COMMENTARIES

ON

AMERICAN LAW;

BY

THEOPHILUS PARSONS,

LATE CHIEF JUSTICE

OF THE

SUPREME JUDICIAL COURT,

FOR THE

COMMONWEALTH OF MASSACHUSETTS.

NEW-YORK:

1836.

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ADVERTISEMENT.

CHIEF JUSTICE PARSONS so enlarged and commented upon cases not merely for the determination of the particular case before the court, but in order to determine other cases which might arise; to settle principles and define the landmarks of property, of personal liberty and personal security. Judge Parker, his associate upon the bench in his address to the grand jury after the death of the Chief Justice, says, "he was regarded as the living oracle of the law; *others* were great men, *he* was a wonderful man. The most complicated questions appeared in his hands the most easy of solution; and if there be such a thing as demonstration in argument, he above all the men I know, had the power to produce it.

"To have had a depository for the preservation of the learned efforts of so eminent a judge, must be considered fortunate for us and for posterity. The six first volumes of the present Series of Reports will long endure, as a monument of the technical learning and deep juridicial reasonings of the late Chief Justice. The principles of the common law, relating to real estates, are there clearly and familiarly explained, and most of our important legislative acts have there received constructions consonant to their real, but often obscure, intent. In these books will also be found many important mercantile cases, in which the principles of commercial and marine contracts have been discussed with remarkable clearness, and the law merchant has been fully and satisfactorily explained.

"He was a patient and diligent inquirer after truth, revolving and revising his own opinions, until it was scarcely possible they should not be correct, communicating fully to his brethren his own reasonings, and candidly listening to theirs, and never being willing to give the sanction of the whole court to a principle, until it had been tested by every method which learning and ingenuity could devise."

"The decisions of the court, with the reasons on which they were founded, when digested and committed to writing by him, were submitted to the consideration of his brethren, with a strong desire that they should be criticised and pruned; and he lent a willing ear to suggestions of alteration and improvement.

"He was great even in common affairs. His conversation could instruct or amuse, as times and seasons suited. Neither philosophers nor children could leave his society without being improved or entertained. The more solid productions of polite literature had passed the ordeal of his judgment, so that his materials for social converse were abundant, and his power of using them unlimited. Indeed, his memory may be considered a capacious store house, separated into an infinite number of apartments, in which principles, facts and anecdotes were laid up according

to their classes, marked and numbered, so that he could draw them out and appropriate them whenever occasion offered, without confusion or misapplication. Parsons could leave the theological controversy, the mathematical problem, or the legal inquiry, and enter at once with spirit and interest into domestic conversation and even into children's sports. When fatigued with the labor of deep legal research, or exhausted by a continued train of thought upon one subject, it was not uncommon for him to relax his mind with some abstruse arithmetical or geometrical demonstration, or to turn over the pages of some popular and interesting novel. And strange as it may seem, it is true, that, from his earliest years to the latter season of his life, these two sources of amusement were constantly enjoyed by him.

"To some of the strongest points of his character, I consider myself a witness, and should disdain to pass beyond the limits of truth. In relation to his professional and public judicial character, I speak in the presence of men, who are witnesses as well as myself. As to his classical and literary acquirements, I can appeal with confidence to the learned and revered governors of our university, who for more than ten years have enjoyed the benefit of his counsels, and witnessed the depth of his learning. For his mathematical and philosophical eminence, I could summon the chosen professors of those branches, and I could add to them the modest and scientific Bowditch. For his knowledge in astronomy, mechanicks, chemistry and electricity, I would venture to call the most distinguished masters we have in those several branches, and I believe the testimony from each witness would be, that Parsons was great in each particular department.

"It is comforting to the sincere and humble believer to add the name of Parsons to the long list of great and good men, who have given their living and dying testimony to the religion they profess.—In respect to the proof of the resurrection contained in the new testament, "he told me, that he felt the most perfect satisfaction on that subject; that he had once taken it up with a view to ascertain the weight of the evidence by comparing the accounts given by the four evangelists with each other; and that from their agreement in all substantial and important facts, as well as their disagreement in minor circumstances—considering them all as separate and independent witnesses, giving their testimony at different periods, he believed that the evidence would be considered perfect, if it was tried at any human tribunal."

CHIEF JUSTICE PARSONS'

COMMENTARIES

ON AMERICAN LAW.

I.

Commonwealth v. Boynton, 2 R. 79.

Indictment for passing as true, a bank bill not countersigned with the name of the cashier.

Parsons, C. J. In considering penal statutes not remedial, we are bound to construe them strictly. The legislature has not expressly extended to bank notes the peculiar safeguard resulting from the penalties of this statute, unless the forged note purport to be countersigned by a cashier of the bank, whose note is counterfeited. As bank notes are generally, and I believe always, countersigned by a cashier, it might be presumed that no man of common prudence could be imposed upon by a fictitious bank note not purporting to be countersigned by a cashier of the bank by which the note was supposed to be issued. If he should be, a punishment as for a fraud at common law would be a sufficient penalty. But when the forgery was completed by counterfeiting not only the name of the president, but the countersign of a cashier of the bank, common prudence might not be able to guard against this fraud. Therefore the more effectually to prevent it, the penalties of the statute are applied.

As the jury have expressly found that this bill was not countersigned with the name of any person who was cashier of the bank, the crime is not within the statute. But this is no cause for arresting the judgment. This is undoubtedly a fraud at common law, and the court is bound to animadvert upon it. The paper was in the form of a good note, and fraudulently passed as such, with intent to injure and deceive. We shall consider of the sentence.

Judgment not arrested.

2.

PERKINS v. BURBANK, 2 R. 81.

Assumpsit. Plea of the statute of limitations; and replication that the promise in first count is within an exception, held good.

PARSONS, C. J. This question has formerly been settled. A plea bad in part is a bad plea. The defendant has pleaded the statute of limitations in bar of the action, and has not pleaded several pleas of the statute to the several distinct causes of action declared on. The plaintiff could not safely demur, for the bar is substantially and formally pleaded. And he could not regularly reply in any other manner. Had he proceeded, and to the second count traversed the bar, and to another count pleaded some other exception of the statute, his replication would have been double, and bad upon special demurrer. Because several distinct issues either in fact or law, must have arisen from one plea in bar. If the defendant had traversed the exception contained in the replication, and the issue had been found for him, the action would have been barred, and if the issue had been found against him, the plaintiff would have had judgment on all the counts. A general bar of the statute pleaded to the action arising on distinct contracts, if it be traversed by the plaintiff in his replication, is attended with no inconvenience. There is but one issue; although it may comprise several facts, all or some of which, may be found for the plaintiff or defendant. But when there is a count containing a distinct cause of action, against which the defendant is apprehensive the statute doth not run, or which may be within some of its exceptions, it will be prudent for him to plead the statute specially to that count; and to plead it generally only to the counts where the facts will require the same replication

By the Court. The replication is good.

PARSONS, C. J. The rule of this court respecting amendments authorises the plaintiff to amend his declaration at any time before joinder in demurrer, on paying costs, or granting a continuance at the election of the defendant. The right to amend then is of course. But the rule has not taken away the discretionary power of the court to grant amendments, whenever the justice of the case shall require it.

But I have never known the court go so far as to grant an amendment or a repleader, after joinder in demurrer, when the proposed amended or new plea does not go to the merits of the action, which cannot generally be said of this plea of the statute of limitations. If an equitable cause was shown in aid of this motion, as that the defendant has lost the benefit of evidence by the death or absence of his witnesses, or that his papers have been destroyed or lost, amongst which was material evidence for him, the court might be induced to grant it, but without some such ground, it is not to be favoured, especially when the action is still open for trial upon the general issue.*

The motion was denied.

3.

PEARSALL v. DWIGHT, 2 R. 84.

The effect of pleading the statute of limitations of a foreign state.

PARSONS, C. J. From the record in this cause the declaration appears

*Vid. 1. W. Black. Rep. 35. Willet v. Atterton. The court will not set aside a judgment, which had been signed by mistake, so as to allow the defendant to plead the statute of limitations.

to be on a negotiable cash note, payable by the defendants to the plaintiffs, or their order, on demand. To this declaration there is a plea in bar, alleging that the plaintiffs long before, at the time, and ever since the note was executed, were inhabitants of the state of New-York; that the note was there made; that before it was made, and six years before this action was commenced, there was a statute of that state still in force, which among other things, limited the time of suing an action of this discription to six years, next after the cause of action accrued, which part of the statute is particularly pleaded with a profert of the exemplification of the whole statute, and there is the averment necessary to bring this action within that statute.

The plaintiffs in the replication, neither pray oyer of the exemplification of that statute, nor particularly plead any exceptions made in it, but confess, and would avoid the bar, by alleging that the defendants were, during all the time, inhabitants of this state.

The defendants, in their rejoinder, confess, and would avoid the replication, by averring that, since the making of the note, and more than six years before this action was commenced, the defendants went and returned to the state of New-York, and were there ten days, with the knowledge of the plaintiffs.

To this rejoinder the plaintiffs demur generally, and the defendants join in demurrer. Whether this rejoinder be good, is the issue in law immediately before the court.

If the matters alleged in the replication are sufficient to avoid the bar, the rejoinder must be bad, because it neither traverses those matters, nor shows any provision of the statute of New-York, by which the effect of the replication is avoided by the collateral facts pleaded in the rejoinder.

For the same reason, if the matters alleged in the bar are sufficient in law, the replication must be bad, for the plaintiffs do not plead any exception in that statute, by which the bar, when confessed, may be avoided. Notwithstanding the profert of the exemplication of that statute, yet if it contained any exception, on which the plaintiffs intended to rely, they ought either to have prayed oyer and spread the whole statute upon the record, or to have particularly pleaded such exception in their replication, and then to have made the allegation necessary to bring their case within it. This reasoning is grounded on the opinion, that if that statute can avail in this court, when pleaded in bar, the bar cannot be avoided, but by virtue of some provision of the same statute. As the pleadings now are, the court cannot take notice of any part of that statute, but of those which are particularly shown in the bar.

Although the rejoinder be bad, yet if the replication is also bad, the defendants must have judgment, if the bar be good.

Thence the great question in the cause is, whether to an action commenced in a court in this state, by the plaintiffs, inhabitants of New-York, on this note there executed, by the defendants, inhabitants of this state, the statute of limitations of the state of New-York can be pleaded in bar.

That the statute of another state cannot *proprio vigore* have the force of law in this state is very clear, and its effect in this court must depend on the laws of the commonwealth.

It is a general rule, that personal contracts entered into, and to be performed in any one state, and which are there valid, are to be considered as valid in every other state.

This rule is founded on the tacit consent of civilized nations, arising from its general utility, and seems to be a part of the law of nations adopted by the common law,

To give effect to contracts of this description, is an act of comity due

from the courts of the state in which such contracts may be sued to the state in which they may be made.

This rule is subject to two important exceptions. First, that neither the state in whose court the contract is put in suit, nor its citizens may suffer any inconvenience by giving the contract effect. And secondly, that the consideration of the contract be not immoral, and the giving it effect will not have a bad tendency. Under these exceptions, the cases, which do not come within the rule, may be classed.

The contract on which this action is founded is clearly within the rule. It was made in New-York, and might there be performed. The plaintiffs when it was made, were inhabitants of that state, and so are the defendants to be considered in this cause by going and making the contract there: The contract when made, was valid by the laws of New-York: The giving it effect here cannot be injurious to the commonwealth, or its citizens, nor have any evil tendency: And the consideration is not immoral: The court are, therefore, obliged by the laws of the commonwealth, to consider it as a valid contract, according to the true construction of the rule.

The party claiming the benefit of the note in this case has sued it originally in a court in this state; the law of the state of New-York will, therefore, be adopted by the court, in deciding on the nature, validity and construction of this contract. This we are obligad to do by our own laws. So far the obligation of comity extends, but it extends no farther. The form of the action, the course of judicial proceedings, and the time when the action may be commenced, must be directed, exclusively, by the laws of this commonwealth.

