late Province of *Massachusetts-bay*; and excepting one quarter part set off to *Josiah Waters*, of *Boston*."

This evidence the Judge rejected, because the proceedings were had in a county other than that in which the lands were situated; and a verdict was taken by consent, for the respondent, subject to the opinion of the court upon the admissibility of the evidence.

J. and *E. Shepley*, for the petitioners, contended that the evidence ought to have been admitted. As there was no issue joined, the proceedings might be had in any county. The jurisdiction of the Supreme Judicial Court, as it is commensurate with the State, may well be exercised over any subject matter, in any county, where it is not made local by particular statutes. The *Stat.* 1786, *ch.* 53, only provides that certain particular facts shall be tried in the county where the land lies, unless it is otherwise agreed. But where these are not in controversy, the proceedings ought to be had wherever the court

may deem it most for the convenience of the parties. *Mitchell v. Starbuck* 10. *Mass.* 5. *Vaughan v. Noble* 6. *Mass.* 252. *Bonner, ex parte* 4. *Mass.* 122. The formal entry of a judgment *quod partitio fiat* was not necessary. *Southgate v. Burnham* 2. *Greenl.* 369.

J. Holmes and *D. Goodenow*, for the respondents, argued that the record was inadmissible for the purposes for which it was offered.

1. It contained no judgment *quod partitio fiat.* The statute of 1786. *ch.* 53. converts what was an amicable proceeding into an adverse suit; and in *Cook v. Allen* 2. *Mass.* 462. it is settled that an adverse interest is let in, and that one claiming to be sole seised, and neglecting to appear, is concluded as to his right of possession. As these proceedings, therefore, are to have the effect of a judgment at common law, they ought to be conducted with the same forms and solemnities. The warrant in the one case, is of no greater value than the *habere facias* in the other; neither being proof of a judgment. Each is an official writ, issued in vacation, and without judicial sanction.

2. But if there had been such judgment, it was rendered in the wrong county. In all proceedings touching the title to real estate, whatever an adverse party has a right to contest, must be transacted in the county where the lands lie. The title to real estate has never, since *Magna Charta*, been tried but by a jury of the vicinage; and this, at most, extends no farther than the limit from which jurors may be summoned to serve on the trial. And the care of the legislature to preserve this right is manifest in the provision excluding all implied consent, and requiring the trial to be had in the county where the lands lie, unless the contrary is expressly agreed. As, therefore, the proceedings in the present case were not had in the county of *York*, they were *coram non judice*, and merely void. The judgment cannot avail for any purpose whatever; and may be avoided collaterally, by plea or otherwise. *Hathorne v. Haines* 1. *Greenl.* 238.

3. The description, also, of the land whereof partition was prayed, was too loose, general, and uncertain, and could not be suffered to go to the jury.

4. And the commissioners were not all freeholders of the county.

It is true, the statute on this subject is not express; but so is the common law, by the principles of which these proceedings ought to be governed. The sheriff was required to make partition by the oath of twelve good freeholders, *de vicineto;* and the commissioners, provided by the statute, are only a substitute for the jury.

MELLEN C. J. delivered the opinion of the Court.

The question is whether the copy of the proceedings in the Supreme Judicial Court of Massachusetts in the year 1788, was properly rejected, when offered to be read in evidence by the counsel for the petitioner. If not, the verdict must be set aside and a new trial granted. Several objections have been urged against its admissibility, on the ground of certain alleged irregularities in those proceedings.

One irregularity or imperfection, as contended, is in the description of the tract of land, whereof partition was prayed. This objection is founded on an intimation in a note subjoined to the report of the case of *Cook v. Allen*, cited in the argument. But on examining the great boundaries of the tract referred to, which from their nature must have been notorious, they must be considered perfectly intelligible to all persons interested; and though certain parcels were excepted by particular references or descriptions, yet forty years ago those excepted parcels must, in all probability, have been well known to the co-tenants, as they all claimed under *William* and *Bridget Phillips*, by title derived after many of the excepted parcels had been conveyed by said *William Phillips*. These co-tenants must be presumed to have known that their common tract did not include those parcels. As to them, therefore, the description in the petition could not have been uncertain or unintelligible; and it does not appear that *Ridlon*, the respondent, or in fact any other persons, at that time, were in possession of any part of the land described, who could have been deceived, even if the description had been less definite than it was. This objection was not very seriously urged by the counsel, and we all consider it unsubstantial.

In the second place it has been contended that no formal judgment was entered, either interlocutory or final. This is true; but it ap-

pears that notice was given according to the order of court; that no person appeared to answer to the petition; and thereupon commissioners were appointed to make partition, and their return was duly made on oath, and accepted. The proceedings, in respect to the above particulars, were not conducted with the same exactness as at the present day. In considering this objection we must remember we are now examining a record more than forty years of age, and in relation to the mere form of it; and we should remember also that the application of rigid rules and principles to such ancient transactions as to form, where there is plain and intelligible substance, would often create confusion, unsettle titles which may have long been considered as firmly established, and produce injustice. On principles of this nature this court proceeded in the case of *Southgate v. Burnham*, cited in the argument, which very nearly resembles the present case, as to the informalities in question. We feel it our duty to overrule this objection.

Another supposed illegality is the appointment of *Robert Southgate* an inhabitant and freeholder in the county of *Cumberland*, as one of the commissioners, though the lands to be divided were in the county of *York*. We consider the act of 1783, *ch*, 41, as a satisfactory answer to this objection. That statute does not require that the commissioners should be inhabitants and freeholders of the same county in which the lands lie. Such was the construction which the court gave to the act, when they appointed Mr. *Southgate;* and we do not feel at liberty or disposed to question its correctness on this occasion. We therefore overrule this objection also.

The last point, and that which the counsel have principally relied upon, is that the informal interlocutory and final judgments were both entered in the county of *Essex*. It is admitted that a petition for partition may be entered in any county and an order of notice there made, because the process does not assume an adversary character till the return of notice to all concerned; yet the counsel have strenuously contended that all parts of the process, in which any respondent has a right to appear, and which he may legally contest, must always be conducted and decided in the county in which the estate is situated; and that such should have been the course of proceedings

by the Supreme Court of Massachusetts in the case in question. This leads us to the examination of the statutes of 1783 and 1786 respecting the partition of real estate. The former contained no provision for the trial, by jury or otherwise, of the question of tenancy in common alleged in the petition, if any person appeared and contested the existence of such tenancy, or the amount of common interest therein specified. By that act, the Supreme Judicial Court, having general jurisdiction over the Commonwealth, were accustomed to sustain and complete proceedings in partition in any county or counties, without reference to the particular county in which the lands, whereof partition was prayed, were situated, when no persons appeared and objected. When there was an objection, then all further proceedings were stayed. This inconvenience occasioned the act of 1876, *ch.* 53, which provided for the trial of the question of co-tenancy, when the allegations in the petition respecting it were contested by a respondent; and the legislature deemed it expedient in conformity to the general principle in relation to the locality of real actions, so far to adopt that principle, as to declare that it should be tried in the county where the lands lie. The language of the proviso is, "that the trial of the fact by a jury, whether the petitioner holds in common, in the same proportion he alleges in his petition, or in a lesser proportion, shall be determined in the county where the lands lie, unless the parties shall expressly agree to the contrary; in which case the trial by jury may be had in such county as the parties agree upon." The restriction contained in the above proviso is expressly confined to the trial of disputed facts by a jury. If the respondent's plea in bar, or the pleadings subsequent thereto, should lead to an issue in law, the proviso would not embrace it and confine the trial to the county, At any rate the proviso has respect only to the trial of the issue formed; in all other particulars touching the proceedings, the court are wholly unrestrained. The court, therefore, might, in their discretion, receive a petition in one county, and order notice returnable in another, though not the county where the lands lay; and if no person should appear to contest the allegation of co-tenancy, there would be nothing in the act of 1786 to prevent the court

from entering the interlocutory judgment there, and afterwards accepting the return in a third county. If, on the return of the notice, a respondent appeared, and contested the alleged co-tenancy, the court would then be obliged to transfer the petition to the county where the lands were situated, that the jury of that county might try it, according to the proviso of the act. In this way, the right to a trial by jury, in usual form, is preserved to the citizen. This construction is sustained by the latter part of the proviso relating to a trial in any county on which the parties may expressly agree. This shows that the legislature contemplated the case of a petition made returnable, and actually returned, in a county where the lands are not situated; because, until after notice returned, there could not regularly be any respondent, and of course, not any parties to enter into the express agreement. In the case in question, however, there was no appearance; no one was disposed to contest the allegations of the petition, and therefore there was nothing requiring the decision of the cause to be in the county of *York;* for there was no fact in controversy. All constitutional and legal rights have been preserved, with full liberty to all to enjoy them. It has not been shown that any injuries or inconveniences have been the consequence of the exercise of the general jurisdiction of the court, in the manner apparent on their proceedings. We hear no complaint from any of the former co-tenants, or any interested in the lands at the time of notice or partition.

Since the organization of this court, the course pursued has been to receive petitions for partition in any county, but to order notice returnable in the county where the lands lie; though the language of our statute is the same as that of Massachusetts, relating to this subject. This has been considered the mode most convenient, all circumstances taken into view. The State being so far settled, and this court holding one or more terms annually in each county, it seems advisable to continue it. If the co-tenants of any large tracts reside out of the State, still, the partition must be made by the authority of some court within the State, and the proceedings may be had in the county where the lands lie, as easily as in any other. In deciding, however, on the legality of the mode adopted by the Supreme Judicial Court of Massachusetts forty years since, such considerations as

may now properly influence this court in the exercise of its discretionary power, ought not to affect our decision of the present cause.

We have thus examined and given our opinion upon all the objections which have been urged by the counsel for the respondent, presuming this course the most useful to the parties, and not unimportant to others. The answer which we might have given, and which would have been decisive of this cause, is, that if the proceedings in question were irregular, and not in conformity to the provisions of the act of 1786, still the judgment and proceedings would not be void, but only voidable in the usual manner, and could not be impeached in the summary and indirect manner contended for by the respondent's counsel. The court had general jurisdiction of the subject; and if they had conducted improperly in its exercise, the judgment and proceedings should be examined on error; but till the judgment shall be so reversed, it must, like other judgments, be respected as binding the rights of the parties, at least so far as their possessory rights are involved. We are therefore all of opinion that the verdict must be set aside, and a new trial granted.

GILPATRICK *vs.* SAYWARD.

A farm being purchased, and sureties given for part of the purchase-money, the deed was made, by consent, to the sureties only, for their indemnity against the note they had signed. Afterwards they refused to give up the deed to the real purchaser, on being discharged of their suretyship, without the payment of fifty dollars to each of them, which the purchaser paid, the farm being of considerable value, without making any objection to the amount. It was held that he could not recover back the money thus paid.