These are matters not relating to the validity of the contract; and to permit the laws of another state to control the court, in its proceedings concerning them, would entrench upon the authority of our own laws unnecessarily, and for no principle of common utility. Cases may also be supposed, in which this permission might be injurious to our citizens. If the state in which the contract was made, had no statute of limitations, then by the *lex loci* the action might there be commenced at any time, and if the plaintiff should afterwards remove to this state and commence his action in our court, defendant would be deprived of the benefit of the limitations here in force. That the form of the action must be conformable to our laws, the case of Folliot v. Ogden* is an authority. In giving the opinion of the court, Lord Loughborough considers it as law, that when a bond made in a foreign state by whose laws it is assignable, is sued at law in England, the suit must be according to the laws of England, in the name of the obligee, and not of the assignee, although it be for his use, because, there bonds are not assignable at law. As to the time when the suit may be commenced, no authorities in point have been cited from our books, nor do I recollect any;† but the subject has been considered by foreign jurists of great merit.

In the prelections of Huber, under the title De Conflictu Legum,‡ he states a case, in which an action was commenced in a court of Friesland, by a Hollander against a Friesiander, on a contract made in Holland, and the limitation in force in Friesland, was pleaded against the action. The Hollander contended that it could not be pleaded against him, to that contract which was to be decided by the *lex loci*, or the laws of Holland. But

* 1 H. Blacks. 135.

† But the case of Duplein v. De Rouen, in 2 Vern. 540, in which the statute of limitations in England was allowed to be pleaded, where the contract was made abroad between two foreigners.

‡ Vol. 2 lib. 1.

the judgment was against the Hollander. After mentioning another case upon execution, in which the *lex loci* was not allowed to govern, the author adds—"Haec est ratio, quod prescriptio et executio non pertinent ad valorem contructus, sed ad tempus et modum actionis instituendæ, quæ per se, quasi contractum seperatumque negotium constitit; adœque receptum est optima ratione, ut in ordinandis judiciis, loci consuetudo ubi agitur, etsi de negotio alibi celebrato, specteter."

It is therefore the opinion of the court that the plea in bar is not good.

Consequently the judgment on the demurrer must be, that it appears to the court that the rejoinder is bad and insufficient in law, &c.

4.

SHARP, ET AL. v. CLARK, ET AL. AND TRUSTEES. 2 R. 91.

Neither a sheriff holding and unexecuted execution, nor the judgment debtor, are chargeable on the absconding debtor's act,

PARSONS, C. J. By the statute on which this process is founded, a creditor is empowered to attach the goods, effects and credits of his debtor in the hands of a third person where they may be found, who, for this purpose is considered as the trustee of the defendant his principal: and the statute provides that the goods, effects and credits thus attached, shall stand bound in the hands of the trustee, to satisfy the judgment, which the plaintiff in the suit may recover. The question is, whether by the facts disclosed in the answer, Hinsdale, the deputy sheriff, is the defendant's trustee, because at the time of the attachment he was possessed of an execution issued on a judgment recovered by the defendants, and which the defendants had delivered to him to execute agreeably to law.

It is my opinion that on these facts Hinsdale is not the defendant's trustee. The execution in his hands at the time of the attachment may, for some purposes, be considered as effects of the defendants; not so the officers authority to execute it, which was derived from the precept of the commonwealth; and by holding the execution he was no debtor of the defendants. But the execution cannot be liable to satisfy the plaintiff's judgment, for it cannot be taken and sold on his execution. Neither can the execution stand bound in the officer's hands for that purpose; because the defendants might release the execution at any time before it was served, which, after notice to the officer, would defeat all his authority to execute it. It is therefore very clear that the execution, in these circumstances, was not goods, effects or credits of the defendants in the hands of Hinsdale within the intent of the statute.

M. & J. Wells, the judgment debtors on the same execution, were also summoned as trustees of Clark, *et al.* the creditors. The process was served upon them while the execution was in the hands of Hinsdale, the deputy sheriff, who afterwards demanded and received satisfaction as above stated.

PARSONS, C. J. From the facts disclosed by the answers to the interrogatories, it appears that when the plaintiff's writ was served on M. & J. Wells, as the supposed trustees of the defendants, they were the judgment debtors of the defendants, who had sued an execution against them, then in the hands of Hinsdale, a deputy sheriff, to execute. On these facts the court are to decide whether M. & J. Wells are the defendants' trustees.

The statute which gives this process, authorises the attachment of any goods, effects and credits of the defendant in the hands of any person where they may be found, and creates a lien on them in his possession as a trustee, for the satisfaction of the plaintiff's judgment. It is also made the duty of

the trustee to discover and expose the goods, effects and credits thus attached, to satisfy the plaintiff's execution. And for discharging this duty, he is protected against all suits of his principal, and in his defence may give the statute in evidence under the general issue Property therefore, liable to attachment in the possession of a trustee, must be so situated, that he may be able to retain it, to satisfy the plaintiff's judgment, against the will of the principal, and may justify his conduct by a defence in a suit at law. At the time of this attachment M. & J. Wells owed the defendants a sum of money secured by a judgment; and there are cases in which a debt of this description is a credit liable to attachment by force of the statute. In the present case, the judgment creditors had sued out their execution, and the debtors could not lawfully retain the money against them, and defend themselves in an action at law. The creditors could compel payment, or imprison their bodies by a legal process then issued. I am therefore satisfied that this debt, in this situation, was not liable to be attached in the possession of M. & J. Wells, within the true intent of the statute. The plaintiff's counsel admit that by their construction of the statute, the trustees must satisfy the defendant's execution, and afterwards must pay the debt to the plaintiff, and the relief proposed for the trustee is an *audita querela* against his principal. This remedy, always expensive, would be often fruitless; and to give this construction to the statute, would expose it to a reproach it does not merit.

5.

KELLOGG v. INGERSOLL, 2 R. 100.

PARSONS, C. J. In this case the count is in a plea of covenant broken, in which the plaintiff declares that the defendant, by his deed dated April 7th, 1787, sold him a tract of land in Alford, to hold in fee simple; and among other covenants, covenanted with the plaintiff that the premises were free of all incumbrances. Of this covenant the plaintiff assigns the breach and avers that before, at the time, and ever since the execution of that deed, there had been, then was, and ever since has been, a public town road or way laid out over the premises by the town of Alford, for the use of the inhabitants, duly accepted and confirmed by the town, which road the plaintiff, in assigning the breach, particularly describes, averring that it contains two acres and eighty rods of the land sold, and concluding that so the defendant his covenant aforesaid hath not kept, but hath broken the same.

To this breach thus assigned, the defendant pleads that the plaintiff ought not to maintain his action, because he says that when the deed was executed the premises were free of all incumbrances, and he concludes to the country.

The plaintiff demurs to this plea specially, because the defendant has not traversed the existence of the road, nor confessed and avoided it, and because the plea does not conclude with an averment. And the defendant joins in demurrer.

Whether the defendant's plea is, or is not good, is the issue in law submitted to the decision of the court.

The defendant's counsel argued that his plea was substantially and formally good; and that, if it was not, the defendant was entitled to judgment, because, a public town road being no incumbrance, the breach assigned was insufficient in law.

As the plaintiff in this case has not assigned the breach merely in the words of the covenant, but has further specially described the incumbrance,

the existence of which constitutes the breach of which he complains; if the breach thus assigned be sufficient in law, the defendant ought, in his plea, either to have confessed and avoided the assignment, or to have traversed the breach thus specially described. As he has done neither, it is the opinion of the court that his plea is bad.

If the breach is not well assigned, the counsel for the defendant is certainly right in demanding judgment for his client, notwithstanding his plea is bad.

If the public town road, described by the plaintiff in his assignment, is no legal incumbrance of the land sold, the breach is not well assigned. But the court are well satisfied, that the road, as there described, is an incumbrance of the land sold. It is a legal obstruction to the purchaser to exercise that dominion, over the land, to which the lawful owner is entitled. An incumbrance of this nature may be a great damage to the purchaser, or the damage may be very inconsiderable or merely nominal. The amount of damages is a proper subject of consideration for the jury who may assess them, but it cannot affect the question, whether a public town road is, in legal contemplation, an incumbrance of the land over which it is laid.

Judgment must therefore be entered, that it appears to the court that the defendant's plea is bad and insufficient in the law, &c.

Judgment for the plaintiff.

6.

WRIGHT v. WRIGHT, 2 R. 110.

The mother of a bastard child has a right to the custody of him, as his natural guardian.

PARSONS, C. J. As the putative father has undertaken the prosecution of this action, I am disposed to consider his claims to the custody of the plaintiff, as if they were regularly before the court.

In legal contemplation a bastard is generally considered as the relative of no one. But to provide for his support and education, the mother has a right to the custody and control of him, and is bound to maintain him, as his natural guardian. In a moral view, he is considered as the child of his mother so far, that their intermarriage is unlawful, and any sexual intercourse between them would be incestuous. And the stat. 4 and 5, Ph. and M. c. 8. against carrying off and marrying maidens not sixteen years of age, has, for the protection of the child, been considered as extending to a natural daughter, in fact under the care of the putative father. The natural guardianship of the mother devolves on her husband on the marriage, in the same manner as an executorship or a guardianship derived from the authority of the probate court; and the husband's power, depending on the marriage, ceases on its dissolution. It is not like the right to the wife's chattels, which by the marriage are vested in the husband and survive to him. Whether a putative father, from whose actual custody and care his natural daughter has been unlawfully taken by a stranger, can maintain a writ De Homine replegiando to regain his custody, is a question different from the present. Perhaps he is within the reason of the case of Rex v. Cornforth, *et al.** but it is unnecessary now to determine this question. As to the right of the present plaintiff I concur with my brethren.

Plaintiff nonsuited.

* 2 Stra. 1162.

7.

BENSON v. RENINGTON, 2 R. 115.

PARSONS, C. J. The law is very well settled, that parents are under obligations to support their children, and that they are entitled to their earnings. It is true parents may transfer this right, or authorize those who employ their children, to pay them their own earnings, and the payment will be a discharge against the parents. But no such facts appear in this case. When the plaintiff's child was 13 years old, he makes his claim upon the defendant for her past services. This demand was adjusted by an arbitration. After this the plaintiff consented, on certain conditions, that she should continue in the service of the defendant, who was apprized that her father claimed a right to her earnings; notwithstanding which he continued to retain her. He must be liable to pay the plaintiff the real value of the services rendered by his daughter. That value has been settled by the proper tribunal, and there is no sufficient reason for setting aside the verdict.

Judgment according to verdict.

8.

WALES v. WILLARD, 2 R. 124.

The opinion of the court was delivered by

PARSONS, C. J. The county courts of probate were never established by any statute until the act of March 12, 1784. Before the revolution, the judges of probate were considered as surrogates of the governor and council, who derived from the royal charter the authority to prove wills and to grant administrations. A provincial act was passed for erecting courts of probate in the several counties, but it was negatived by the king. A number of other acts were afterwards passed, which recognize the power of the courts of probate, and regulate appeals from them to the governor and council, which were approved.

By the constitution, among other laws, the act regulating and defining the proceedings of the court of probate, were confirmed; and the appeal given to our governor and counsel, until the legislature should otherwise provide. By the statute of March 12, 1784, probate courts were established, with the powers and jurisdiction given by the laws of the commonwealth. The appellate jurisdiction is vested in the supreme judicial court; to which is also given original jurisdiction in all cases in which the judge of probate is interested. The only authority of the court of probate to grant administration in cases of intestacy is derived from the statute of March 9, 1784, in which it is expressly enacted that no administration shall be originally granted on the estate of any deceased person, after the expiration of twenty years from his death.

According to the legal construction of these two last statutes, must the issues in law in this cause be decided. The defendant contends that the administration is void. The plaintiff, not insisting that the administration is legal, contends that it is only voidable by way of appeal.

When the question before a judge of probate is only as to the manner of exercising his jurisdiction on a subject of which some court of probate has jurisdiction, there if he mistakes, the means of correcting such mistake is by appeal. But when the question is whether the court of probate has jurisdiction of the subject or not, he must decide it, but at his own peril. If

he errs by assuming a jurisdiction which does not belong to the probate court, his acts are void.

It appears from the pleadings that the administration was originally granted after the intestate had been dead twenty years. This administration, it was not competent for any judge of probate to grant, but it is a case in which it is expressly provided by the statute from which he derives his authority, that no administration shall be granted. It is not, therefore, the erroneous exercise of his jurisdiction, but it is an assumption of power against law, and the grant is *ipso facto* a nulity.

The objection that the statute was passed after the death of the plaintiff's intestate, cannot prevail. The statute must be considered as applying to all cases arising, or in which application for original administration should be made to the judge of probate, after the passing of the statute, whether the death occurred before or after that time.

Judgment must be entered for the defendants upon both pleas.

9.

COMMONWEALTH v. CONE, 2 R. 135.

PARSONS, C. J. This indictment pursues the words of the statute, and if the offence proved be within the mischief of it, the conviction is right. The criminal intent alleged and found by the verdict is an intent to pass the forged bills as true, to defraud the Nantucket bank incorporated by the legislature of the Commonwealth. It is objected to the verdict, that the jury have found it without evidence, because the testimony in behalf of the Commonwealth, proved an intent to pass the bills without the state. It is immaterial where the defendant intended to pass the bills. The Nantucket bank might have been as effectually defrauded by passing them in Connecticut as in this county, and the conclusion the jury have drawn from the testimony is correct. The gist of the criminal intent alleged, is to defraud the Nantucket bank, and the passing the forged bills as genuine is only a mean to effect that fraud.

If the indictment had alleged that the intent to pass the bills was to defraud the citizens of any foreign state, it would deserve further consideration whether such intent be within the mischief provided against by the legislature, although it be within the words of the statute.

New trial refused.

10.

BEMIS v. FAXON, 2 R. 142.

Per Curiam. The statute gives an appeal from every judgment of the common pleas to this court. But it is contended that in this case there was no judgment, and so nothing to found an appeal upon. But if the court below did not see fit to render judgment according to the verdict, they ought to have entered another judgment, viz. That the plaintiff take nothing by his writ. We have, however, no doubt that the arresting of the judgment in this, although a regular judgment was not entered, is such an act of the court from which an appeal lies. If it were otherwise, the court of common pleas would possess a power to oust this court of its appellate jurisdiction at their pleasure. The appeal is sustained, and the action will stand for trial in course.

11.

THE INHABITANTS OF PEMBROKE v. THE INHABITANTS OF ABINGTON.

Petition praying that a writ of error might issue on a judgment of the court of common pleas.

Per Cur. This writ must issue in the county where the judgment was rendered. You have no occasion to petition for it, as it is a writ of right, grantable *ex debito justitiæ*. File your errors in the Clerk's office at Plymouth, and take out your writ of course. If you insert the assignment of errors in your *scire facias*, you may probably have a decision at the first term.

12.

WALES, JUN. Treasurer of the Blue-Hill Turnpike Corporation, v. STETSON, 2 Rep. 143.

Trespass. The first count was for passing the turnpike gate without payment of the legal toll; and the second was for cutting down the gate.

PARSONS, C. J. After considering the several points made in this cause by the counsel, we are satisfied that the question submitted must be decided according to the legal construction of the act incorporating the proprietors of this turnpike. We are not prepared to deny a right in the general court to discontinue by statute a public highway. It is an easement common to all the citizens, who are represented in the legislature. The authorising of the erecting of bridges over navigable waters is, in fact, an exercise of a similar right. We are also satisfied that the rights legally vested in this, or in any corporation, cannot be controled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation.

In the consideration of the provisions of any statute, they ought to receive such a reasonable construction, if the words and subject matter will admit of it, as that the existing rights of the public, or of individuals, be not infringed. And we are opinion that this act of incorporation reasonably admits such construction. The corporation had a right to make the turnpike over such parts of the old road as lay in their way. This affects no existing rights, as the easement remains. But before we construe the statute as giving an authority to obstruct a former highway by erecting a gate thereon, it should appear that such construction is necessary to give a reasonable effect to the statute. In this case no such necessity appears: but from the case as stated, it appears that the corporation might have exercised their right to erect a gate, and to receive the toll, as empowered by the statute, without impeding the travel on the old highway. The statute authorises the corporation to erect a gate on the turnpike road near the dwelling house of Joseph Hunt; and it is agreed in the case, that a gate might have been erected on the turnpike, and near the dwelling house of J. Hunt, and not upon any part of the old highway. This gate being on the old highway is a public nuisance, and the defendant had a right to abate it. Let the plaintiff be called.

13.

FAXON v. MANSFIELD, and HOLBROOK, his trustee, 2 R. 147.

Holbrook upon his examination disclosed the following facts, viz. On the the 21st day of May, A. D. 1803, he made a contract in writing with Mansfield the principal de-

fendant, by which the latter undertook to erect and finish a barn for Holbrook by the first of August then next, at which time he was to receive of H. 400 dollars in full compensation. At the time of the service of the writ in this case he had performed a part of the undertaking, and had received sundry sums of money towards his compensation. Afterwards he left the work unfinished without the consent, and contrary to the wishes of H. who was obliged to procure other workmen at his own expense and with considerable trouble to complete the same. That these expenses and trouble, together with the damage sustained by injury to his hay, amounted to more, in the opinion of H. than the balance which would have been due to M. had he fulfilled his undertaking; but the money actually paid to M. on account of the contract did not amount to the proportion of the labour performed by M. before he quitted his undertaking.

PARSONS, C. J. It appears from the answers to the interrogatories that there is no ground to charge Holbrook as the trustee of Mansfield, unless the latter has a legal cause of action against the former for his work done under the contract stated in the answer. From the terms of the contract Mansfield was not entitled to receive any thing from Holbrook until the contract was executed on the part of Mansfield.

Mansfield did not fulfil his contract: His failure did not arise from inevitable accident, but from his own neglect, for he voluntarily left the work unfinished. On these facts he can maintain no action either on his contract, or on a *quantum meruit* against Holbrook, who must be discharged.

Trustee discharged.

14.

EDDY v. KNAP, 2 R. 155.

Petition for partition.

PARKER, J. When this objection was made at the trial, I overruled it, but not without doubts then existing in my mind. I am now satisfied that this evidence ought not to have gone to the jury. It appears by the return on this execution that two of the appraisers were appointed by the officer, who does not show that the debtor refused to chose one. It ought to appear that the debtor had an opportunity to choose one. On this ground I am of opinion that there ought to be a new trial.

PARSONS, C. J. My mind is satisfied on this question. At the common law, land is not liable to execution. This being wholly a provision of a statute, the proceedings ought substantially to pursue the statute. The act of 6 Geo. 2. c. 2. by force of which this execution was levied, directs the officer to cause three indifferent and discreet freeholders to appraise the land on oath. Of these appraisers the creditor is to choose one, the debtor one, if he see cause, and the officer the third. If the debtor does not see cause to appoint an appraiser, the duty necessarily devolves on the officer, or he cannot cause the land to be appraised by three appraisers. But here is nothing shown to authorise the officer to appoint two of the appraisers. It does not appear that the debtor had the option given him by law; as the officer does not return that the debtor did not see cause to choose an appraiser. The objection is fatal. The execution ought not to have been given in evidence, because the judgment creditor derived no title to the land by the levy.

New trial granted.

15.

COMMONWEALTH v. LYDIA CLARK. 2 R. 156.

Certiorari on certain proceedings of the court of sessions upon the complaint of Lydia Clark against Joseph Cundell, as a putative father of a bastard child, of which she had been delivered.

PARSONS, J. This cause comes before the court upon a *certiorari*, on which are certified the proceeding of the court of sessions upon an information preferred by Lydia Clark against Joseph Cundell, as the putative father of her bastard child, that he might stand charged towards the maintenance of the child. Cundell has taken several exceptions against the regularity of the proceedings, of which the court do not think it necessary to give any opinion, because there appears another exception which must be fatal. There is not in the record any adjudication that Cundell was the putative father of the child. This adjudication is necessary, as the only foundation of the subsequent order for maintenance. The statute of March 15, 1786, which gives to the mother of the bastard child this remedy, expressly provides that the party charged be adjudged the putative father, unless the jury find him not guilty. The necessity of this adjudication, as the foundation of an order for maintenance, results also from the principles of the common law; and the cases of Rex v. Perkasse, 2 Sid. 363; Regina v. Weston, Lord Raym. 1198; and The King v. Pitts, Doug. 662, are express authorities.

The Court, therefore, ordered the proceedings quashed.

16.

PAGE v. TRUFANT, ET AL. 2 R. 161.

PARKER, J. The question brought before the court by the pleadings in this case, is, whether the consideration of this bond is traversable? A mere voluntary bond, given without any consideration, is good Bonds obtained by duress, given during infancy, and in certain other specified cases, as for instance, in restraint of trade, are void in law. These cases are all stated and described in the books. The case before the court comes within none of them. Perhaps a court of chancery might compel the plaintiff to execute the covenant which it is stated he engaged to execute, but we possess no such power. The pleas appear to me insufficient to bar the plaintiff of his action

SEWALL, J. The amount of the defendant's pleas is, that, the wife not being bound by her covenants in the articles of separation, and no covenants having been made by the plaintiff pursuant to his engagement, there was therefore no consideration for this bond. But a mere want of consideration is not sufficient to avoid a bond; although an illegal consideration is. Perhaps a court of equity might afford some relief in such a case, but this court have no powers to that purpose. As to the legal operation of this bond, it appears to me to be valid, and must be supported; and I am consequently of opinion that the pleas in bar are insufficient.

SEDGWICK, J. This bond is stated in the defendant's pleas to be given for securing the separate maintenance of a wife. There are demurrers to these pleas, by which all the facts well pleaded the court must consider to be true. The question then, brought before the court is, whether the consideration for which this bond was given is sufficient to support an action upon it? Every bond, from the solemnity of the instrument, carries with it an

internal evidence of a good consideration;* and is to be supported in a court of law, except facts are disclosed to the court whereby the consideration appears to be *immoral, illegal,* or *against the policy of the law.* These pleadings show neither. Separate maintenance is lawful, and a bond given to secure it to a wife, is meritorious and therefore valid and binding. The defendant's pleas are insufficient.

PARSONS, C. J. A bond, from the solemnity of its execution, imports a consideration, the want of which the obligor is estopped by law to plead. He may avoid the bond, by showing that it was obtained by fraud or duress, or that the consideration is illegal or against the policy of the law.

In the first plea in bar, it is alleged that the bond was given for a separate maintenance of the wife on mutual stipulations between the husband and wife, which stipulations on her part were void. In the second plea it is alleged that the bond was given on mutual promises between the parties, and that the plaintiff hath not performed the premises on his part to be performed. In both these pleas the objection to the bond is substantially the same, viz. a want of consideration, which cannot prevail. It in fact appears upon the record, that the consideration was legal and meritorious, as it was made to secure a separate maintenance for the wife, who separated from her husband for their mutual comfort, to avoid the effect of jealousies and animosities that existed between them.

The judgment of the court is, that the pleas in bar are bad and insufficient in law.

17.

NELSON, plaintiff in error, v. ANDREWS, 2 R. 161.

Error brought to reverse a judgment of the court of common pleas. The original action, with all demands between the parties, was referred in the court below and the report of the referees was that Andrews, who was original plaintiff should recover 6 dols. 69 cents damage and costs of reference, with one quarter part of the costs of court. The court, notwithstanding this report, gave judgment for full costs of court.

PARSONS, C. J. The report having been accepted by the court below, they ought to have pursued it in rendering their judgment, unless this part of the report can be rejected as surplusage. But if, by the terms of the submission, the referees had jurisdiction of the question of costs, their award concerning them is not to be rejected. This practice is of so long standing that it cannot now be shaken, if we were so disposed. But the practice may be considered as beneficial. There may be reasons, respecting the allowance of costs, which in the minds of referees would very properly have weight, although they could not be admitted in a court of law. It may appear to them, that a creditor has unduly harrassed his debtor for a trifling demand, or has brought his action before the cause of action had accrued. Many other reasons may be conceived. It was therefore both legal and expedient that these referees should take the subject of costs into their consideration, and make their award concerning them. The court having accepted the report were bound by it, and ought to have followed it in rendering their judgment. There is no doubt then that their judgment is erroneous. As the error extends to part of the judgment only, it must be reversed for that part, and will remain good for the rest.

Let the judgment be reversed for three quarters of the costs; and as the error was of law, and not of fact, the plaintiff in error is not entitled to costs.