THIS was assumpsit for money had and received. At the trial before *Parris J.* it appeared that the plaintiff had made a parol

agreement for the purchase of a farm, at the price of twelve hundred dollars; for which he paid six hundred dollars at the time, and procured the defendant, and two others, to become his sureties in a promissory note for the residue; and for indemnity against their liability on the note, it was agreed that the deed should be made to them alone. It was accordingly so made, and left with an attorney; who testified that he advised that the deed should not be recorded, because the grantors were responsible men, and he supposed the negotiation was not finished; but yet that he thought he should have been justified in delivering the deed to the sureties, if they had called for it.

After some months, he real purchaser having made a bargain for the sale of the land, in order to pay off the note, payment of which, however, had never been demanded of the sureties, he applied to them to give up the deed; which the defendant expressed his willingness to do; and when compensation for his trouble was spoken of, he considered it trifling, and deemed six or ten dollars a liberal allowance. But afterwards he, with the other sureties, refused to give up the deed, on being discharged of their suretyship, without receiving fifty dollars each; which the plaintiff paid, without making any objection to the amount; and brought this action to recover the sum paid to the defendant.

Upon these facts, the counsel for the defendant requested the Judge to instruct the jury that if they believed that the deed to the sureties was at their control, and that they had a right to cause it to be recorded at their pleasure, then the fee was vested in them; and that any parol agreement to deliver up the deed, upon being discharged of their suretyship, was void by the statute of frauds. But this the Judge declined to do; and a verdict being returned for the plaintiff, the point was reserved for the consideration of the court.

D. Goodenow, for the defendant, to show that the action was barred by the statute of frauds, cited *Pitts v. Waugh & al.* 4. *Mass.* 424. *Baker v. Jewell* 6. *Mass.* 460. *Boyd v. Stone* 11. *Mass.* 342. *Bliss v. Thompson* 4. *Mass.* 488. *Sherburne v. Fuller* 5. *Mass.* 153.

J. Holmes, for the plaintiff, contended that the money was obtained from him by extortion, and taking an undue advantage of his situation. The deed was left with the attorney for the sole purpose of indemnity to the sureties against their liability. No other object or damage was ever pretended. To withhold the deed, after this purpose was accomplished, was a fraud. And the plaintiff, being placed, by the bad faith of the defendant and his partners, in a situation where he must pay one hundred and fifty dollars, or lose twelve hundred, was compelled, by a moral necessity, to yield to their demand, however unjust. Money thus obtained, neither equity nor law will allow the party to retain. 2. *Poth. Obl.* 380. *Astley v. Reynolds* 2. *Stra.* 915. *Smith v. Bromley, Doug.* 696, *note. Moses v. Macferlan* 2. *Burr.* 1012. *Dutch v. Warren* 1. *Stra.* 406. 7. *Johns.* 240. The case of *Hall v. Shultz* 4. *Johns.* 240, materially differed from this, because there the defendant had actually paid his own money to purchase the land, and took the conveyance to himself, under an agreement that the fee should vest in him, as in fact and in law it did. But the reasoning of *Thompson J.* in that case is strong to the point now contended for ; and is supported by *Shepherd v. Little* 14. *Johns.* 210.

Weston J. delivered the opinion of the Court, at the succeeding term in *Cumberland.*

It is the policy of the statute of frauds to require written evidence of certain contracts, for the purpose of security against the frailty of memory on the one hand, and fraud and perjury on the other. The wisdom of this policy has been generally approved, and might be illustrated, if necessary, by a consideration of the insecurity and uncertainty to which important rights, especially in relation to real estate, would be exposed, if the law was changed by the legislature, or relaxed by judicial construction. In a community where almost every individual is able to write, it imposes no unreasonable burthen; and indeed requires nothing more than what is dictated by common prudence, and a due regard to valuable interests. It will sometimes happen that men, who do not feel the force of moral obli-

gation, will avail themselves of the rule, to escape from the performance of contracts, which, in equity and good conscience, they ought to fulfill. It is to be regretted that instances of this kind should occur, where the law cannot afford adequate relief. They arise from the unavoidable operation of general rules. It is not the fault of the law, that parties are thus exposed to suffer. It is because they are too confiding, and neglect the forms and precautions which the law has provided for their security and protection.

In the case before us, by the appointment of all the parties in interest, land of considerable value was conveyed, by an absolute deed, to the defendant and two other persons. They paid no part of the consideration, although they had become sureties for the plaintiff for a portion of it, from the payment of which, however, they were ultimately relieved. There was no declaration of trust in writing; nor did they enter into any written contract to convey the land to him, or to any other person whom he might appoint. The plaintiff had placed himself in their power; and they could have held the land, however unconscientious such a course might have been, in defiance of any legal remedy. They stopped short of the extreme point of injustice, to which they might have gone, if they had availed themselves, to the utmost extent, of the legal advantage they derived from the mistaken confidence reposed by the plaintiff in their honor and integrity. They insisted that the plaintiff should pay a sum equal to about one eighth of the value of the land, and he, finding he could obtain no terms more favorable, deemed it prudent to pay what they required. He now brings this action, to recover back the sum received by the defendant.

A moral obligation has been held a sufficient consideration for an express promise; but the law does not imply a promise, except upon the basis of a legal obligation. A contract for the conveyance of real estate, or of any interest in it, not reduced to writing and signed by the party to be charged, or his authorized agent, does not create an obligation of the latter kind. The law takes no notice of it as the foundation of legal rights. The grantees, in the case under consideration, were the legal owners of the land; they relinquished it for a stipulated sum; and this sum, received upon a legal consideration,

they will be suffered to retain, notwithstanding they may have refused to perform a contract, which the law does not enforce.

It has been often laid down as a general proposition, that the law implies a promise to pay or refund money, which in equity and good conscience ought not to be withheld. The generality however of this rule is not without qualification The law lends not its aid to enforce equities, however binding in conscience, which are not founded upon a legal consideration. It is undoubtedly equitable that co-trespassers upon the person or property of another, should contribute in the payment of satisfaction to the party injured; and yet if one pay voluntarily, or be compelled to do so by suit, he has no remedy for contribution. The law will not enforce express promises, nor raise implied ones, which are against public policy, or which indirectly tend to defeat its rules. If the principle of equity and good conscience, according to the moral sense of mankind, is to be a basis upon which the law will, without exception, imply an *assumpsit*, the policy of the statute of frauds may be greatly impaired. A party is under a parol contract, binding in conscience but not at law, to convey real estate. He refuses to do it. The party contracted with purchases and obtains a conveyance, upon the payment of a sum of money as a new consideration. If upon these facts, an action lies to recover back the money, the law is indirectly made the instrument of defeating its own principles. If the purchaser of real estate could recover back the purchase money, whenever he could prove a parol trust against the vendor, and thus establish the fact that the consideration was retained against equity and good conscience, it would be to no purpose that, by the policy of the law, all trusts not declared in writing, except such as arise by implication of law, are disregarded.

In the case of *Hall v. Shultz*, 4 *Johns.* 240. the plaintiff presented a strong case in equity, arising from hard and oppressive conduct, on the part of the defendant. A farm of the plaintiff's worth eight thousand dollars, was about to be sold by the sheriff at auction, on an execution against him. Not being able at that time to command the money, he procured the defendant to purchase it in for him; under a parol agreement that the defendant should reconvey to the plaintiff, upon being refunded the purchase money and inter-

est; and, as one witness testified, a reasonable compensation for his trouble. The defendant bought the farm for about three thousand dollars; but refused to reconvey to the plaintiff, except upon the repayment of the principal and interest advanced, with the further sum of three hundred dollars. The plaintiff complained of this exaction, as a violation of their agreement; but not being able to obtain better terms, he paid the money required, and took a reconveyance of the land. He then brought *assumpsit* to recover back the three hundred dollars. *Thompson J.* was for supporting the action; and he adduced authorities, and urged, with great ability, every argument which could be brought to bear in aid of his opinion. But he did not satisfy his brethren, *Kent C. J.*, *Spencer*, *Van Ness* and *Yates*, Justices, who concurred in deciding that, hard as the plaintiff's case was, he was remediless, the defendant being protected by the statute of frauds.

It has been contended in argument, that the opinion of Justice *Thompson* was confirmed by the subsequent case of *Shepherd v. Little*, 14 *Johns.* 210; but it will be found upon examination, that in that case it was only decided, that *assumpsit* will lie for the price of land conveyed, notwithstanding the consideration is formally acknowledged by the deed to have been received.

New trial granted.

Usher *vs.* Hazeltine.

Where a farmer made a conveyance of his farm to his son, in consideration of the son's bond to support him during his life, retaining in his own hands personal property to a greater amount than the debts he owed at the time; this conveyance was held good, there being no proof of actual fraud; although some of the personal property was exempt from attachment; and although after his decease, in consequence of the charges of administration, and of the sum allowed by the Judge of Probate to the widow, the estate proved insolvent.

If a creditor will blend in one suit debts accrued partly before and partly after a conveyance which he would impeach as fraudulent, and has one judgment for them all; he can come in only in the character of a subsequent creditor.

This was an action of trespass *quare clausum fregit*, in which both parties claimed titte to the *locus in quo*.

At the trial, before *Parris J.* at the last *September* term, it appeared that *William Hazeltine*, father of the defendant, induced him, in *August*, 1824, to return from *Calais* where he then resided, to *Buxton* in this county, and take a deed of his farm, giving back his own bond to support his father and mother during their lives, and to pay out certain sums to the daughters, he being the only son. This deed and arrangement were made upon deliberation, and advice with their relatives and friends; and without actual fraud. It was testified that the father was an honest man, and not then involved in debt. After the decease of the father, in *November*, 1824, his widow deserted the contract in the bond, and took her dower in the estate; the son, however proceeded to pay out, in that and the three following years, divers sums to his sisters, as stipulated in the bond. The deed was recorded in *February*, 1825, and the farm actually occupied by the defendant, ever after the conveyance.

The personal estate was inventoried at $427,46; besides which there was other property, to the value of upwards of 80 dollars, not

inventoried ; in *June*, 1825, the Judge of Probate made an allowance of two hundred dollars to the widow, out of the personal estate ;—she settled her third administration account *Jan.* 23, 1826 ; after which the estate was represented insolvent ;—and at the close of the administration, the debts were found to amount to two hundred and thirteen dollars and some cents, and there remained a balance of personal estate, amounting to forty-one dollars and some cents, to be distributed among the creditors.

The plaintiff had a book account, consisting of various charges against the deceased, entered mostly before the conveyance of the farm to the son ; but a small portion, amounting to $10,96, was entered afterwards ; and the last item was charged after his decease. This account was sued against the administratrix ;—judgment recovered at *February* term, 1827 ;—and the execution extended, in *August* following, on the *locus in quo*, which was part of the farm, as the estate of the deceased, not inventoried.