* 2 Black. Comm. 446.

18.

HUNT, ET UXR. appellants, v. HOLDEN, 2 R. 168.

Appeal from a decree of the judge of probate for this county, granting to the appellee administration *de bonus non* with the will annexed of Seth Sweetser, deceased. The reasons of appeal filed in the probate court, pursuant to the statute, were

1st. There is no personal estate of the deceased not administered by the former executors to the amount of *five pounds*.

2dly. There are no debts due from the said estate of the like or greater value.

After sundry bequests in the devise of the use of certain parts of his real estate to the wife, is the following clause: "Further if my wife remain my widow, and it should happen that, by reason of sickness or age, what I have given her should not be sufficient for her comfortable support, then and in such case my will is that my other executor dispose of so much of my estate as shall be necessary for that end. And he made his wife, and Henry Sweetser his executors."

PARSONS, C. J. The decision of this question must turn on a single point, viz. whether there was personal estate of the value of *five pounds*, or debts due from the estate of a like amount. One of these must be true or the statute forbids an administration *de bonis non* to be granted. No personal estate is pretended in this case, but it is attempted to show a debt due under a clause in the will making provision for the testator's widow, in the event that the provisions previously made should prove insufficient. It is agreed that she needed the aids intended her, and that the appellee furnished them. But it is very clear that the authority given by this clause to one of the executors to sell land for the particular purpose, cannot support an action at law, as for a debt due from the testator. It was a mere personal trust originating in the will. Had we a court of chancery, there might have been power to enforce the execution of the trust, and perhaps an action might have lain against the executor while living. But it is enough for the present purpose, that this can in no sense be considered as a legal demand on the estate of the testator as for a debt due from him.

The statute authorizes an administration *de bonis non* on the oath of the party applying; but this is not conclusive evidence either with the judge of probate, or with this court upon the appeal. The decree is reversed.

Costs for the appellants.*

19.

COMMONWEALTH v. WHEELER, ET AL, 2 R. 173.

The effect of a *nolle prosequi* entered on an indictment.

PARSONS, C. J. The plea in bar is not good unless a *nolle prosequi* amounts either to a pardon or to an acquittal. It cannot be considered as having the effect of a pardon, because, by our constitution, the governor, with the advice of the council, has the sole power of granting pardons; and he cannot have this power until after conviction.

Neither can a *nolle prosequi* be deemed an acquittal. This was adjudged in the case of Goddard v. Smith.† The plaintiff sued a writ of conspiracy

* *Note*—The decree of the Judge of Probate was made August 6, and the appeal was claimed September 5. A question arose whether the claim was made within "*one month*," as the statute requires?

The Chief Justice said it had been settled that by *month* in the statute is intended a calendar month.

† 6 Mod. 262.

against Smith, *et al.* for maliciously indicting him of barratry without probable cause, of which he was *debito modo* acquitted. On producing the record, it appeared that the plaintiff was discharged of the indictment by a *nolle prosequi;* and the court held he was not acquitted. As the writ of conspiracy must pursue the register, and allege the plaintiff to have been acquitted, case for a conspiracy has been substituted, in which the plaintiff is not holden to allege that he was acquitted, but may declare according to the truth of his case.

The practice of entering a *nolle prosequi* to informations is very ancient; but to indictments it began in the latter end of the reign of Charles 2d, and was then much complained of. But when it is entered is a defective indictment, on which no legal judgment can be entered, there can be no cause to complain. For although the defendant may be tried on another indictment. so he may also after judgment is arrested on an insufficient indictment

I observe in the bar, the *nolle prosequi* is alleged to have been entered by the advice of the court of common pleas. Certainly the court are not legally competent to give any advice on this subject. The power of entering a *nolle prosequi* is to be exercised at the discretion of the attorney, who prosecutes for the government, and for its exercise he alone is responsible.

Judgment that the plea in bar is bad.

20.

COMMONWEALTH v. HARDY, 2 R. 317.

The prisoner may give his general character in evidence on a trial for murder.

The court unanimously admitted the evidence.

PARSONS, C. J. said, that he was of opinion that a prisoner ought to be permitted to give in evidence his general character in all cases; for he did not see why it should be evidence in a capital case, and not in cases of an inferior degree. In doubtful cases, a good general character, clearly established, ought to have weight with a jury; but it ought not to prevail against the positive testimony of credible witnesses. Whenever the defendant chooses to call witnesses to prove his general character to be good, the prosecutor may offer witnesses to disprove their testimony. But it is not competent for the presecutor to go into this enquiry, until the defendant has voluntarily put his character in issue, and in such case there can be no examination as to particular facts.

SEWALL and PARKER, Js. said, that they were not prepared to say that the testimony of general character should be admitted in behalf of the defendant in all criminal prosecutions; but they were clearly of opinion that it might be admitted in capital cases, in favor of life.

21.

SULLIVAN v. MASSACHUSETTS MUTUAL FIRE INSURANCE COMPANY, 2 Rep. p. 318.

This was an action of covenant broken, grounded on a policy of insurance, under the seal of the company. A case was stated, at the last March term, for the opinion of the court; of which the following is the substance.

PARSONS, C. J. This is an action of covenant broken, brought upon a

policy of insurance which was issued under the seal of the company, and it comes before the court on a case stated by the parties.

It appears from the case, that after the company were incorporated, and established their rules and articles, the plaintiff, in March, 1799, caused his house in Boston, to be ensured by them for the term of seven years, and paid the premium and deposit agreed upon. Afterwards, in May, 1800, he sold his house, and took back a mortgage of it. In October, 1800, he assigned the mortgage, which was discharged in January, 1802. In April following, he offered to surrender his policy to the company, and also demanded the repayment of his deposit, which the court must, from the case, consider as not having been then appropriated by the defendants. They refused to accept the surrender, or to repay the deposit.

If the plaintiff can recover, his right must be derived from the act of incorporation of the company, and from their articles, both which make a part of the case. He relies on the 18th article, in which it is agreed, that when any building insured shall be alienated by sale, the insured may surrender the policy; and receive a sum not exceeding his deposit money. An offer to surrender, and a refusal to accept it, having the same effect in this cause as an actual surrender, the facts agreed in the case bring the plaintiff *prima facie* within that article, and he must recover, unless some of the objections made on the part of the defendant should prevail.

The first objection is, that the 18th article does not give the assured an option to surrender on alienation, without the assent of the company, who may withhold their assent, or grant it on such terms as may be agreed by the parties, so that a sum exceeding the deposit shall not be repaid. This objection they rest on a principle of the common law, that contracts cannot be dissolved, but by the mutual consent of the parties; and also on the indefinite description of the sum to be repaid on surrender. The principle is correct, when the contract does not secure to one of the parties a right to dissolve without a mutual consent; and from the nature of this contract, there must exists rules for ascertaining the sum to be repaid on surrender, independent of the will of either party.

We must, therefore, look into the incorporating act, and the articles, to determine the intent of the contracting parties. By the act, any person insuring his building, situate within the commonwealth, becomes *ipso facto* a member of the company. On his insurance he must advance the requisite premium and deposite money; and the sums so advanced are to be appropriated to defray the expenses of the company—to pay the losses that may happen during the existence of his policy—and to raise a reserved fund of 10,000 dollars. If from the extent of the losses, the fund should be inadequate to the payment, he may be assessed to supply the deficiency in a sum not exceeding twice the amount of premium and deposit he has advanced: and at the expiration of his policy he will be entitled to receive his proportion of the fund remaining. When we look into the articles, there appear to be several that relate to this action. The 12th, limits the company to the making of any insurances, but for the term of seven years, on the last day of which the policy is to expire. The 11th defines the absolute fund more particularly. The 17th directs the appropriation to the payment of losses—for raising the reserved fund—and for refunding to the insured such part of his deposit as may remain not so appropriated, at the expiration of his policy. The articles are silent as to his share of forfeits, premiums, interest and profits, which constitute part of the absolute fund, while the act gives him his share in all the funds remaining at that time. From a view of these articles, as connected with the act of incorporation, it appears that the insured must continue a member of the company for seven years, subject to all

the burthens to which a member is liable, and at the expiration of that time, he will be entitled to receive his proportion of the remaining fund, if any; and no alienation of his property, although by it the company are discharged from all risk, could dissolve his connexion. A provision of this nature and extent, it is to be presumed, would have prevented insurances by those, whose sole object was indemnity; and this effect would have been inconvenient to the corporation. The 18th article is designed to prevent this inconvenience, by authorising the insured to surrender his policy upon alienation. If this authority could not be exercised but with the consent of the company, this object of the article would be defeated; also the introduction of the article would be nugatory, for without the article the parties might at any time have annulled the policy by mutual consent. We are therefore satisfied, that the construction of this article must be according to the natural import of the words; and the right to surrender the policy by the insured on alienation may be exercised by him at his election. Nor does the uncertainty in describing the part of the deposit to be refunded on surrender, militate with this construction. Until the offer by the insured to surrender, his deposit is subject to the appropriation of the company for the payment of all losses that have happened before that time, and for the other purposes mentioned in the act and articles. He is, therefore, to receive so much of his deposit, as remains not liable to the legal appropriation by the company. If no part is thus liable, he will receive the whole; if the whole is thus liable, he will receive nothing.

Another objection is, that the alienation was made in May, 1800, and the plaintiff did not offer to surrender until more than a year after the alienation. To support this objection, the defendants rely on the 19th article, which provides that all deposit money not demanded within one year from the expiration of the policy shall be deemed forfeited, and become the property of the society. The validity of this objection must depend on the construction given to the expression, "from the expiration of the policy." If it means from the expiration of the time, for which the policy was affected, the objection is without weight. But if it is to be extended to cases, where the risk is terminated by alienation, the objection will prevail, unless the taking back the mortgage was a continuance of the risk. Whether the risk was thus continued, it is not necessary to give an opinion, as we are satisfied the former is the true construction. The phrase is used in the act of incorporation, where it must necessarily mean the expiration of the policy by the efflux of time, for the termination of the risk, in any other way, is not there contemplated. The corporation, in the 12th article, speak of the policy as expiring at the end of the time for which it was effected. The expression is also used in the 17th article, where it must have the construction we give it, or the 18th article is rendered superfluous. The 17th article secures to the insured, the return of so much of his deposit, as is not applied at the expiration of his policy; but if the policy expire by alienation, it is a case within the 17th article; for the surrender of an expired policy is a preposterous and futile act. Indeed, were we to admit the construction insisted on by the defendants' counsel, it would be less beneficial to the corporation. Then every alienation of a building insured, would not only dissolve the contract of insurance, but would discharge the insured from his liability to assessments for losses happening before the surrender, and by the express words of the act of incorparation, he would be entitled to his share of the remaining funds.

The last objection admits the right of the insured to surrender at his election, but the defendants insist that he should make his election in a reasonable time, which they say was not done in the present case. And they com-

pare it to the obligation to abandon on a constructive total in a marine insurance.

This objection, when made, seemed to deserve attention; but on consideration we think it ought not to prevail. There is no reasonable analogy between the two cases. Abandonment, in a marine policy, is supposed to vest a beneficial interest in the insurers. A surrender in this case is merely a discharge of a contract. A delay to abandon may materially injure the underwriters; but a delay to surrender must be for the benefit of the company, as they have the use of the deposit, and hold the insured liable for assessments for losses which may happen before the surrender.

But it is supposed that the insured, after alienation may, in contemplation of a future loss, offer to surrender. This supposition is very natural, for we know of no motive to induce him to surrender at any time, but to guard against the consequences of future losses. For this purpose was the right to surrender at his election vested in him; and he gives the company what they consider as an equivalent for the exercise of it, by extinguishing his claim to any share of the funds remaining at the expiration of the time, for which his policy was effected.

Judgment must be for the plaintiff, according to the agreement of the parties in the case.

21.

COMMONWEALTH v. JUDD, ET AL. 2 R. 333.

The opinion of the court was delivered by

PARSONS, C. J. The defendants have been indicted for conspiring together to manufacture of certain materials mentioned in the indictment, of which one was good indigo of foreign growth, a base composition resembling genuine indigo of the best quality, and of foreign growth, with a fraudulent intention that the same should be exposed to sale, and sold at public auction, as genuine indigo of the best quality and of foreign growth. The indictment further charges that, in pursuance of this conspiracy, they in fact manufactured this base composition; and that, in further pursuance of this confederacy, they exposed this base composition for sale at public auction, and in fact sold it for genuine indigo of the best quality, and of foreign growth.

Upon this indictment the defendants have been tried, and the jury have returned their verdict; that the defendants were "guilty of a conspiracy to make base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo: but they do not find that the same was sold at auction in the manner set forth in the indictment."

The defendants now move in arrest of judgment, first, because the verdict has not found them guilty of any offence charged in the indictment; and secondly, if the verdict had found them guilty of the first count in the indictment, that count doth not contain a charge of an indictable offence.

It is necessary first to decide what facts are found in the verdict. The counsel for the government contends that after the words "genuine indigo," ought to be inserted the words "in manner and form as is set forth in the indictment." This is opposed by the counsel for the defendants, who contends that no such amendment ought to be made. We are all of opinion that this amendment be made, that the words are merely technical, and when omitted ought to be supplied. As the jury cannot enquire into the truth of any facts, but those which are comprised in the issue, it must necessarily be intended, that whatever facts they find are according to the allegations of the indictment, unless a different intention can be inferred from the verdict. In this

case no such different intention can be inferred, but the general intent of finding according to the indictment is supported by the addition by the jury of these technical words of reference at the close of the verdict.

The verdict being thus amended by inserting the usual words of reference, the counsel for the commonwealth insist that it amounts to a general verdict of guilty as to the first count in the indictment. To this the counsel for the defendants has made two objections. The first is, that the first count charges the defendants with a conspiracy to manufacture a base composition resembling indigo: The verdict finds them guilty of making base and spurious indigo. As the first count alleges that the materials of the base composition are the same as are aftermentioned in the indictment, and among which good and genuine indigo of foreign growth is an ingredient, composing one third of the whole mass, we are satisfied that there is no material variance in the verdict from the first count. A base composition intended to resemble genuine indigo, and one third of which composition was genuine indigo, is very clearly a mass of base and spurious indigo; it is indigo debased and adulterated. The second exception is, that the first count alleges that the intent was to make a fraudulent sale of the base composition at public auction, as and for genuine indigo of the best quality and of foreign growth, but the verdict only finds a fraudulent intention of selling it This exception, we are of opinion, would have been fatal, if we had not been obliged to admit the verdict to be amended by inserting the technical reference to the indictment. Now we are satisfied that the finding of the jury comprises not only the intention to sell, but to sell in the manner, for the purposes, and as and for the material alleged in the first count.

Several exceptions have also been taken to the first count as insufficient to support a judgment thereon against the defendants. It is objected that there is no allegation that the defendants intended to affirm at the sale that the base composition was genuine indigo. The indictment alleges that the intent was to sell it as genuine indigo, which, in our opinion, is a sufficient allegation, and the constant usage in cases like this, in principle supports our opinion.

Another objection is, that there is no allegation in the indictment that the base composition was not as useful and beneficial to the purchaser, for every purpose, as genuine indigo; and then the fraudulent intention alleged could not have been committed, as no injury would have been done the purchaser. But the indictment states that the intent was to deceive the purchaser by concealing from him the nature and quality of the commodity he bought, by selling it as a different commodity, and that this intent was fraudulent: and so it certainly was, as every purchaser is entitled to open and fair dealing from the seller. It may also be observed, that if the defendants were skilled in a manufacture of a commodity as useful as genuine indigo, by adding to such indigo other cheap ingredients, so as to treble the quantity, the selling the whole mass as one of the raw materials is undoubtedly a fraud on the purchaser.

It is also objected that there is no allegation in the indictment, that the intent was to defraud the citizens of the commonwealth, or to sell the base composition within the state: and it was insisted that any act done within the state, not prohibited by law, with an intent to practice a fraud without the state, on the citizens or subjects of other governments, was not an indictable offence. Without giving any opinion as to the correctness of this position, and without observing whether, if the intent had been to sell the base composition without the state, it should not have been shown to the jury by the defendants, it is sufficient here to notice, that the indictment alleges that the conspiracy was made, and the fraudulent sale designed, with the in-

tent of acquiring the monies, goods and chattels of the citizens of this commonwealth by fraudulent and dishonest means.

The last and principal objection is, that the first count charges a conspiracy to do an act not prohibited by law, with an unlawful intent to defraud, not any individual, by name, but whoever might be the purchasers, without giving any description of them as consisting of certain people, or of a certain class of people, and no act done in pursuance of this conspiracy is either alleged in the first count, or found by the verdict. And it is insisted that this is not an indictable offence.

Certainly as no act is alleged in the first count to be done in pursuance of the conspiracy, and as the jury are silent as to the second count, and negative the third count, the court must consider the defendants as acquitted of all the indictment but the first count. The question is, therefore, whether the conspiracy, as alleged in the first count, no act being alleged as done in pursuance of it, is an indictable offence? After fully considering the several cases, the court are satisfied that the gist of a conspiracy is the unlawful confederacy to do an unlawful act, or even a lawful act for unlawful purposes. That the offence is complete, when the confederacy is made, and any act done in pursuance of it is no constituent part of the offence, but merely an aggravation of it. This rule of the common law is to prevent unlawful combinations. A solitary offender may be easily detected and punished. But combinations against law are always dangerous to the public peace, and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished, to prevent the doing of any act in execution of it. Of this principle the adjudged cases leave no doubt.

That a conspiracy to do a lawful act for an unlawful purpose is an offence, was determined in the cases of The King v. Edwards, *et al.* (8 Mod. 320;) The King v. The Journeymen Taylors of Cambridge, (Ibid. 11;) and The King v. Robinson, (1 Leach. C. C. 47.)

In the argument by the counsel for the defendants, he admitted that a conspiracy to do a lawful act, with the unlawful intent of injuring an individual, was an indictable offence, although no act were done in pursuance of it; but he insisted that the law was different when the intent was to injure a number of people not described; and that in such case an act done in pursuance of the conspiracy, must be alleged and found, as a necessary mean to designate the persons intended to be injured. We are not satisfied that the law makes this distinction: it certainly does not in the cases of knowingly having in possession forged bank notes or counterfeit current coin, with the intent to pass them as genuine; for it is not necessary to allege in these cases an act done in pursuance of the intent. The intent is to cheat whoever can be cheated. In the case at bar there was the same general intent, to defraud all who could be defrauded. We therefore think the offence to be greatly aggravated by the undistinguishing mischief that was designed. If an authority was required on this plain principle, we think the case of The Journeymen Taylors is substantially in point. The object was to raise their wages; and the persons, who were to be injured, were more immediately any persons who might hire them, and perhaps remotely all their customers. Upon the whole, we are satisfied this objection ought not to prevail.

We have considered this record with a disposition to allow the defendants every advantage, to which we could believe them entitled. There is also justice due to the commonwealth for the protection of its citizens against fraud and deceit; and after an attentive examination of the motion in arrest of judgment, and of the arguments in support of it, it is the opinion of

the court that judgment be not arrested, but that it be entered against the defendants on the first count of the indictment.

22.

Coffin v. Coffin, 2 R. 360.

Parsons, C. J. This is an action of trespass for an assault and battery; and a verdict has been found for the plaintiff upon the general issue. The defendant now moves in arrest of judgment for a defect in the declaration. The defendant was attached to answer the plaintiff in a plea of trespass, for that whereas the defendant, at the time and place mentioned, with force and arms committed the trespass complained of. It is said that this manner of laying the trespass is by way of recital, and not sufficiently certain and positive to admit of a legal judgment after verdict. A count in trespass of this form, when the proceedings were in Latin, was called a declaration with a *quod cum*, *whereas* being substituted for *cum*. In examining the cases on this point, it is very certain that formerly declarations in trespass with a *quod cum* were holden bad, and that no judgment could be rendered thereon, even after verdict; and the defect was not considered as cured by any of the English statutes of amendment or jeofails. For many years past the judges in England have appeared dissatisfied with these decisions; and after several attempts it is now holden, that a declaration of this description filed in the Common Pleas is not bad, even on special demurrer. Much legal *astutia* is discovered in the reasoning which has led to this conclusion. To explain it, it must be remembered that a count in the Common Pleas recites the writ; and this recital is considered as a part of the count. Thus in trespass for an assault and battery with a *quod cum*, the defendant is attached to answer the plaintiff in a plea, *quare* or wherefore with force and arms he assaulted and beat the plaintiff; whereupon the plaintiff complains *quod cum*, for that whereas the defendant assaulted and beat the plaintiff, by which he hath damage to the sum of, &c.

The first attempt was made in the case of Norman v. George.* The declaration was in the Common Pleas, and was trespass with a *quod cum*. The error assigned was, that the trespass was alleged by way of recital, when the charge ought to have been certain and positive. The defendant in error insisted that, as the count inserted in the writ, a reference to the writ aided the insufficiency of the charge. Of this Lord Raymond doubted; for if the recited original vary from the count, the court could not take notice of it but by resorting to the original. He also observed that a reference to the writ as recited would not amount to a positive allegation, for there it is *quare vi et armis*. No judgment however was given.

Four years after this, in the case of Warren v. Lapdon, (1 Barnes' Notes, 176.) in the Common Pleas, the declaration in trespass was with a *quod cum*, and a motion was made after verdict to arrest the judgment for this cause. But the court refused a rule to show cause, being of opinion, that although *cum* if it stood alone might be bad, yet the recital of the original had helped it.

Notwithstanding the Common Pleas would not arrest the judgment for this defect, an attempt was made in the King's Bench, in the case of Douglas v. Hall,(1 Wils. 99.) to reverse a judgment of the Common Pleas for this error. But Lee, C. J., thought the declaration with a *quod cum* well enough, as it referred to the writ, in which *quare vi et armis* was a sufficient

* Fitz. 255.

averment. However Dennison J. assumed a different ground. He would reject *cum* as surplusage after the merits had been tried, but thought it bad upon demurrer. No judgment was given.

Afterwards in the case of White v. Shaw,(2 Wils. 203.) in the Common Pleas, *whereas* had complete success. A declaration in trespass with a *quod cum* was demurred to specially for that cause. The court observed, that if the declaration had been in a bill in the king's bench, it might have been bad; but in the Common Pleas the count is helped by setting out the writ in the declaration, and the plaintiff had judgment. Thus it is settled in the Common Pleas that *cum*, when referred to the potent word *quare*, amounts to a positive allegation. Yet if we look into the case of Hore v. Chapman, (2 Salk. 636.) in the king's bench, we shall find a declaration in trespass, where *quare* is substituted for *quod cum*. But judgment was arrested after verdict, because *quare* is not positive, but interrogatory, and much worse than *quod cum*. It is however settled in the Common Pleas, that by connecting the *whereas*, a word of recital, with the interrogative *why* or *wherefore*, there results a positive allegation: the reasons for this decision it is not expedient critically to examine. We perfectly understand Justice Dennison, when he observes that after the merits had been tried, "*whereas*" ought to be considered as surplusage, and no notice be taken of the officious intruder.

I have found no decision of the court of king's bench, since the proceedings were in English, on the effect of *whereas* in a count in trespass, when introduced in proceedings by a bill, in which is not contained the interrogative *why*.

Thus far we have considered the authorities in the books. The general rule, which governs in deciding on the forms of declarations in all cases is, that they should with sufficient certainty describe the *gravamen*, that the defendant may know what to answer. And certainty to a common intent is sufficient. But there is a greater strictness in the rule, in actions where the consequences of a conviction are penal to the defendant, than in others. In *assumpsit* it has been determined as long ago as the case of Ernly v. Lord Falkland & al. (Hard. 1 103.) that a declaration *quod cum super se assumpsit* is good after verdict. But the reason why in trespass it is not, is given in the case in Fitzgibbon 255, already cited. It is because on a conviction in trespass there is a judgment *quod capiatur* against the defendant. In this state a judgment of *capiatur* cannot be entered; and there is therefore no reason for requiring greater strictness in declarations in trespass than in *assumpsit*. There is also a difference in the form of the writ prescribed by our statute, and the common law form in the Common Pleas. In the English form, the plaintiff, after alleging his damages, adds, "and thereupon he brings suit," &c. or proffers his witnesses. In our form there is a material substitution of the affirmative words, "which shall then and there appear." By our writ the defendant is attached to appear at a court named, there to answer to the plaintiff in a plea of trespass for that *whereas* the defendant with force and arms at the time and place mentioned assaulted and beat the plaintiff, to his damage, &c. "which at the said court shall appear." In this view of the declaration can it be doubted whether it is not certain to a common intent: or whether the charge be not positively, although not in technical form, affirmed?