A verdict was returned for the defendant, subject to the opinion of the court upon the general question whether, upon this evidence, the action was maintainable.

E. Shepley, for the plaintiff, argued that the conveyance from the father to the son was voluntary in its character, and void against prior creditors. And such, he said, the plaintiff was, though some of the charges bore date after the deed ; for it did not appear but that the debt was incurred long before ; and the last item of charge, being made after the decease of the debtor, excludes the presumption that the goods were delivered on the days they were entered on the book. Herein this case differs from *Reed v. Woodman*, 4. *Greenl.* 400, which turns, as to this point, on the time when the debt was actually created.

The principle of law is, that one must not so diminish his estate by gratuities, as to prevent his creditor from obtaining his debt at law. Yet here the facts show that after deducting the property exempted by law from attachment, and allowing for the common and ordinary results in the settlement of estates, such satisfaction could not be had. The title, therefore, of the defendant ought to be postponed to that of

the creditor. *Drinkwater v. Drinkwater*, 4 *Mass.* 354. *Doe v. Routledge, Cowp.* 705. *Partridge v. Gopp, Ambl.* 596.

N. Emery, for the defendant.

MELLEN C. J. delivered the opinion of the Court.

William Hazeltine, being seized of the premises in question, on the 9*th* of *August*, 1824, by his deed of that date, conveyed the same to the defendant, his son. The deed was recorded *February* 8, 1825. The plaintiff in *February* 1827, obtained judgment against the estate of *William Hazeltine* in the hands of his administrator. The execution issued on that judgment was duly extended upon the same premises in *August* 1827, and the return was seasonably recorded. The conveyance from the intestate *William Hazeltine* and the registry of it, being some years prior to the levy, if it was good and effectual to pass the estate to the defendant, there must be judgment on the verdict; otherwise there must be a new trial granted. The case finds, that *William Hazeltine* was an honest man, and, at the time of his conveyance to his son, was not involved in debt. There is no proof of any actual fraud in the conveyance, nor is it pretended that any such existed in respect to the transaction. But the counsel for the plaintiff has contended, that the conveyance was merely a voluntary one, made on a good, but not a valuable consideration, and therefore not valid as against prior creditors; and he has insisted that the plaintiff was a prior creditor. His argument is, that though there was no actual fraud, the peculiar circumstances of this case shew that on legal principles, the conveyance ought not to be sustained.

His first point is, that the plaintiff was a creditor at the time the deed was made. As to this, it appears that all his demands, on which he recovered his judgment against the estate of the intestate, except $10,96, were charged prior to the date of the deed; and that the items composing the sum of $10,96 were charged after its date. Now according to the decision of this court in the case of *Reed v. Woodman* 4. *Greenl.* 400, which is not impeached or doubted, the plaintiff, "having taken his judgment for his whole demand, is to be regarded as a creditor subsequent to the conveyance" of the premises in dis-

pute. It is said, however, that though the items composing the $10,96, are charged after the date of the conveyance, there is no proof that the sums charged, became due after that time; and that certainly the last item could not be, because charged after the death of the intestate; but laying this out of the case, we may and ought to presume that the other charges were made at the time the debts became due, in the absence of all proof to the contrary. In this view, the plaintiff was not a creditor at the time of the conveyance.

His second point is, that a voluntary conveyance ought to be deemed void as against even subsequent creditors, if the grantor was insolvent at the time; or at least, that such a circumstance is a badge of fraud, that may lead to that conclusion; according to the third point settled in *How v. Ward* 4. *Greenl.* 195. One reply to this objection is, that the jury have found no fraud in this case; and it is admitted that none influenced the parties to the conveyance in question. But, beyond this, can the position of the counsel be admitted, that a voluntary conveyance can be impeached by a subsequent creditor, though the grantor was entirely free from debt, if he was not possessed of property sufficient to pay the expenses of settling his estate also, after his death? We are not prepared to sanction such a principle; the consequences of its adoption would not only be extremely embarrassing, but in many instances would be productive of discord and confusion by the disturbance or destruction of family settlements made with the best of motives and by the best of men of independent fortunes. The most prudent and calculating man cannot foresee what misfortunes may overtake him, or how soon he may be reduced from opulence to poverty and ruin, without the least fault or imprudence on his part. It is for the public good, that parents should be permitted, when possessed of property that renders them able, to make advances to their children to assist them in their business or settlement in the world, and not to the prejudice of any of their creditors, without exposing the property thus conveyed to the danger of being wrested from them, whereby they may be subjected to greater trials and misfortunes than they probably ever would have suffered, if they had never received the bounty and assistance of their parents in the manner above mentioned. Besides, who can foresee how

much of his estate, in case of his death, may be absorbed in expenses of administration, or withdrawn from the control and enjoyment of his creditors, by those discretionary allowances which the Judge of Probate may decree to his widow out of the personal estate. But in addition to these arguments *ab inconvenienti* which we have stated, we would observe that the cases cited, do by no means sustain the principle assumed. In *Drinkwater v. Drinkwater*, the principal inquiry was, whether the defendant, as administrator, was entitled to contest the deed of the intestate on the ground of fraud; and as there was no personal estate left more than sufficient to pay all his debts and the charges of administration properly incurred, and as the defendant had no lien on the real estate for the costs of that suit, judgment was rendered against him. That decision does not touch the point under consideration. So in the case of *Doe v Routledge*, the only points decided were, that to make a voluntary settlement void against a subsequent purchaser within the statute of 27. *Eliz.* it must be covinous and fraudulent, and not voluntary only; and that he who would set it aside, must be a purchaser *bona fide*, and for valuable consideration. Lord *Mansfield's* expression, "there is no allegation that *William Watson*, the uncle, owed a farthing at the time, or left a single debt undischarged at his death," had no necessary connection with the point in judgment; it was strong language used to show *Watson's* perfect solvency. Neither does the case from *Ambler* aid the plaintiff, so far as to maintain the objection we are considering. In the case before us, the inventory of the personal estate, as appraised, amounts to the sum of $427, 46, and the amount of debts was only $213 and some cents; and had not the Judge of Probate, in his discretion, allowed the widow $200, there would have been more than sufficient personal estate to pay the debts of the deceased and the charges of administration; and yet the language of Lord *Mansfield*, in the case in *Cowper*, goes no further than to the "debts he owed at the time of his decease."

On view of all the facts before us, and the authorities applicable to the case, our united opinion is, that the action cannot be maintained; and there must be *Judgment on the verdict.*

GRIFFIN *vs.* DERBY.

Where *R* the son of D, bargained with the plaintiff for a yoke of oxen, giving his promissory note payable in six months for the price, under an agreement that the oxen should be his own if the note was paid at its maturity, otherwise the plaintiff should take them back; and the son afterwards exchanged them with a stranger, for other oxen, and then absconded, leaving on the farm of *D* his father, with whom he had dwelt, the oxen, thus obtained; and the note being due and unpaid, the plaintiff called on *D* for the oxen, who replied,—"if you will be easy a fortnight, I will become accountable for the oxen which *R* had and bring you the money"; this was held to be an original undertaking of *D*, and so not within the statute of frauds.

THIS was *assumpsit*, for the price of a yoke of oxen sold to the defendant.

At the trial, before *Parris J.* it appeared that one *Rufus Derby*, a son of the defendant who resided with him, and assisted in the management of his farm, had bargained with the plaintiff in *April* 1827, for a yoke of oxen, giving his own promissory note therefor, payable in six months; upon an agreement between them that the oxen should remain the property of the plaintiff till the money was paid; and that if it was not paid at the end of six months, the plaintiff should receive the oxen again. They were not delivered to *Rufus* as his own property, but he was suffered to take them home, under the contract. He afterwards, in *May*, exchanged these oxen for others, with one *Raymond;* and these last again in *July*, for another yoke, with one *Gary;* giving his note for the difference in value, which the defendant subsequently paid; observing, at the same time, that he owed the plaintiff for a yoke of oxen. Before the end of the six months, *Rufus* being in embarrassed circumstances, left that part of the country, to avoid legal process, leaving these last purchased oxen on the defendant's farm, where they were worked by him and his sons, as those had been which had been received of the

plaintiff, and of *Raymond*. At the maturity of the note in *October*, the plaintiff called on the defendant for the oxen, that he might take them away; to which the defendant replied—"if you will be easy a fortnight, I will become accountable for the oxen which *Rufus* had, and bring you the money." The defendant also said to another person, that he had the cattle in his possession, and would see *Griffin* paid; and in *January* following, the plaintiff sending to him for money, he answered that he would see him paid in the following week; and wished him not to come and take the oxen.

A verdict was returned by consent for the plaintiff, subject to the opinion of the court upon the question whether the promise, thus proved, was within the statute of frauds.

J. Holmes, for the defendant, contended that the oxen were sold to *Rufus* at least so far as innocent purchasers and creditors were concerned. The plaintiff had given him the common and ordinary *indicium* of ownership, taking his absolute engagement in writing to pay the money at a certain day; and had acquiesced for months in the sale to *Raymond*. It was too late, therefore, for him to set up a lien on the property, which had passed to *Raymond;* and from that moment his remedy was against *Rufus* alone. If the sale had not been originally absolute, yet it had become so by the plaintiff's acquiesence in the disposal of them. So that upon either point of the dilemma, the defendant is not liable to the plaintiff.

For if they were still the cattle of the plaintiff, for which *Rufus* was responsible; and he was liable upon his note, if at all, that being an express written promise, excluding all implication;—then the promise of the defendant was void, both for want of consideration, and by the statute of frauds, it being collateral, for the debt of another. 1. *Com. Contr.* 57. 1. *Dane's Abr.* 214. 215. 647. *sec.* 11. *Fish v. Hutchinson* 2. *Wils.* 94. *Read v. Nash* 1. *Wils.* 305. *Anderson v. Hayman* 1. *H. Bl.* 170. *Wagener v. Gray's adm'r.* 2. *Hen. & Muff.* 611. *Perley v. Spring* 12. *Mass.* 299. 1. *Phil. Ev.* 361. *Jackson v. Rayner* 12. *Johns.* 291. *Leonard v. Kedenburg* 8. *Johns.* 29. *Bayley v. Freeman* 11. *Johns.* 232.

D. Goodenow and *Appleton*, for the plaintiff.

Griffin *v.* Derby.

WESTON J. delivered the opinion of the Court at the ensuing term in *Cumberland.*

This is an action of *assumpsit* brought upon an account annexed, to recover the value of a yoke of oxen. It is defended under the statute of frauds ; upon the ground that it is founded upon a parol promise to pay the debt of another. If the promise is of this character, the action cannot be sustained. This branch of the statute has been ably analysed by *Kent, C. J.* in *Leonard v. Vredenburgh*, 8 *John.* 29, and he there adverts to promises to pay the debt of another, founded upon a new and independent consideration, moving between the newly contracting parties, which are regarded as original in their character, and therefore not within the statute.

By the express agreement between the plaintiff and the younger *Derby*, the oxen were to continue the property of the plaintiff, until the note was paid ; and if not paid by the time stipulated, he was again to take them into his own possession. Whether he could do this against an attaching creditor, or a bona fide purchaser from young *Derby*, for a valuable consideration without notice, is not now a question before us. The plaintiff might approve and adopt the successive exchanges made by young *Derby*, and the oxen received in exchange would thus become his property. That he did so, is to be inferred from the fact, that it was the oxen last received in exchange, which were in the defendant's possession, which the plaintiff proposed to take away, and not those which originally belonged to him. If this case is to be considered as belonging to either of the classes stated by Chief Justice Kent, it is to that which, arising from a new and distinct consideration, between the newly contracting parties, is not within the statute. But upon a fair consideration of the facts in the case, the engagement of the defendant cannot, in any point of view, be regarded as a promise to pay the debt of another. The note not being paid by the time appointed, the plaintiff claimed to receive back the oxen. If he had done so, he would have had no debt against young Derby. Had he paid the note the oxen were to be his ; if not paid, and they were reclaimed, there could be no pre-

tence that the note remained due; and as between the original contracting parties, they were virtually received again. The note not being paid at maturity, and young *Derby* having absconded, the plaintiff demanded the oxen as he had a right to do, by which the sale originally contemplated, was waived and abandoned. He thereupon made a new bargain with the defendant; by which the latter was permitted to retain the oxen, upon his engaging to pay for them the same sum his son was to have paid. There was in effect a sale of the oxen from the plaintiff to the defendant instead of young *Derby*, who had never become the purchaser; the intended sale to him having been vacated by the plaintiff, in pursuance of their original agreement. The defendant, having received the oxen under a new contract with the plaintiff, and having promised to pay for them, is called upon to pay his own debt, and not that of his son; and has therefore no defence under the statute of frauds.

Judgment on the verdict.

NASON *vs.* ALLEN.

The right of a widow to have dower assigned in the lands of her husband, cannot be taken in execution for her debt.

To a plea, in an action of dower, that the widow claimed the premises in fee, and that her estate therein had been duly set off to the tenant by extent, for her own debt, a replication that she had no right, interest, or estate in the premises, other than a right to have her dower therein, ought to conclude to the country. But if it be concluded with a verification, it is good on general demurrer.

To an action of dower, alleging the marriage, seisin in fee, and death of the husband, &c., the tenant pleaded in bar, that at the time of the decease of the husband, the demandant was in the open and peaceable possession of the premises, claiming the same as her

own in fee; until, having recovered judgment against her, he caused his execution to be duly and legally extended on the premises, and seisin and possession to be delivered to himself. To this the demandant replied that her husband died in the possession and occupancy of the premises, leaving her living thereon; that she continued to dwell there at the time of the extent of the tenant's execution; and that she had then no other right, estate, or interest therein, than the right to have her dower assigned out of the same; which had never yet been done. Whereupon the tenant demurred, generally; which was joined.

J. Holmes, and *Butler*, in support of the demurrer, argued that the replication was bad, as it alleged no estate in the husband, of which the wife could be endowed. The estate must be in fee simple or fee tail; *Co. Lit.* 31 *a*;—but in the replication it is only said that the premises were in his possession and occupancy. In this respect it does not fortify the declaration, and is therefore a departure. *Co. Lit.* 304.

And the plea, they contended, was good. The widow has a right to the perception of the profits of the land, or to an annuity or periodical allowance, in substance the same. It is in essence, though not in form, an estate in the land, even before the assignment of dower; which, by collusion with the heir, she may enjoy during her life, setting her creditors at defiance; unless they may take it in execution as her freehold estate. It is property which she may convey by a proper instrument, and it therefore may be seized by her creditors. The contrary doctrine opens an avenue to multiplied frauds; and introduces into our law the anomaly of an estate for life, which the debtor may convey, but the creditor cannot touch; and which, notwithstanding, is protected by no positive statute. *Bartlett v. Harlow* 12. *Mass.* 348. *Gooch v. Atkins* 14. *Mass.* 378.

Had she released her right of dower to the tenant in possession, beyond controversy the release would be a good bar to an action of dower. But the extent of an execution on lands divests the title of the tenant therein, and transfers it, by a statute purchase, to the creditor. The title of the present tenant, therefore, is as good against

the demandant as if he had her release. *Baldwin v. Whitney* 13. *Mass.* 57. *Porter v. King* 1. *Greenl.* 297.

Appleton, for the demandant.

MELLEN C. J. delivered the opinion of the Court.

This seems to be a very plain case. As the replication merely denies the averment in the plea, that the demandant held and claimed the premises in fee; that is, that she had any other title than a right to have her dower assigned, she ought to have concluded to the country, as the more correct mode of pleading. But this objection, if a good one, is not good on a general demurrer. 1. *Chitty* 540. But it is said that the replication is a departure, and does not support the declaration. It is true it does not re-state the facts contained in it; for the plea does not deny them; but still it is no departure. "A departure in pleading is said to be when a party quits or departs from the case or defence which he has first made, and has recourse to another." 1. *Chitty Pl.* 618. It is a denial of the asserted title in her, under which the tenant professes to claim the lands in question as his own estate in fee. Suppose the plea in this case had stated by way of bar to the action, that the demandant by her deed had released to the tenant her right of dower in the premises; surely she might properly have replied *non est factum*, without being guilty of a departure in pleading. In such case the replication, by removing the bar, supports the declaration.

But supposing the replication to be bad, is the plea good? Certainly not. It neither traverses nor confesses and avoids any one of the essential facts alleged in the declaration; but merely states certain facts as to her conduct and claims, after the death of her husband, in respect to the premises, which gave her no legal right or title to them, if true; and only rendered her liable to the heirs of her husband as a wrongdoer. But the counsel for the tenant contends that by the levy of his execution on the whole of the premises, and the whole estate therein, as before mentioned, the demandant's right of dower was divested and transferred to the tenant. No authority has been produced to support such a doctrine, and we are

well satisfied none can be found. Some of the decisions, cited by the demandant's counsel, show that such a right cannot be taken on execution directly; and if so, there is less ground for supposing it can be taken indirectly, in the mode resorted to by the tenant. No mere right can be attached or taken on execution, except in those cases provided for by statute; as, for instance, the right to redeem mortgaged premises; but though a debtor has a right to redeem property on which execution has been extended, still that right is not the subject of attachment or levy on execution, any more than the right of redeeming personal property pledged or mortgaged. The tenant's experiment has proved wholly unsuccessful. We are clearly of opinion that the defence is without foundation; and according to the form of the issue, adjudge the replication good and sufficient.

Cutts *vs.* King.

By the use of the term "*about*," in describing the length of line in a deed of conveyance, it is understood that exact precision was not intended; but if the place where the monument stood, by which the distance was controlled and determined, cannot be ascertained, the grantee must be limited to the number of rods or feet given.

If one tenant in common sues a writ of entry against his co-tenant, who pleads *nul disseisin*; proof of the demandant's title as tenant in common will not now entitle him to judgment; the *Stat.* 1826. *ch.* 344. having rendered it necessary that he should also prove an actual ouster.

Since the passage of *Stat.* 1826. *ch.* 344, a verdict and judgment in favor of the tenant, upon the general issue, in a writ of entry, will not always be evidence of title in him; for the statute having declared that such plea shall not be taken as an admission of the tenant's seisin and possession of the land, it may be that he prevailed because he was not proved to be in possession.

This was a writ of entry by one tenant in common, against his co-tenant, for the moiety of an undivided half part of a tract of land

in *Saco ;* counting on his own seisin within twenty years, and a disseisin by the tenant ; who pleaded the general issue, which was joined. A second plea was also pleaded by the tenant,—that before the commencement of the action, viz. *July* 5, 1825, the demandant, by his deed of bargain and sale, conveyed the whole of the demanded premises to one *Jonathan Tucker*. To this the demandant replied that at the time of the conveyance he was disseised by the tenant, and nothing passed by the deed. The tenant rejoined, taking issue on the fact of disseisin as alleged in the replication, which was joined by the demandant.

The demandant, to prove the issue on his part, read in evidence a deed from *David Sewall*, as agent for the Commonwealth of Massachusetts, dated *March* 12, 1801, conveying to him one eighth part of a double saw-mill in *Saco*, with the like proportion of the stream, falls and privileges thereto belonging, late the property of Sir *William Pepperell*. He also produced a deed from *Thomas Cutts*, dated *July* 4, 1816, conveying to him three eighth parts of the same estate. And it was admitted that the demanded premises were part of the *Pepperell*-mill-privilege, so called.

To prove the disseisin as alleged in the writ, the demandant showed a deed of quitclaim from *George Tucker* to the tenant, dated *Nov.* 4, 1818 ; and proved that in *January* 1828, before the commencement of this suit, he called on the tenant, and inquired if he held the demanded premises as a proprietor of the mill-privilege, or adverse thereto? To which the tenant replied—"if you have rights there, enjoy them." And on the demandant's saying that he had such rights, which he wished to enjoy, and inquiring if the tenant was willing that he should ; the tenant replied as before. The demandant also proved that a small piece of stone fence, about ten feet in length, on the line of the demanded premises and the public highway, had been erected by men in the tenant's employment, from rocks taken from the highway.

The tenant, on his part, read a deed from *David Sewall*, agent as aforesaid, dated *June* 14, 1800, conveying to *Nancy Ayer* a part of the estate formerly of Sir *William Pepperell*, being a moiety of a small lot in *Saco*, " bounded twenty-four feet on the post road leading

to *Scarborough*, and to extend back northwesterly from said road about thirty feet, where an old small dwelling house now stands, improved or occupied by *Peter Page*," &c., being part of the *Pepperell*-mill-privilege. He also read a deed from *Nancy Ayer*, dated *March* 26, 1803, conveying the same lot to *George Tucker*, " together with an old house standing on the premises, lately occupied by *Peter Page*, and now in the possession of said *George*, and used by him as a saddler's shop;"—and deduced the title to the same land from said *George*, through *James D. Tucker*, to himself, by deed dated *Nov.* 24, 1818. The title of the tenant to the land described in these deeds was not controverted. He also produced a deed from *Samuel Hartley*, as guardian of certain children of *Daniel Cleaves*, dated *June* 28, 1819, conveying to him certain other specified undivided portions of the *Pepperell*-mill-site and privilege; by which it was admitted that he became a tenant in common with the demandant of the premises therein described; but the proportion was not admitted. He further proved that at the time of the commencement of this action, he had a store covering the lot described in the deed of *James D. Tucker* to himself, and extending back from the street thirty-four feet and a half; and being in width twenty-five feet and nine inches;—that the cellar wall, upon which the store then rested, was laid about the first of *July* 1804; and that the store was immediately erected thereon, and had ever since continued in the occupancy of him and his grantors. In the deed from *George* to *James D. Tucker*, and from him to the tenant, no mention is made of the house of *Peter Page;* but the lot is conveyed " with the building thereon standing."