To relieve parties from the consequences of objections to mere informality in legal proceedings, the statute of Oct. 30, 1784, beside vesting the court with a general power to order amendments on motion, enacts that "no summons, writ, declaration, process, judgment, or other proceedings in court or course of justice, shall be abated, arrested, quashed, or reversed, for any kind of circumstantial errors or mistakes, where the person and case may

be rightly understood by the court, nor through defect or want of form only." In the action before us the person and case cannot be misunderstood by the Court from the unnecessary use of the word "*whereas.*" Its insertion is a mere technical mistake in form, and not a substantial error: and we think with Justice Dennison, that it is mere surplusage, and after verdict shall be rejected. It is not necessary to decide what judgment would have been given, had the defendant demurred specially to this declaration. But as it is a matter of practice, and the negligence or unskilfulness of attorneys may again bring up the question, we are fully satisfied that as the mistake is merely formal and not substantial, a general demurrer would not avail the defendant. As we are not satisfied with the reason of the judgment in the case of White v. Shaw, if the defendant should demur, and assign this mistake specially for cause of demurrer, we think the exception must prevail.

We are sensible that this opinion is against the judgment of the court in the case of Holbrook v. Pratt. By the present system of administering justice by this court, the Judges on the circuit have not time to deliberate, or to examine books on any subject. Under these circumstances it would be surprising if a mistake were not sometimes made by the judges. This apology which we make for others, we hope the candor of the public will allow to the present judges.

Let judgment be entered according to verdict.

23.

KINDER, ET AL. V. SHAW, ET AL. 2 R. 400.

A factor cannot pawn goods, which he has on sale.

PARSONS, C. J. afterwards observed, that the court, considering the question of importance to the mercantile part of the community, had looked into the case with attention, and were all of opinion, that a factor has no authority to pawn goods which have been entrusted to him for sale. The rights of the principal and factor depend on the law merchant, which has been adopted by the common law. By this law a factor is but the attorney of his principal, and he is bound to pursue the powers delegated to him. If he sells the goods on a credit as his own, the purchaser not knowing him to be a factor, the principal may forbid payment to be made to the factor, and if afterwards the debtor should pay the money to the factor, he would pay it in his own wrong, and be still liable to the action of his principal, unless he had at the time, given to the factor a bond, or a negociable security, which had been actually negotiated before notice.

There must be judgment according to the verdict.

24.

AUSTIN V. WALSH, 2 R. 404.

PARSONS, C. J. This case comes before the court upon the reservation of the judge of certain points, which arose in the trial of the cause.

It appeared at the trial, that the plaintiff and one William H. M'Neil, were jointly and equally interested in an adventure shipped on board the ship America, and consigned for sales and returns to the defendant, the master; that at the time of the shipment Austin was not known to Walsh as a partner, and the defendant had agreed to account with M'Neil or his assigns. The adventure was profitable, and the defendant, before the com-

mencement of this action, held the proceeds in cash, for one moiety of which the action was brought. Immediately after the shipment it was agreed by Austin and M'Neil, the partners, to sever their interest, and that Walsh should account with Austin for his moiety; and M'Neil gave Austin an order on Walsh for this purpose. When Walsh first returned, he had left the proceeds at the Havanna, and immediately on his return, M'Neil having in the mean time become insolvent, Austin showed Walsh the evidence of his original partnership, of the agreement between him and M'Neil to sever their interest, and that Walsh should account with Austin for his moiety. Walsh refused to pay Austin, but said he was ready to account with the right owner, and promised, on the arrival of the proceeds from the Havanna, to pay Austin, if they belonged to him.

M'Neil was a witness for the plaintiff, to prove the execution of the writings, which proved Austin's partnership with him, and their agreement to sever their interest, and also Walsh's confession of the amount of the profits of the adventure. His admission was objected to by the defendant.

On these facts the judge directed a verdict for the plaintiff, for a moiety of the proceeds.

The defendant objected to the admission of M'Neil as a witness, because he was interested; and he excepted to the direction of the judge, because M'Neil was not made a joint plaintiff with Austin.

After hearing the parties, the court are very clearly of opinion, that M'Neil and Austin being original partners, no agreement of theirs to sever their interest could entitle either of them to sue alone for his moiety, and that Walsh might take the exception in this case, under the general issue, unless, after notice of the partnership, and of the agreement to sever their interest he had consented to it, and to account with each for his part. This consent might be either express or implied. If a factor should in fact account with and pay one partner his share, and thereby discharge all his interests in the partnership, this would be an implied engagement to account with each partner severally. The second exception must be decided according to the construction we put on the promise to Austin by Walsh, after his return. We cannot adopt the construction of the defendant's counsel, that it was merely an engagement to do what the law would oblige him to do. Upon this construction, his promise is a mere nullity, and a waste of words. The natural construction is, that Walsh not meaning to decide on Austin's right, promises if he should in fact be entitled to a moiety, to account with him for it. The evidence in this case establishes Austin's right, and the promise of Walsh must be considered as obligatory to Austin, to pay him his moiety. We are, therefore, satisfied that it was a proper direction of the judge to the jury, that if they believed the testimony in the cause, they might legally infer that Walsh made the promise declared on. The jury have made this inference, and we think have done right.

As the action was grounded, not on the original promise to M'Neil, nor on any implied promise resulting from the partnership, but upon the express promise of Walsh to Austin, the exception against M'Neil, as an interested witness, has no foundation.

Let judgment be entered according to the verdict.

25.

WHIPPLE v. DOW, ET UX. 2 R. 419.

PARSONS, C. J. The plaintiff has brought her action upon an implied

promise of her daughter, to pay for her support during her infancy, she having sufficient estate for her own support. I agree with my brethren, that the mother was not compellable in this case to support her child, though I apprehend it would be otherwise in case of a father. The special agreement being annulled by the daughter, on her arriving at full age, is as if it had never been made. The implied promise may then be considered as having never been suspended.

Judgment according to verdict.

26.

UPON THE PETITION OF AUGUSTIN LE FORESTIERE, 2 R. 419.

By the Court. Our whole authority to admit aliens to the rights of citizenship being from the statutes of the United States, we must find it there, or we cannot exercise it. To enable an infant to annul his obligations of allegiance to his native sovereign, and enter into new ones to the United States, the provision ought to be expres[illegible] But we find no such provision. The petitioner can take nothing by his [illegible]on.

The *Chief Justice* suggested that if a [illegible]ition was offered by the parent or legal guardian of a minor, it might present the subject to the court in a different view.

27.

MARSTON v. HOBBS, 2 R. 433.

Covenant broken, brought upon a deed purporting a conveyance from the defendant to the plaintiff, of two hundred acres of land in Effingham, in the state of New Hampshire, in fee simple, for the consideration of $133,33. The covenants recited in the declaration were, that at the time of executing the deed the defendant was lawfully seized in fee of the premises; that they were free of all incumbrances; that he had good right to convey the same; and that he would warrant and defend them to the plaintiff against the lawful claims of all persons. Breaches.—"Now the plaintiff in fact saith, that at the time of executing and delivering the said deed to the plaintiff, the said defendant was not lawfully seized in fee of the premises; that they were not free of all incumbrances; that he had not good right to sell and convey the same to the said L. M. in manner aforesaid; and that he has not warranted the same to the said L. M. against the lawful claims and demands of any person or persons whomsoever; and so the said D. H. his covenants aforesaid hath not kept and performed, but altogether hath broken the same."

The defendant pleaded, by leave of the court, two several pleas in bar, on both which issues in fact were joined; and on each issue the question was, whether the defendant was seized of the premises in fee simple at the time he executed the deed declared on.

Verdict for plaintiff.

PARSONS, C. J. [After a concise recital of the pleadings, trials, and exceptions.] As actions to recover damages for the breaches of covenants contained in deeds of conveyance of land are very frequent in this part of the country, and as the principles on which such actions are to be maintained seem not to be generally understood, it may be expedient to consider the subject more at large than perhaps is necessary for determining the validity of the exceptions filed in this case.

The manner of assigning breaches of these covenants deserves some attention. The general rule is, that the plaintiff may assign the breaches generally, by negativing the words of the covenant. The exception to the

rule is, that when such general assignment does not necessarily amount to a breach, the breach must be specially assigned.

The first and third covenants in this case come within the rule. If the defendant was not seized, or if he had no right to convey, these covenants must necessarily be broken. They are called synonimous, because the same fact—the seizin of the defendant—which will support the first, will also support the other covenant. The defendant in his bar should regularly maintain his seizin: and then the plaintiff in his replication should aver who in fact was seized.

The second covenant against incumbrances, and also a covenant for quiet enjoyment, usually contained in deeds of conveyance, although not in this deed, come within the exception. For the defendant does not covenant against all interruptions of the plaintiff's possession, nor against all possible incumbrances. To these covenants the breaches should be specially assigned, showing the nature of the incumbrance and interruption complained of. No express case has been produced as to covenants against incumbrances; but in principle they are analogous to covenants for quiet enjoyment: and in the entries the incumbrance is specially alleged in the count.

The last covenant of general warranty may deserve a more particular consideration. At common law a warranty is a foundation of a voucher by the tenant when impleaded; and if he lost the land he might have judgment to recover of the warrantor other lands to the value. Or when he could not vouch, or feared to be impleaded, he might, while tenant of the land, sue a real action on a writ of warranty of charters, in which he might have judgment to recover his warranty, which would bind the lands of the warrantor from the date of the writ. But the demandant could not have execution for other lands in value until he had lost his land. And if they were [illegible] assize, or on a writ of entry, in which damages were recovered, he might also have execution for other lands in value, and for damages also. At common law, the tenant, after he had lost his land, might bring a personal action of covenant, on the covenant to warrant and defend, and recover a satisfaction in damages: but he must assign, as a breach of the covenant, an ouster by a title paramount.

The two former methods of recovering a recompence in value have never been practised in this state; but the immemorial usage has been to recover damages in a personal action of covenant on the warranty.

As the defendant is not bound by this general warranty to warrant against all claims and ousters, this covenant comes within the exception; and the plaintiff must assign a breach by showing an ouster by an elder title. In the present action the breaches of the second and fourth covenants are not well assigned, no incumbrance or ouster being alleged. For if these breaches had been well assigned, there would have been a material defect in the pleas, because they do not cover all the breaches. The defendant, at the execution of the deed, might in fact have been seized, and might have had a good right to convey, and yet there might have been incumbrances, against which he had engaged to indemnify the plaintiff, and there might have been a subsequent ouster by an older title.

Our next consideration has been on the nature of the evidence necessary to maintain the issues in this case.

The pleadings having admitted the conveyance and covenants declared on, it was not necessary for the plaintiff to produce the deed to maintain the issues on his part. We are therefore satisfied with the opinion of the judge in ruling that it was not necessary.

The defendant, to maintain the issue on his part, was obliged to prove his seizin when the deed was executed. But it was not necessary to show a

seizin under an indefeasible title. A seizin in fact was sufficient, whether he gained it by his own disseizin, or whether he was in under a disseizor. If at the time he executed the deed he had the exclusive possession of the premises, claiming the same in fee simple by a title adverse to the owner, he was seized in fee and had a right to convey. If Weare Drake had no authority to convey the premises to the defendant, yet if in fact he entered under color, though not by virtue of that deed, and acquired a seizin by disseizin by ousting the former owner, he has not broken these covenants. In this case the deed of the constable, describing the land and its boundaries, was proper evidence to show the extent and limits of the defendant's seizin, and the intention with which he entered. But we are also satisfied that if the defendant had not afterwards shown to the jury an authority in the constable to make the conveyance, he must have failed, notwithstanding the registry of the deed, which supplies the want of livery of seizin only where the grantor has right to convey, unless he has satisfied the jury that he entered under color of that conveyance, and had acquired a seizin of the premises.