Upon these facts a verdict was returned by consent for the demandant, subject to the opinion of the court upon his right to recover the whole or any part of the demanded premises; the parties agreeing that the court might infer, from the facts reported, whatever the jury might properly infer from the same facts; and that a general verdict might be entered for the tenant, if he was entitled to prevail.

J. and *E. Shepley*, for the tenant, maintained his title to the portion covered by the store, by his deeds, and by exclusive possession for more than twenty years. The store, they contended, must be

taken to have been erected on the site of *Page's* house, which, as a monument, controlled the distance given in the deed. *Purinton v. Sedgley*, 4 *Greenl.* 291.

His becoming a tenant in common in the mill-privilege within that time, did not change his rights. He is not estopped, because he gave no deed; for it is the grantor, and not the grantee, against whom this principle is admitted to operate. *Blight's lesse v. Rochester*, 7 *Wheat.* 547. *Fox v. Widgery*, 4 *Greenl.* 218.

As to the portion not covered by the store, they insisted that the demandant could not recover, because he held in common with the tenant, who never had ousted him. The deed from *George Tucker* to the tenant was no ouster, it being but a naked release, without covenants, and not to one in the actual, exclusive and adverse possession, which was necessary to constitute a disseisin. *Porter v. Perkins*, 5 *Mass.* 233. *Warren v. Child*, 11 *Mass.* 222. *Mayo v. Libby*, 12 *Mass.* 343. *Little v. Megquier* 2 *Greenl.* 176. *Kennebec Proprietors v. Laboree*, *ib.* 286. *Robison v. Swett*, 3 *Greenl.* 316. *Brimmer v. Proprietors of Long Wharf*, 5. *Pick.* 135. Without proof of such disseisin, since the statute of 1826, *ch.* 344. no demandant in a writ of entry can recover.

J. Holmes, for the demandant, argued that since the *Stat.* 1826, *ch.* 344, a tenant in common cannot defend, as such, against his co-tenant, under the plea of *nul disseisin*, but must specially plead his tenancy. Otherwise, if he can defeat the demandant, by showing his tenancy in common under that issue, which goes to the whole title, he will obtain all the land, by proving title to a moiety. For if judgment, upon that plea, since the statute, is not conclusive upon the title, as it was before, then the tenant may be harrassed with endless suits, of the same nature, for the same land. *Outram v. Morewood*, 3 *East*, 346.

But here was proof of an actual ouster, in the acceptance of a deed of the whole, from *George Tucker*. Such a deed, from a mere stranger, to one tenant in common, his co-tenant may treat as an ouster. *Higby v. Rice*, 5 *Mass.* 352. If proof of his intent to hold under this deed were necessary, it is found in his equivocal reply to

the demandant, when particularly interrogated to the point. *Hillings v. Bird*, 2 *East* 49.

Weston J. delivered the opinion of the Court at the ensuing term in *Cumberland.*

Of the premises demanded, the tenant claims only that portion, which is covered by a part of the store. He deduces his title from *Nancy Ayer ;* and it is well made out, if the land described in the deed, dated *June* 14, 1800, made by *David Sewall* in behalf of the Commonwealth of Massachusetts to her, embraced this part of the premises. It was bounded twenty-four feet on the road, and extended north-westerly therefrom about thirty feet, where an old small dwelling house, improved or occupied by *Peter Page*, then stood. Whether that house stood upon the land conveyed, or whether it extended to that house, does not distinctly appear from the deed. In either case, the extent of the land would depend upon the location of the house. If it did not stand on the land, the house would be the terminating monument given; if it did, the land would extend as far as the house did, in the direction from the road. In *March*, 1803, *Nancy Ayer* conveyed the same land to *George Tucker ;* "together," as the deed states, "with an old house standing on the premises, lately occupied by *Peter Page.*" From this deed it would seem, that the house stood on the premises, when she received her deed from the agent of the Commonwealth. The *Page* house has been since taken down or removed, and it is agreed that its site cannot now be rendered certain by the testimony of witnesses. It is therefore insisted by the counsel for the demandant, that the tenant must be restricted to the length of the line given from the road, in the deed under which he claims, which is about thirty feet. By the use of the term, "about," it may be understood that exact precision in the length of line was not intended; but if the place where the monument stood, by which the length was controlled and determined, cannot be established, the tenant must be limited to the number of feet given, and the demandant is entitled to recover the excess, which is four feet and a half.

The law requires the best proof in the power of a party to produce; and it will be sufficient, if of a nature to afford reasonable satisfaction to the mind. Monuments referred to in deeds are often perishable; as trees, wooden buildings, or fences; or slight and temporary; as a stake, or a stake and a few loose stones, intended to be supplied by something of a more permanent character. They serve to point out at the time, to the parties in interest, the bounds of the land conveyed. After these monuments are gone, and such a period of time has elapsed, that no one can be found who remembers to have seen them, or can testify as to their location; uniform continued occupancy, by buildings, fences, or other equivalent indications of ownership, is evidence that the land was located according to the original monuments. These monuments perish; and time sweeps away those who could point out where they stood; actual occupancy therefore, within the period of memory, is the only evidence which can be substituted. A prudent grantee causes posts or pillars of stone to be placed at the corners of his purchase, instead of the stakes referred to in his deed. When that generation is gone, no one can be brought to testify that they were rightfully placed; yet if there has been a corresponding possession, no reasonable doubt can or ought to be entertained of this fact. Of the same character in principle is the evidence arising from fences and buildings. These deductions and inferences are fully justified and required by the general law of evidence; and it is of great importance to the peace and quiet of the community, and to the security of titles, that they should be applied and sustained.

In 1803, it appears from the deed of *Nancy Ayer* to *George Tucker*, that the *Peter Page* house was still standing. The next year, when the site of that house could not have been mistaken, the store now owned by the tenant was built; and it does not appear that from that time, the title of the tenant, or those under whom he claims, to the whole land covered by the store, has been questioned, until the commencement of this action. Upon this evidence, we are of opinion that the jury would have been warranted, and that it would have been their duty, to have regarded the tenant's occupancy to have been in conformity with the monuments in the deed to *Nancy Ayer*, under which the tenant holds.

If the tenant's title to the part demanded under the store commenced by disseisin, it would be protected by the statute of limitations; but his case does not require the aid of that statute, and it is therefore unnecessary to give an opinion upon this point.

With regard to that part of the land for which this action is brought, which is not covered by the store, the tenant sets up no interest whatever in the moiety claimed by the demandant. It is insisted however that as the tenant has pleaded the general issue, and it appearing that he holds a part as tenant in common, the demandant is entitled to judgment. The demandant, having made out his title, would have had a right to a verdict and judgment under this plea, but for the statute of 1826, *ch.* 344. Prior to that statute the tenant, by the general issue, admitted himself to be in the seisin and possession of the land demanded. The statute expressly declares that this plea shall no longer have this effect. Before the new law, a judgment in favor of the tenant was, as between him and the demandant, evidence that he had title to the land demanded. Litigation between the parties was thus closed, and the party prevailing had a record title, which parties and privies to that judgment could not controvert, except in a higher species of action. Whether it was wise and expedient, by a change of the law, to render judgments in real actions less certain and effectual, it is not our business to inquire. A judgment for the tenant is not now necessarily evidence of title in him. He may have prevailed, because he was never in possession of the land demanded. It may be well in practice, whenever this is the case, that this fact should appear in the verdict. But if it does not, there must be some other mode, by averment and proof, to protect the demandant's title, where there has been no recovery against him upon the merits.

It is insisted by the counsel for the demandant, that the law of 1826 cannot apply to tenants in common; and that when a tenant in common is sued, he should by his plea set out his own proportion, defend as to that, and disclaim the residue. It may still be necessary and proper for him to do this, when the whole land is demanded. But when the action is brought for a proportion, which he does not claim, and which does not affect his own estate and interest, and

he pleads the general issue, we cannot, consistently with the statute of 1826, hold him to have admitted himself by his plea to be in possession of the part or proportion of the land demanded. The demandant must be held to prove that the possession of the tenant is exclusive, or that he claims to exclude the demandant from the enjoyment of his proportion. Proof that the tenant is in possession of a proportion not demanded, and which is consistent with the demandant's claim, is not sufficient to maintain the action.

It remains to be determined whether such proof has been exhibited. The deed of *George Tucker* to the tenant, of *November* 1818, was merely a release. It does not appear that either party was in possession, or that the tenant claimed or exercised any act of ownership under it. The erection of a small piece of fence on one of the lines, was no invasion of the demandant's rights, nor is it evidence of exclusive possession. If one tenant in common in possession deny the right of a co-tenant, it may be evidence of ouster. What was said by the tenant to the demandant, cannot be so construed. It was a guarded reply to a question put by the demandant, having no tendency to affect or impair rights on either side.

It being the opinion of the court that the demandant is not entitled to recover, the verdict is set aside ; and according to the agreement of the parties, a verdict is to be entered for the tenant.

MOORE *vs.* SMITH.

In an action against an executor, under *Stat.* 1821, *ch.* 51, *sec.* 11, to recover the penalty there provided for not filing a will in the probate office, it is not competent for the executor to prove that the will was revoked, this being a question exclusively of probate jurisdiction.

The *Stat.* 1821, *ch.* 62, *sec.* 14. limiting penal actions to one year from the time of forfeiture, may be given in evidence under the general issue.

The penalty, not exceeding sixteen dollars per month, provided by *Stat.* 1821, *ch.* 51, *sec* 11, for not filing a will in the probate office, is incurred, and may be sued for, at the end of every month, within a year next preceding the commencement of the action.

THIS was an action to recover of the defendant, who was named executor in the will of *John Moore* deceased, the penalty mentioned in *Stat.* 1821, *ch.* 51, *sec.* 11, for not filing the will in the Probate office within thirty days after the death of the testator, which happened *September* 3, 1823.

At the trial, which was before *Parris J.* upon the general issue, the plaintiff produced the will, dated *May* 14, 1813, and proved its execution, and the sanity of the testator, by two of the subscribing witnesses. He also proved that at the time of making the will the testator was possessed of a large farm, well stocked, and furnished with implements of husbandry; and that at the time of his death he continued so to occupy it; and was also possessed of other personal estate, money, and securities, to the value of nearly a thousand dollars.