The measure of damages in cases of this nature, has required the attention of the court. When the breaches assigned to the first and third covenants are found for the plaintiff, it then appears that those covenants were broken as soon as the deed was executed: that no estate or interest passed by the conveyance: and that the plaintiff's entry, although under color of it, was tortious, and a trespass or disseizin to the owner. Hence it is clear that an action for the breach of these covenants cannot be maintained by an assignee of the purchaser, because no estate passed to which these covenants could be annexed, and because being in fact broken before any assignment could be made, they were choses in action, and not assignable.

Another consequence is, that as no estate passed by the conveyance the plaintiff could lose no estate by the breach of these covenants, and that he has lost nothing but the consideration which he paid for the intended purchase.

The verdict, finding these covenants thus broken, operates as a disaffirmance of the original contract of conveyance. The conclusion is then inevitable that the only legal measure of the damages for the breach of these covenants is the consideration paid, and interest upon it from the payment to the verdict, this being all that was lost by the breaches assigned.

It has been objected that if the covenant had not been broken the plaintiff would then have been seized of the land, and therefore ought to be considered as having lost it by the breach of the covenant. If the objection be allowed, the measure of the damages will still be the consideration paid with interest. For the value of the land must be taken at the time the covenant was broken, which was immediately on executing the conveyance, and the consideration paid by the purchaser will be deemed, as to him, to be a fair price for the land.

We give no opinion as to the rule of assessing damages, where the grantee was seized by virtue of the conveyance, and has been lawfully ousted or evicted under a paramount title. The rule in that case may be derived from different principles.

In the case before us, it is our opinion that the verdict be set aside, and a new trial granted, because the deed of Weare Drake was rejected, and because the rule for assessing damages was not correctly stated to the jury.

28.

DROWNE v. SAMPSON, 2 R. 443.

PARSONS, C. J. The complaint in the case, which is brought before

court by this writ of error, is given by the statute passed March 16, 1786. entitled "An act for the punishment of fornication, and for the maintenance of bastard children," and to support the proceedings the statute must be substantially pursued. To entitle the complainant to an adjudication, the statute requires that she charge the defendant with being the father in her travail, and that she afterwards continue constant in her accusation. It appears from the proceedings that she did not thus charge the defendant, and that in fact she afterwards on oath charged another man. She has not therefore, brought herself within the statute; and the reason of this conduct as explained by herself on oath, will not cure these errors in the proceedings. She is to be admitted as a competent witness, although interested; but as a pre-requisite to her admission, her credit must be fortified by her having charged the defendant in her travail, which is a time of distress and danger, when it may be supposed that she would speak the truth; she must have continued constant in her accusation, or at least it must not appear that she has been inconstant, and she must have been examined on oath before a justice on the several circumstances of her complaint necessary for the discovery of the truth. Although directly interested, yet if her credibility be supported by these facts, she may be sworn as a witness, but the evidence, introduced to entitle her to be sworn, may notwithstanding be impeached by the defendant before the jury. As in an action upon a promissory note, the signature to which is denied, before the court will suffer it to be read to the jury, there must first be some evidence, whence the jury may reasonably presume the signature. The note may then be read, but the defendant may afterwards impeach this evidence if he can.

There has been some question whether the complainant may not be sworn, and, if by her testimony she prove that these pre-requisites have been complied with, she is not within the statute. We are satisfied that she is not, for several reasons. One is that the pre-requisites thus testified to by her have no tendency to support her credit. Another is, that although made a competent witness by the statute from necessity, yet her testimony ought not to be given to facts equally within the knowledge of other persons, who are disinterested. As in debt on the statute of hue and cry, the party robbed is a competent witness from necessity, and is sworn in chief: he is examined as to all facts, which, from the nature of the transaction, must be within his own knowledge; but to the other facts necessary to support the action, and which from their nature, are within the knowledge of disinterested persons, he is not examined. As to the examination before the justice, another reason may be given, for the justice's record is the best evidence.

We cannot avoid remarking on the great informality, not to say insufficiency, of the complaint in this case. It is an uniform rule of law, that when a statute gives a remedy under particular circumstances, the party seeking this remedy should, in his plaint or information, allege all the facts necessary to bring him within the statute. In this complaint it ought to have been averred, not only that she had been delivered of a bastard child, of which the defendant was the father, but that she had accused him in the time of her travail, had been examined on oath before a justice, and had continued constant in her accusation. Upon a regular complaint in this form there can arise no difficulty as to the trial. We are sensible that this informality has been of long standing; but when it is productive of uncertainty in the law in these cases, it should be removed.

We doubt whether the proceedings in this case were removed by the proper writ. Error lies when the proceedings are according to the course of the common law, so that the court above may, if there be error, render the right judgment. In this case, if the defendant be found guilty,

and adjudged the putative father, the court have to assess the weekly maintenance, and to order indemnity to the town; and bonds are to be given accordingly on penalty of imprisonment. The court may afterwards diminish the weekly allowance, if it should appear reasonable. These are powers not given to this court. But the record and the parties being before us by writ of error, we can proceed to quash the proceedings. But if a record is removed by *certiorari*, when it ought to have been by writ of error, the reverse is not true. A *certiorari* may remove the record in any stage of the proceedings, at the discretion of the court: Error is of right, and lies only after judgment.

Let the proceedings be quashed.

29.

WHEELRIGHT ET AL. Petitioners for Partition, v. WHEELRIGHT, 2 R. 447.

A conveyance of an estate tail, made in pursuance of the statute of March 8, 1792, may be for a good as well as for a valuable consideration.

A deed, signed, sealed, delivered, and acknowledged, which is committed to a third person as the deed of the grantor to be delivered over to the grantee on a future event, is the deed of the grantor presently; and the third person is a trustee of it for the grantee.

But if delivered to a third person as the writing or escrow of the grantor, to be delivered on some future event, it is not the grantor's deed until the second delivery; and if the grantee obtain possession of it before the event happens, the grantor may avoid it by pleading non est factum; but to this last rule there are exceptions.

PARSONS, C. J. The right which the father of the respondent had to convey any of the lands he held in tail must be derived from the statute of March 8, 1792. By that statute it is made lawful for any person of full age seized in fee tail of any lands by deed duly executed before two subscribing witnesses, acknowledged before the Supreme Judicial Court, Court of Common Pleas, or a Justice of the Peace, and registered in the records of the county where the lands are, for a good or valuable consideration, *bona fide* to convey such lands or any part thereof in fee simple to any person capable of taking and holding such estate; and such deed, so made, executed, acknowledged, and registered, shall bar all estates tail in such lands, and all remainders and reversions expectant thereon.

From inspecting the deeds produced in evidence in this cause, it appears that two subscribing witnesses, to whose credibility no objection is made, have certified that they were signed, sealed, and delivered, in their presence. And it further appears that the grantor, on the same day, acknowledged that each instrument was his deed before a justice of the peace.

One objection made by the respondent is, that admitting the deeds to have been executed in the form and manner required by the statute in this case, yet these conveyances are not *bona fide*, being made, not for a valuable consideration, but for the purpose of depriving the heir in tail of his inheritance. The deeds purport to be for a valuable consideration in money, and for love and affection to his issue, which is a good consideration. The statute also provides that the conveyance may be on good consideration. It is therefore very clear, that the statute intended that the tenant in tail might bar the heir in tail, by deed conveying the land to his relatives, executed for a good, although not a valuable consideration. This he might do by a common recovery: and this method by deed is substituted by the statute in the place of that common assurance, the effect of which is founded on legal fictions: and it is certain that justice or parental affection will often induce parents, who hold their lands in tail, to make provision for the younger branches of their

family out of the entail. As the statute has made the estate tail assets for the payment of the debts of the tenant, before and after his decease, a *bona fide* conveyance was required by the statute, to prevent alienations to defraud creditors, and not to protect the heir in tail. This objection cannot prevail.

The other objection is, that by the statute the conveyance should be completed, and the estate pass in the life time of the tenant in tail: and that the deed should be sealed, delivered, and acknowledged, by him as his deed: that in the case at bar the deeds were delivered by the grantor to Judge Wells, not as his deeds, but as his writings or escrows, to be delivered as his deeds by the Judge to the grantees on his the grantor's death: that they could have no effect until delivered by the Judge accordingly: and as the grantor was dead before the second delivery, they were never his deeds, but are void.

This objection seemed to deserve much consideration. The statute certainly intended that the conveyance of the estate tail should be executed in the life time of the tenant; and therefore, if there be no acknowledgment of the deed by him, the defect cannot be supplied by the testimony of the subscribing witnesses after his death, as it may be in conveyances of estates not entailed. The reason is, as common recoveries must be suffered in the life time of the tenant in tail, and at a court holden at stated times, and the heir in tail has a chance that the tenant may, after the commencement of the suit, die before the term, so it was intended to leave him the chance of the tenant's dying before acknowledgment, which, as the statute was first drawn, could be made only in some court of record: although, as it was amended, it may now be made before a justice of the peace. There is therefore some chance saved to him, but of much less consequence than it was before the bill was amended.

The law, so far as it relates to the nature of this objection, is very well settled. If a grantor deliver any writing as his deed to a third person, to be delivered over by him to the grantee, on some future event, it is the grantor's deed presently, and the third person is a trustee of it for the grantee. And if the grantee obtain the writing from the trustee before the event happen, it is the deed of the grantor, and he cannot avoid it by a plea of *non est factum*, whether generally or specially pleaded. This appears from Perk. 143, 144, and from the case of Bushell v. Pasmore, 6 Mod. 217, 218. But if the grantor make a writing and seal it, and deliver it to a third person, as his writing or escrow, to be by him delivered to the grantee, upon some future event, as his the grantor's deed, and it be delivered to the grantee accordingly, it is not the grantor's deed until the second delivery. And if the grantee obtain the possession of it before the event happen, yet it is not the grantor's deed; and he may avoid it by pleading *non est factum*. This appears from Perk. 142, 137, 138.

It is generally true that a deed delivered as an escrow, to be delivered over, as the deed of the party making it, on a future event, takes its effect from the second delivery, and shall be considered as the deed of the party from that time. Perk. 143, 144. 3 Co. 35 b. 36 a.

Whether the deeds in this case were delivered to Judge Wells as writings to be delivered over as the grantor's deeds on his death, or whether they were delivered as the deeds of the grantor to Judge Wells in trust for the grantees, to be delivered to them on the grantor's death, is a question of fact, to be determined by the evidence. This evidence results from the testimony of Judge Wells, and from the inspection of the deeds. The deeds appear to have been signed, sealed, and delivered, in the presence of two subscribing witnesses, and to have been acknowledged as the deeds of the grantor, be-

fore a justice of the Peace. The witness swears that the grantor did then sign, seal, and deliver them, for the use of the grantees. Thus far there can be no doubt. But the witness further testifies, that because the grantor was to have the use of the premises during his life, and some of the grantees being minors, the deeds were delivered to him as escrows to be delivered to the grantees upon the grantor's death. What the witness understood by escrow, is not explained. He might consider them as escrows, because he was to have the custody of them until the grantor's death. To aid his memory he therefore refers us to the memorandum he made at the time, upon the wrapper of the deeds. In that memorandum they are called the two deeds of the grantor, naming him, to the grantees, naming them, to be kept until the death of the grantor, and then to be delivered to the grantees. Here they are not called the writings or escrows, but the deeds of the grantor. The weight of the evidence is certainly very great, if not conclusive, in favor of the deeds having been delivered by the grantor, as his deeds, and deposited with Judge Wells, in trust for the grantees. Upon this ground the deeds were very properly admitted as evidence, and the direction of the judge was correct.