The defendant offered in evidence a deed dated *June* 5, 1815, from the testator, conveying to his son *John Moore* 3d, all the real estate mentioned in the will, and all his stock and farming utensils, for the consideration of 2000 dollars;—also a lease from the son to his father and mother, of the property thus conveyed, and all the personal property, during their several lives;—also a bond given by

the son to the father, conditioned, among other things, to clothe and educate five of the minor children, during their minority. He also proved that the son, pursuant to an agreement with his father, and for the consideration mentioned in the deed, had secured and paid divers sums to his brothers and sisters, amounting in all to 1400 dollars. The securities for these sums were deposited in the hands of the late *John Burnham*, Esq. who prepared the deeds. It also appeared that the father, at the time of making the deed, stated to the scrivener and others, that he wished to convey his estate to save the expense of administration; and that on other occasions he stated that the farm did not lie conveniently to make three farms; that his sons *Ira* and *James*, whom he had made joint devisees with *John*, upon certain conditions, were young, and probably would not live on it, if they had each but a third; and that his wife was dissatisfied; that after having made his will, he had altered his mind, and given it all to *John*, by a deed, and held him to pay out; taking a life-lease to himself and wife. But it did not appear that he spoke particularly of his money, notes, or furniture.

There was no evidence that either of the heirs knew of the existence of the will till *August* 1826; when they were so informed by the defendant; who stated that *John* said he had a deed, but that he did not believe it, as he had caused the records to be searched, but found none there. And it further appeared that *John* had kept the existence of this deed a secret, both from the other heirs, and the defendant; but that on the decease of his father he took possession of the money on hand, and divided it with his mother; and there was no proof that any of the money, notes or furniture, ever came to the hands of any other of the heirs, except a note of about fifty dollars to the plaintiff, and another, of about the same sum, to his brother. The will was delivered by the defendant to the plaintiff, about eighteen months ago, at the plaintiff's request.

After the deed was given, *John* conducted the operations on the farm; the produce of which went to the support of the family, and the surplus he appropriated to himself; and this course of proceeding was continued after the death of the father, as before.

The defendant could have proved, by one of his own witnesses, belonging to the family, that on the day of the funeral the witness told him that he had nothing to do with the will, the property having all been conveyed to *John;* but this evidence was excluded.

Hereupon a verdict was returned, by consent, for the plaintiff; subject to the opinion of the court, whether the testimony offered by the defendant was admissible, and constituted a good defence to the action.

J. Holmes and *D. Goodenow*, for the defendant, objected to the plaintiff's right to sue for the penalty, on the ground that he was not interested in the will; for to no other person does the statute give the right of action. He cannot take the real estate, because it is conveyed to *John;* nor can he take the personal estate; because, if the will is not revoked, the personal estate was therein bequeathed upon condition of payments which have already been made by *John*, under the subsequent arrangement, and which the plaintiff cannot comply with.

2. But the will was revoked by the testator. The whole evidence shews that he made a subsequent disposition of his whole estate; for though the deed to *John* does not expressly mention all the personal estate, yet the lease from him does. By the subsequent arrangement he provided for all his family, executed writings disposing virtually of all his estate, taking the notes of his son *John* for the amount, which have been paid, or are still in force against him. *Ira* also, the plaintiff, has so regarded it, and thus concluded himself, by accepting payment of the note given for his benefit; and by not filing and proving the will since it has been in his hands. These acts are at least as clear and unequivocal in their character as others which have been held to amount to a revocation, even since the statute of of 29. *Car.* 2 *cap.* 3;—such as marriage, and the birth of a child; 5 *D & E.* 49;—a sale and repurchase of the land devised; *Jacob's Law Dict. tit. Wills, &c. Carter v. Thomas*, 4 *Greenl.* 341;—or an ineffectual attempt to convey. *Cave v. Holford*, 3 *Ves.* 650. And this court is competent, at common law, to examine this point, so far as the liability of the defendant to a penalty is concerned.

3. The defendant, under the circumstances of this case, is not

liable for the penalty. He acted under an honest conviction of duty. And it is no where proved or alleged that no just excuse was made and accepted by the Judge of Probate for the delay. Yet this point, though apparently a negative, must be proved by the plaintiff, in a penal action, in order to make out his case. *Little v. Thompson*, 2 *Greenl.* 228. *Williams v. Hingham*, 4 *Pick.* 341. The remedy, also, is merely commulative ; since the Judge of Probate, at the instance of any one interested, may summon the person having custody of the will, to produce it for probate. *Stebbins v. Lathrop*, 4 *Pick.* 33.

4. The action is barred by the statute of limitations, which terminates the right of an individual to sue for himself, after one year from the time when the penalty accrued. But here the penalty accrued at the end of thirty days from the death of the testator; at which time the right of action attached, and from which the period limited in the statute is to be computed. All subsequent neglect is in the nature a *continuando*, depending on proof of the original trespass. *Cro. Car.* 115. And this may well be shown under the general issue. By *Stat.* 1821, *ch.* 59, *sec.* 23, executors may in all cases give any special matter in evidence, under the general issue; and here the plaintiff is estopped to deny that he is executor. But in all actions on penal statutes, the defendant may thus avail himself of this defence. 1 *Chitty's Pl.* 476. 1 *Salk.* 278. 1 *Ld. Raym.* 153. 1 *Saund.* 283, *n.* 2. *Com. Dig. tit. Pleader*, 2 *W.* 16. 2 *Saund.* 63, *a. n.* 6. *Lee v. Clark*, 2 *East*, 336.

E. Shepley and *Howard*, for the plaintiff.

Mellen C. J. delivered the opinion of the Court, in *Cumberland*, at the ensuing term.

This is an action of debt for a penalty alleged to have been incurred by the defendant under the statute of 1821. *ch.* 51. *sec.* 11. in neglecting to file the last will and testament of *John Moore* for probate, as required by that section. The will bears date *May* 14, 1813; and it is not pretended that it was ever so filed for that purpose. The

testator died *Sept.* 3, 1823. Several circumstances have been relied upon as constituting a substantial defence.

1. It is said that the plaintiff is not entitled to maintain the action, because he is not "interested in the estate devised by such will;" and that the statute authorises no one who is not so interested to sue for the penalty.

2. That the will before mentioned, was revoked by the testator.

3. If not, that the neglect of the defendant was not the consequence of any such motives and intentions as could subject him to the severe penalty of the statute.

4. The statute of limitations.

With respect to the first objection, the reply is, that by inspection of the will it appears that one third of the estate was devised to the plaintiff on certain specified conditions; and, therefore, he must be considered as manifestly interested, unless we have evidence before us of its revocation.

As to the second objection, the question is, whether we have such evidence and are authorized in this action, to pronounce upon its sufficiency as establishing the fact of revocation. According to our laws, the probate of wills is within the exclusive jurisdiction of the courts of probate, and of this court, on appeal, sitting as the Supreme Court of probate; and, except in a specified case, this court has no original probate jurisdiction, and no jurisdiction whatever sitting and proceeding as a court of common law, as decided in *Small v. Small*, 4. *Greenl.* 220, and the cases there cited. After a will has once been duly proved and approved, its existence and validity as a last will and testament cannot in any court be questioned; nor can any evidence of its revocation have the least operation or influence. Proof of revocation must be presented to the Judge of probate by way of objection to the probate; and, on appeal from the decree below, this court, as the Supreme Court of probate, can decide upon the question of asserted revocation; but in no court of common law can that question be settled, and, of course, all evidence bearing upon the point is irrelavent and of no importance. In the case before us, the will has not been proved and approved; and the defendant contends it never could have been, because it had been revoked. But

this argument proceeds on the assumption of a fact as true, which we have no jurisdiction in this cause to hear and determine. The law never intended that an executor should settle the question of revocation for himself and all concerned; and justify his neglect to present it to the proper tribunal for probate, upon his own decision, and according to his own good pleasure. Such a course of proceeding could not, on the ground of innocent intentions and pure motives, exempt an executor from the penalties of the statute, even if certain peculiar circumstances might, in legal contemplation, amount to a defence of such an action as this, on the principle mentioned and relied upon in the defendant's third objection.

As to this objection, there are numerous facts stated in the report, showing not only a design in the testator to make a distribution of his estate in his life time, by deeds and certain arrangements mentioned, but that such design was in many if not all respects, carried into execution; and for the purpose of shewing the defendant's motives in neglecting to present the will for probate, we do not perceive any impropriety in the admission of such evidence to the jury; the effect of it is now the subject of consideration. Upon a careful examination of the report, we do not find any proof showing that the executor knew the facts in relation to the testator's settlement of his estate among his children, until the time of the trial of this cause; and that he acted under the influence of any such knowledge in the neglect of his duty; but in *August* 1826, he informed the heirs of the testator that *John* said he had a deed, but that he, the defendant, did not believe it, having in vain searched the records to ascertain the fact. It is true, the defendant offered to prove that one of his own witnesses, on the day of the testator's funeral, told him he had nothing to do with the will, as the property had all been conveyed to *John;* but such evidence was properly rejected, and clearly inadmissible.

With respect to the statute of limitations, *Stat.* 1821. *ch.* 62. *sec.* 14. though it may be given in evidence, yet it cannot avail the defendant, as to the amount of penalty during the year next preceding the commencement of the action; for by the terms of the section on which the action is founded, the penalty is incurred monthly, and therefore, at the end of each month of delay, the right of action accrued.

As to the want of a negative averment in the declaration respecting an excuse for the defendant's delay, our only reply is, that the objection is not regularly before us. The proper mode of presenting it for decision is on motion in arrest of judgment, or on error. No motion has been filed. There must, therefore, be judgment for the plaintiff; but considering all the facts in the case in relation to the estate and the disposition of it by the testator after the will was made, and what were in all probability his understanding and intentions, and those of the family; and considering also that the statute has given us so broad a discretion, we feel disposed to exercise it mercifully, and accordingly shall enter judgment in favor of the plaintiff for twenty-one dollars, and costs.

LINSCOTT *vs.* FERNALD & AL.

Where the course first given in a deed of conveyance was north 69 degrees west, forty-six rods, and thence to a certain range-line, and by that line, and other courses and monuments, to the beginning; and this description was intelligible, and unambiguous, agreeing with all the monuments given;—the grantor was not permitted to prove by parol that the first course actually run by the surveyor, at the time of the conveyance, was *south* 69 degrees west, which would equally well agree with all the other courses and monuments in the deed; and that the surveyor, who also wrote the deed, inserted *north* instead of *south*, by mistake.

In an action of trespass *quare clausum fregit*, the defendants claimed the title to the *locus in quo* under a deed from *William Linscott* the plaintiff, to *James Linscott*, dated *April* 22, 1822, conveying a tract of land in *Shapleigh*, bounded thus:—" beginning at the county road opposite *Joseph Linscott's* corner, and running *north* 69 degrees west, forty-six rods, thence north 86 degrees west to the range line, thence south, on said range line, to *Joseph Linscott's* land, thence easterly, by said *Joseph Linscott's* land, to said county road, and

northwesterly, by said county road to the place begun at," &c. *James Linscott* mortgaged this property to one *Pugsley,* by a more general description, bounding it, on the side now disputed, by *William Linscott's* land; and the defendant *Fernald* purchased his right in equity of redemption, at a sheriff's sale.

At the trial before *Parris J.* the plaintiff offered to prove by parol that in his deed to *James Linscott* the first course was written *north,* instead of *south,* 69 degrees west, by mistake, the *locus in quo* being between those two courses. To this the defendants objected, as contradicting a deed which was free from ambiguity. The Judge, however, admitted the testimony.

He then called the surveyor, who surveyed the land at the time of the conveyance, and wrote the deed; by whom, and by other witnesses it appeared that the course actually run was *south* 69 degrees west, and it was supposed that the deed was so written;—that if the line ran *north* 69 degrees west, it would describe a tract between twenty and thirty acres larger than was surveyed, and would include the orchard;—and that the grantor had exclusively occupied the orchard ever since. *James Linscott* testified to the same facts; adding that he never occupied nor claimed beyond a line running *south* 69 degress west; on which line there was no fence; but there was one near it, for a part of the distance. At the end of the forty-six rods, on the course *south* 69 degrees west, a stake was put down as a bound near a heap of stones; which remained more than two years; and on the range line a yellow oak tree was marked by the surveyor as a corner; but neither of these monuments were referred to in the deed. And it did not appear that any one had claimed to hold by the line mentioned in the deed, till a survey was taken by order of court, to be used at the trial of this action.

Upon this evidence a verdict was taken by consent, for the plaintiff, subject to the opinion of the court upon the admissibility of the testimony offered, to vary the description given in the deed.

J. Holmes and *D. Goodenow,* for the plaintiff, argued against the iniquity of allowing the defendants to take advantage of so palpable a mistake of the scrivener, in drawing the deed; and urged, on

grounds of general policy, the importance of administering relief in such cases, at law, by the principles of equity, where no court of chancery existed to correct the mistakes of parties by the exercise of its peculiar functions. In some other States, the force of this necessity of freeing the law from the odium of imbecility had been felt, and acted upon. *Swift v. Hawkins*, 1 *Dal.* 17. *Bayard's Ev.* 88.

As to the admissibility of parol proof to contradict a deed; it cannot be laid down, as a general rule, either that it is not to be admitted in any case, or that it is to be received in all cases *Washburn v. Merrills*, 1 *Day*, 139. In many States the rule, in questions of boundary, is either greatly relaxed, or wholly disregarded. *Mageehan v. Adams' lessee*, 2 *Bin.* 109. *Baker v. Seekright*, 1 *Hen. & Munf.* 177. *Loften v. Heath*, 2 *Hayw.* 347. *White v. Eagon*, 1 *Bay*, 247. *Middleton v. Perry*, 2 *Bay*, 539. 2 *Dal.* 196. And in Massachusetts parol evidence was admitted, in a case exactly similar to the case at bar. *Webb v. Winslow*, *Cumb.* 1799, in 3 *Dane*, 398. *sec.* 7.

But however this may be, the defendants cannot set up title under *James Linscott* to the *locus in quo*, he being disseised of it at the time of his mortgage to *Pugsley;* by which, therefore, nothing passed to the mortgagee. The grantor being disseised, the grantee's entry was itself a trespass, the continuance of which is not justified by his deed. *Hathorne v. Haines*, 1 *Greenl.* 238.

J. and *E. Shepley*, for the defendants.

The opinion of the Court was delivered at the ensuing term in *Cumberland*, by

Mellen C. J. The only question of any importance in this case is, whether parol evidence was admissible to explain the deed from the plaintiff to *James Linscott*, dated *April* 22, 1822, in respect to an alleged mistake in the description of the land conveyed. It is contended that the facts reported present a case of a latent ambiguity, which, on legal principles, may be proved and corrected by the introduction of parol evidence. The general principle that deeds and other instruments in writing cannot be contradicted, varied or explained by parol evidence, is established by a host of decisions, and it

seems not to be denied on this occasion. So that we have only to inquire whether the deed in this case is one admitting of explanation on the ground of mistake, or as of doubtful construction by reason of a latent ambiguity. On this general subject, also, there are numerous decisions to be found in our law books in which the question has been presented in a vast variety of forms. The practice of admitting parol evidence for the purpose of correcting a mistake is most frequent in courts of equity; and such proof is generally inadmissible in a court of law, to show a mistake in a written instrument. *Fitzhugh v. Runyan* 8. *Johns.* 375. *Dwight v. Pomeroy & al.* 17. *Mass.* 303. In the case of *Doe v. Chichester, Dow* 65. it was observed by Sir *Vickary Gibbs*, that courts of law had been jealous of extrinsic evidence for the purpose of explaining the intention of a testator, and that he knew of one case only in which it is admitted, and that is when an ambiguity is introduced by extrinsic circumstances. In *Hatch v. Hatch* 2. *Hayw.* 32. parol evidence was admitted to show what was meant by a devise of "a tract of land called the *Beaver Dam.*" So a description of a farm as the one on which the grantor then lived, was a case of latent ambiguity, explainable by parol. *Doolittle v. Blakeley* 4. *Day* 265. So the identical monument referred to in a deed is always a subject of parol proof. *Proprietors of Claremont v. Carleton* 2. *N. Hamp. Rep.* 373. But parol evidence to prove that certain property was intended to have been comprehended in a deed of settlement, was rejected. *Barret v. Barret* 4. *Dessaus.* 447. The case before us seems to be a plain one; but as the counsel for the plaintiff have urged their arguments at some length in support of their construction, we have taken a wider view of the cause than we should have otherwise done.

Is there any latent ambiguity in the language of the deed in question, in relation to the description of the lands conveyed? If not, parol proof is neither necessary or proper. The description begins at an undisputed point, and runs "*north*, 69 degrees west, forty-six rods; *north* eighty-six west to the range line; thence *south* on said range line to *Joseph Linscott's* land; thence easterly by said *Linscott's* land to said county road; thence *north-westerly* by said county road to the place begun at." By the plan laid before us at the argument, it

appears that every monument referred to in the deed, is situated as therein described; and that on the face of the earth there is no kind of disagreement between the courses and boundaries, as there found, and as they are all stated in the deed. Where then is the ambiguity? A latent ambiguity arises from extrinsic circumstances; but in the case at bar, such circumstances do not exist to create any ambiguity.

Those extrinsic circumstances which the law contemplates and has reference to, are those which are either inconsistent with the language of the deed in some respects, or which render parol evidence necessary for our understanding it. The usual illustration of the rule and its operation, is that of the description of a devisee, or of an estate, in a will, where it turns out that there are two persons, or two estates, of the same name and description. When a grantee receives his deed and repairs to the land, and upon following the description as to courses and distances, finds a perfect agreement between them and the monuments mentioned, how can it be truly said that there is any latent ambiguity in such a deed, arising from an extrinsic circumstance. On the contrary, supposing that such a grantee, on repairing to the lands conveyed, should commence running it out by the courses described; suppose the first course from an undisputed monument to be "north-west five hundred rods to the great elm, so called;" but on examination, it should be found that the course is "*north*" to the "great elm." Here is a difficulty arising from an extrinsic circumstance. In such a case, parol proof may be introduced to show that there is a tree usually called and well known by the name of the "great elm," and but one such, and that the course "north-west" from the agreed point of departure would never strike the tree, but that a *north* course would. Or suppose that the great elm had decayed or been cut down, so that no vestige of it could be found at the time of surveying the line; still, parol evidence might be admitted to show that a tree known by that name once existed, and where it stood; and that the place was *north* from the point of departure; here the latent ambiguity would be removed by the parol evidence, and the error in the course described in the deed be corrected by it. But in the present case, the first monument mentioned is the range line, and it appears that the course *north* 69 degrees west, as well as

the course *south* 69 west, will strike the range line; and upon the construction given to the deed by both parties, the second monument is *Joseph Linscott's* land. It would seem, therefore, that in the present case there could be no occasion for the introduction of parol evidence, as there is no ambiguity to be removed; and when not necessary, it is not admissible.

The counsel for the plaintiff, however, have cited several cases to prove that the parol, explanatory evidence was properly admitted in the case at bar. The case of *Webb v. Winslow*, cited from *Dane's Abridgment*, is very briefly stated, and we have very few facts by which to learn the grounds of the decision. The trial was had when the court had no time for deliberation, or examination of books. It is not said whether there was any monument mentioned as standing at the end of the line "south 29 degrees *west*," as expressed in the deed; if there was, and yet the monument really stood at the end of a line drawn south 29 degrees *east*, which was contended to be the true line, then surely the evidence was properly admitted. The date of the deed is not given, though a grant to *Ingersol* was dated 1729. It was probably an ancient deed, as evidence of possession was offered and allowed to correct the mistake. So in the case of *Sherman v. Noyes*, decided in 1799, being the very next case stated by Mr. *Dane*, parol evidence of the position of monuments was admitted to correct the mistake as to course. In *White v. Eagan* 1. *Bay* 247, the land was described as bounded *north* on Sir *John Colleton* and *south* on *Coxe;* when in fact it was bounded *south* on *Colleton* and *north* on *Coxe;* parol evidence was admitted to correct the mistake. Here was a latent ambiguity, description and fact not agreeing. In *Middleton v. Perry* 2. *Bay* 539, a grant was said to be bounded on "*Cedar Creek*, waters of *Broad River*," and parol proof was admitted to show a mistake by the surveyor, who originally laid out the grant, in stating the land as lying on "*Cedar Creek*, waters of *Catawba* river"; there were two creeks of the same name. The party was allowed to show this mistake, not as to course or distance, but a part of the name of the boundary. In the case before us the plaintiff wishes to contradict his own deed, where the monument is truly stated. In *Baker v. Seekright* 1. *Hen. & Munf.*

177, there were only course and distance given; and the court admitted parol evidence of marked trees, on a line varying from the course in the deed, to establish it as the true line. The jury returned a plan of the land to which they referred in their verdict; and the counsel contended that it could not be contradicted, as it was expressly made a part of the record. The court assigned no reasons for their opinion. The case cited from 1. *Day* 139, was in chancery, and properly examinable in such a tribunal. The case from 2. *Dal.* 196, decided only that a receipt was a subject of explanation by parol evidence. Some other cases were also cited, which seem not to vary the principle contended for by the counsel for the defendant. The admission of the principle in such a case as the present would serve to render titles to real estate dependent, not on deeds of conveyance, and the language of the grantor, and courses, distances and monuments, but on the mere memory of witnesses, repugnant to such descriptive language in every essential particular.

There is no question that where the course and monument in a deed do not agree, the monument is to govern; so this court decided in *Cate v. Thayer* 3. *Greenl.* 71. In the act incorporating the town of *Dresden*, one of the lines was—"from thence on a north northeast course to the northerly line of said town, including the whole of the farm or land there belonging to the estate of Doctor *Gardiner*,"—and the line so running would not include the whole of the farm. The court, therefore, in the above case, considered that the line must give way and be established so as to include the land; but had not that farm been alluded to in the deed in the above case, parol evidence would not have been admitted to remove any supposed error in the course, and vary it in accommodation to such supposed error.

The plaintiff was permitted to offer the evidence stated in the report, and prove that a short time before the deed was written the land was run out which was intended to be conveyed, by a course *south* 69 degrees west, instead of *north* 69 degrees west, that the surveyor wrote the deed, and that he recognised the place and course of his running by certain monuments set up by him. Can the plain-

tiff be permitted to contradict his own deed in this manner, in an action against a man claiming under *James Linscott*, the grantee; the defendant too having no knowledge of such alleged mistake or ambiguity in the deed? We apprehend there are numerous cases which settled this question in the negative. In *Jackson v. Bowen* 1. *Caines* 358, the court decided that parol evidence could not be admitted to change one of the lines in a deed on the ground of mistake as to its length, from 36 chains to 29 chains. *Thompson J.* in delivering the opinion, said he had not the least doubt it was not to explain any ambiguity, but directly contradictory to the deed and manifestly inadmissible. The same principle is settled, or rather pronounced as unquestionable, in the case of *King v. King* 7. *Mass.* 496. There the demandant offered parol evidence to prove that the demanded premises had always been known and called by the name of the mill privilege, and that the deed from the tenant to the demandant was understood and intended by the parties to describe and convey the same to him. The court unanimously decided that the evidence was inadmissible, as the deed had no reference to extraneous circumstances, or any latent ambiguity. It should be observed that the alleged intention and understanding of the parties was the only ground of the motion; and in the case we are now considering, there was nothing more. So in the case of *Townsend v. Weld* 8. *Mass.* 146, it was decided that parol evidence of an agreement on the part of the plaintiff, that, on certain conditions, the defendant should not be answerable on his covenants, was inadmissible. It was an attempt to control the effect of a sealed instrument by parol evidence which is not permitted, as the court observed.

We will not multiply authorities on this point but only cite the case of *Small v. Quincy & al.* 4 *Greenl.* 497, and the cases there collected. It has often been decided by other courts as well as this, that where there are no monuments referred to in a deed of conveyance, or if they are gone and the place where they originally stood cannot be ascertained, the courses and distances mentioned in the deed must govern the parties and those claiming under them; for in such case there can exist no latent ambiguity, because no extrinsic facts or circumstances exist to create it.

As to the other point relied upon by the plaintiff, viz. that if the land in question did pass by his deed to *James Linscott*, still nothing passed by *James'* deed to *Pugsley*, because, at the time of executing it, he was disseised by the plaintiff, it cannot avail him. In the first place it appears by the report that the land was not inclosed and separated from the adjoining land by fences. And though he had occupied the orchard ever since the deed was made to *James*, yet it does not appear that he occupied it adversely when *James* conveyed to *Pugsley*. When a man sets up a title by disseisin he must establish such a title by strict proof. *Pro. Ken. Pur. v. Laboree*, 2 *Greenl.* 275.

We are all of opinion that the verdict cannot be retained.

Verdict set aside and a new trial granted.

SMITH *vs.* SAYWARD & ALS.

Where one was employed as the agent of certain others, to purchase for them a piece of land, and take the conveyance to himself, concealing his principals; and a third person, at the request of the principals, became surety for the agent in a promissory note for the purchase money; which note the surety paid;—it was *held* that the surety alone might have *assumpsit* against the principals, for the money thus paid.

Held also, that this was an original undertaking, and not within the statute of frauds.

Held also, that the benefit accruing to the principals was a sufficient consideration to support the promise.

THIS was an action of *assumpsit* brought by *Archibald Smith, Jr.* to recover the amount of certain monies laid out and expended for the defendants. The facts in the case, and the points raised in the argument, are clearly stated in the opinion of the court, which was read as drawn up by

PARRIS J. The defendants, being tenants in common of certain

certain real estate with one *Ayer*, whose share they were desirous of purchasing, employed one *Daniel Smith* to contract in their behalf with *Ayer*, for the purchase of said property; and under an apprehension that *Ayer* would not sell to them, or to any person known to be employed by them, requested that the negotiation with *Ayer* should be carried on by *Daniel Smith*, in his own name, and with all the appearances of a real purchaser. On the completion of the bargain with *Ayer*, promissory notes were to be given for the purchase money, with some responsible person as surety. The defendants procured the plaintiff to sign in that character. Deeds were executed by *Ayer* to *Daniel Smith*, and the consideration was secured by notes signed by said *Smith* as principal, and the plaintiff as surety; and thereupon other deeds were immediately written, and executed by *Daniel Smith*, by direction of the defendants, conveying the same property to them, and were ready for delivery upon the defendants securing the said *Daniel* and the plaintiff for their liability thus incurred. One of these notes having been paid by the plaintiff, he now brings his action in *assumpsit* to recover of the defendants the amount thus paid for them and to their use.

At the trial, the principal question of fact was, whether *Daniel Smith*, in his negotiation with *Ayer*, acted for himself, or as the agent and in behalf of the defendants; and upon this point the jury were instructed, that if they believed he was acting merely as the agent or instrument of the defendants, they would find for the plaintiff; but if, from the evidence, they believed that he was making and conducting a bargain for himself, although with the intention of transferring that bargain to the defendants, they would find for the defendants. The verdict being for the plaintiff, the jury have settled the fact that *Daniel Smith* was the agent of the defendants, and acted as such in making the purchase; and the case finds that he did not, either as principal or agent, request the plaintiff to become surety; but that the surety was procured by the defendants. The question then is, whether they are accountable to the plaintiff for having become surety for their agent, and at their request.

To the first point made in the defence, that the action should have been brought jointly by the plaintiff and *Daniel*, it is a sufficient an-

swer that the latter has suffered no injury. Where a person has laid out and expended his own money for the use of another, at his request, the law implies a promise of repayment, and an action will lie on this *assumpsit*. But *Daniel* has neither paid nor been called upon to pay any thing. He was the mere agent of the defendants, employed by them as such, and placed in their stead. There was no joint promise to him and the plaintiff; he has expended no money for the defendants; and, of course, has no right of action against them. Even if he had, as their agent, paid money for their use and benefit, he could not recover it in a joint action with the plaintiff, unless the consideration had been joint. *Bell v. Chaplain, Hardr.* 321; or unless the payment had been made from a joint fund, or raised on joint credit. *Osborn v. Harper* 5. *East* 225. *Graham v. Robertson* 2. *D. & E.* 282.

Where different persons have distinct and separate claims, though standing in the same relative situation, or where their legal interests are several, if there be no express contract with them jointly, they must enforce their claims by several suits. 1. *Chitty on Pl.* 8. As if there be two persons, and each of them advance money for a third, they cannot maintain a joint action, but each must sue severally. *Birkley v. Presgrave* 1. *East* 220. *Brand v. Boulcott* 3. *Bos. & Pul.* 235. The plaintiff has advanced money for the defendants, inasmuch as he has done it to discharge his liability, incurred at their request and for their benefit, and of course under an implied promise of indemnity; 3. *Bl. Com.* 163; and unless relieved from that promise, as contended by the counsel, they are bound in law to save him harmless.

But it is contended that the agreement or promise being merely verbal, is within the statute of frauds, and void, because for the debt of another. However hard such a construction of that statute would operate upon the plaintiff, who has been induced, by the defendants' representations, and for their benefit, to incur a liability for which he now seeks relief, and from which, in good faith, they ought to relieve him; yet, if such be the law, public policy requires that it be executed.

Was this a "special promise to answer for the debt or default of another," within the meaning of the statute? In *Perley v. Spring* 12.

Mass. 297. the plaintiff was induced to become surety for a debtor in prison, upon the promise of the defendant to indemnify him. Having been obliged to pay a considerable sum of money in consequence of his suretyship, he called upon the defendant to perform his promise. The same objection was raised in that case, as in this, that the promise not being in writing, was void. But the court held that it was not a case within the statute; that it was an original and not a collateral promise. In *Harrison v. Sawtel*, 10. *Johns.* 242. *Sawtel* being bound to indemnify one *Foot* in a certain suit in which he was arrested, requested *Harrison* to become special bail for *Foot*, and promised to indemnify him. *Harrison* suffered in consequence of his suretyship; and on bringing his action for indemnity, was met with the same defence as is raised in the case at bar; but the court say "this was not a promise to pay the debt or answer for the default of another person. It was an original promise between the parties to it, that one of them would indemnify the other, if he would become special bail for a third person, whom the defendant was bound to protect and save harmless in the suit. It was done at the request and for the benefit of the defendant, as it saved him from becoming bail himself or procuring some other person to become bail. The case had nothing to do with the statute of frauds, and there was a consideration for the promise, the advantage resulting to the defendant from the plaintiff's becoming bail." So, in the case under consideration, the defendants were exclusively interested in the bargain with *Ayer*. It was conceived and perfected for their benefit. To effect its completion, it became necessary to procure a surety. That surety was procured by them, "at their request and for their benefit. It saved them from becoming sureties themselves or procuring some other person to become such;" and it enabled them, through their agent, to effect a desirable object, which they could not accomplish in their own names. The benefit resulting to the defendants from the plaintiff's suretyship, was a sufficient consideration for any promise of indemnity. In the language of the law, it was a consideration moving to the party making the promise, from the party to whom it was made, and the promise raised upon that consideration was not, as contended by the defendants' counsel, to pay the debt or answer for the default

of a third person, but it was to indemnify and save the plaintiff harmless for performing a beneficial service for them and at their request; to save him harmless in case he should be compelled, as he has been, to pay their debt contracted by their agent. *Thompson v. Linscott*, 2 *Greenl.* 190.

Neither can the promise be avoided as relating to the purchase of real estate. Between the parties in this suit, there was no "contract for the sale of real estate, or any interest in or concerning the same." The use to which the defendants applied the notes, did not affect the plaintiff's liability as surety, neither could it affect his claim upon them for indemnity. He had become legally liable at the defendants' request; they were benefited by that liability, and they either expressly promised indemnity, or the law raised that promise for them. In either case, the promise is not affected by the statute of frauds.

We are all of opinion that the instruction to the jury was correct, and that there must be *Judgment on the verdict.*

J. Holmes and *D. Goodenow* for the plaintiff.

J. and *E. Shepley* for the defendants.

A TABLE

OF THE

PRINCIPAL MATTERS CONTAINED IN THIS VOLUME.