But if the deeds are to be considered as delivered to Judge Wells, not as the deeds, but as the writings of the grantor, we must not thence conclude that they are void. Although generally an escrow takes its effect from the second delivery, yet there are excepted cases, in which it takes its effect, and is considered the deed of the maker, from the first delivery. The exception is founded on necessity, *ut res valeat.* Thus Perk. 139, 140. If a *feme sole* seal a writing, and deliver it as an escrow, to be delivered over on condition, and she afterwards marry, and the writing be then delivered over on performance of the condition, it shall be her deed from the first delivery; otherwise her marriage would defeat it. In Brook's Reading, on the statute of limitations, p. 150, there is another exception. A delivers a deed, as an escrow, to J. S., to deliver over on condition performed, before which A becomes *non compos mentis*: the condition is then performed, and the deed delivered over: it is good; for it shall be A's deed from the first delivery. Another exception is in 3 Co. 35 b. 36 a. Lessor makes a lease by deed, and delivers it as an escrow, to be delivered over on condition performed, before which lessor dies, and after it is delivered over on condition performed: the lease shall be the deed of the lessor from the first delivery. There is also a strong exception in 5 Co. 85. If a man deliver a bond as an escrow, to be delivered on condition performed, before which the obligor or obligee dies, and the condition is after performed: here there could be no second delivery, yet it is the deed of the obligor from the first delivery, although it was only inchoate: but it shall be deemed consummate by the performance of the condition.

Therfore if the deeds in this case were delivered to Judge Wells, as escrows, and by him delivered over on the death of the grantor, they must take their effect, and be considered as the deeds of the grantor, from the first delivery, he being dead at the second delivery. And the cases in 3 Co. 36 a. and 5 Co. 85, are in point. It may here be observed, that it is not to be presumed, that it was the intention of the grantor to deliver these deeds as escrows, to be after delivered as his deeds, on the event of his death; when, from the nature of the event, they could not be considered as his deeds from the second delivery. The presumption is violent that he considered Judge Wells as a trustee of the grantees. But whether the deeds were delivered to him as escrows, or in trust for the grantees: in either case the verdict must stand, and the first judgment entered thereon, viz. that partition be made; and let a warrant issue to commissioners to make partition.

30.

BICKFORD v. PAGE, 2 R. 455.

Covenant broken on a collector's deed of conveyance of a non resident proprietors's land, for the neglect of the proprietor to pay a tax assessed upon it.

PARSONS, C. J. In this case there is an issue in law, arising on a general demurrer to the plaintiff's replication, and a joinder and demurrer.

In an action of covenant, the plaintiff declares on a deed of the defendant to him, in which, for the consideration of six shillings and five pence, the plaintiff sold him the lands described in the declaration, to hold in fee simple; and that the defendant in substance covenanted that he had good right to sell the same, that they were free of all incumbrances, and that he and his heirs would warrant the same to the plaintiff, his heirs and assigns, against all lawful claims. The plaintiff then assigns a breach of each covenant generally, by negativing the words of the covenant.

The defendant pleads in bar that before the plaintiff commenced this action, and before he had improved the premises, or added any value to the same, for the consideration of one hundred dollars, he assigned and transferred to one Thomas Roberts in fee, but without any warranty or covenants rendering the plaintiff answerable for any defect of title in the premises, all the plaintiff's right, title and interest therein, and in the covenants contained in the deed declared on, which passed to the said Roberts accordingly.

The plaintiff in his replication sets forth his deed to Roberts, *in hæc verba*, by which it appears to have been a release of all his right with a warranty against all persons claiming under him and his heirs.

To this replication there is a demurrer and joinder.

In looking into the replication, to which the demurrer is immediately applied, it appears neither to traverse, or to confess and avoid, any material allegation in the bar. The deed therein recited is substantially the same, as to its legal operation, as is supposed in the bar. The replication is therefore ill, if the bar be good. To support the bar, the defendant supposes that the conveyance by the plaintiff, under the circumstances there alleged, is a discharge, as to him, of the covenants contained in the deed declared on. It is a general rule, that when a feoffment or demise is made of land, with covenants that run with the land, if the feoffee or lessee assign the land before the covenants are broken, and afterwards they are broken, the assignee only can bring an action of covenant to recover damages, unless the nature of the assignment be such that the assignor is holden to indemnify the assignee against a breach of the covenants by the feoffor or lessor. This rule is founded on the principle, that no man can maintain an action to recover damages, who can have suffered no damages.

To apply this principle to the defendant's plea in bar, we must examine the nature of the covenants contained in the deed, and of the breaches assigned. One of these is a covenant that the defendant had good right to convey the premises in fee simple to the plaintiff; and a breach of this covenant is well assigned. As the defendant in his bar has not traversed this breach, nor confessed and avoided it, we must consider this covenant as having been broken by him. It must therefore have been broken immediately on the execution of the deed containing it; and the damages accruing from the breach must have been suffered by the plaintiff before his release to Roberts. This covenant, having been broken before the release, was at that time a mere chose in action not assignable. Neither could it have passed by the release, because no estate passing to the plaintiff by the defendant's deed,

there was no land to which this covenant could be annexed so as to pass to the releasee. The plea in bar is therefore bad and insufficient in law, and the plaintiff must recover his damages, if the declaration be good.

The covenants against incumbrances, and to warrant and defend we lay out of the case; as no particular incumbrance is shown, and no ouster by a title paramount is alleged, the plaintiff cannot recover damages for any supposed breach of these covenants. But he is entitled to his damages for the breach of the defendant's covenant that he had good right to convey. The rule for assessing the damages arising from this breach is very clear. No land passing by the defendant's deed to the plaintiff, he has lost no land by the breach of this covenant; he has lost only the consideration, which he paid for it, amounting to 6*s.* 5*d.* This he is entitled to recover back with interest to this time.

31.

COOK v. ALLEN, 2 R. 467.

PARSONS, C. J. This action is on a writ of *entry sur disseizin in the quibus*, in which the demandant demands of the tenant seizin of 78 acres and 44 rods of land. The tenant, as to part, pleads *nul disseizin*, on which issue is joined; and, as to the residue, he pleads non-tenure with disclaimer, which is traversed by the demandant, and issue joined. On the trial both the issues are found for the tenant. The direction of the Judge, before whom the issues were tried, is excepted against, and the cause is before us to decide on the validity of the exception.

If the record of the partition, which the demandant gave in evidence to the jury, was conclusive against the tenant in this action, the direction was wrong; if it was not conclusive the verdict must stand.

It appears that Reed, from whom the demandant derives his title, filed his petition for partition, alleging that he was seized as a tenant in common, *with divers persons to him unknown*, of 1000 acres of a large parcel of land described in his petition, in which are comprehended the premises in dispute, and praying that partition might be made. Notice of the petition was given to all persons interested, that they might show cause against granting the prayer of it. Afterwards, on proclamation being made for any person to appear and show cause, no person appeared, and the first judgment, *quod partitio fiat*, was entered. Pursuant to this judgment, Reed's purparty was regularly set out and assigned to him, which included the premises: and a final judgment was rendered, that he and his heirs hold the part thus assigned, in severalty for ever. And the partition thus made has been duly recorded.

The tenant, to defeat this title, gave in evidence the entry of one Jonathan Frye into the lands described in his first plea, more than thirty years past; that he afterwards mortgaged them to the present tenant, who foreclosed the mortgage, by judgment and execution, according to the statute in such case provided, and that he, the tenant, has continued in the possession thereof ever since. From this evidence he insisted that Reed and the other tenants in common were disseized by Frye; that, at the time of partition, their right to enter was gone; and that he, not appearing to defend against Reed's petition, and not claiming as a tenant in common, was not concluded by the judgment on that petition, even as to the right of possession. Of this opinwas the Judge, who directed the jury accordingly. To this direction the exception is filed.

The question is, whether the record of partition made upon Reed's petition, concludes the tenant in this action, in which the *jus possessionis* only is to be

tried. As this partition was not made by writ, according to the course of the common law, but by virtue of the statute of March 11, 1784, the validity and effect of it must depend upon the construction of that statute.

A writ of partition must name all the tenants, who hold together and undivided, either as plaintiffs or defendants; the shares of each must be alleged; and partition must be made among them all. In this state very large parcels of land are holden in common, the tenants are numerous and frequently unknown to each other, and their shares unascertainable. Partition, so necessary for the settlement and cultivation of the lands, is therefore impracticable by writ at common law. Inconveniences of this kind heretofore prevailed in England, and they were remedied by an act of parliament passed 8 & 9 Will. 3. c. 31. This act, after providing that to a writ of partition no plea in abatement shall be received, and that it shall not abate by the death of any of the tenants, enacts, that if any tenant to the writ shall not enter an appearance within fifteen days after the return of the attachment, notice having been given of such writ, by leaving a copy thereof, forty days before the return, with the occupier or tenant in possession, or, if he cannot be found, with his wife, son or daughter, the court may proceed to examine the demandant's title, and give judgment, on default, for his purparty; and his purparty being regularly assigned by an execution of that judgment, the partition shall be good, *and conclude all persons whatever, whatever right or title they had to the premises*, although all persons concerned were not named in any of the proceedings, nor the title of the tenants truly set forth. And a power is given to the court, within a limited time, to permit a tenant, against whom judgment has been rendered by default, to plead in bar, or to show an inequality in the partition.

The inconveniences of partition by writ according to the course of the common law, were, in this state, remedied by a temporary provincial act, passed 22 G. 2. c. 3. This act, after several continuances, expired, but its provisions were re-enacted, with some new regulations, by the statute first mentioned, and which is the foundation of the partition in the case.

By virtue of this statute, a person, interested with others in land, may file his petition showing his purparty, and that others, naming them, hold the premises together and undivided with him, and may pray for the severance of his purparty. Of this petition, those others named are to be notified personally, or by leaving a copy of it at their last place of abode, if practicable.

If the petitioner does not know the co-tenants, he may allege that he holds his purparty together and undivided, with others to him unknown. In this case notice is to be given to all persons interested, by publishing the substance of the petition three weeks successively, in one or more of the public newspapers, as the court shall direct. If partition be regularly made, pursuant to the petition, it is declared to be *valid to all intents and purposes*, which words are of as large import, as the provision of the English statute, where the partition is declared *to conclude all persons whatever*, whatever may be their right or title to the premises.

But it is reasonable to give the words a construction, by which no person shall be concluded by a partition, when he could not by law be admitted to defend his rights. This construction is conformable to a maxim of the common law, that judgments do not bind the rights of any but parties or privies; understanding by parties all persons, who might have been parties on the record, but from their own laches.

In applying this construction to the statute before us, when in the petition certain persons are named as the co-tenants, if partition be made, none are concluded by it, but the persons named, their heirs and assigns. If in the petition, the co-tenants are not named, but are supposed to be persons un-

known to the petitioner, and notice is given to all persons interested, to appear and show cause against the petition, and partition be made, no person appearing, this partition shall conclude all persons whatever, as to their right of possession. Any person interested was authorised to appear, and, by falsifying any allegation of the petition in a point material to his defence, might have protected his interest. But if he will lie by, and refuse to appear, it is a consent that the petitioner may proceed *ex parte*; and he shall be bound by the partition, as fully as if he had appeared, and afterwards made default.

In a writ of partition, the plaintiff alleges that all the parties to the writ hold together and undivided: so in the petition, where the co-tenants are not known nor named, the petitioner, by declaring that he is seized of an undivided share of the land, in effect alleges that all persons holding the land, or any part of it, are seized as co-tenants with him. And when judgment is rendered in partition, all the allegations material to the rendition of the judgment are to be considered as facts, and all persons concluded by the judgment are estopped from controverting them. In this case therefore, Allen, the tenant, cannot be admitted, by showing a disseizin of all the tenants in common, to question the right of Reed, alleged in his petition, and supported by the judgment; as he cannot be considered as a stranger to the record, and so not bound by it. He was on the land at the time of the partition, claiming an interest in it; he was notified to appear and defend his interest; he might have appeared, and have been admitted a party on the record; he did not choose to do it; and it is owing to his own laches, that he did not defend his interest, if he had any to defend. To consider him, under these circumstances, as a stranger to the record, is repugnant to a well known rule of law; for he would take advantage of his own laches.

The remaining objection, made by the tenant, against the effect of the partition is, that upon the true construction of the statute, the right of possession of no person is in fact bound by any proceedings under it, but a tenant in common.

It is a sufficient answer to this objection, in this case, that the tenant having been notified of the petition, in which it appears that the petitioner claimed to hold with him, together and undivided, the premises; and having a legal right to appear and controvert the petition, and judgment being rendered on his default, he is now concluded from saying that he is not a tenant in common.

The objection is supposed to rest, not on any expression in the statute we have mentioned, but on the provisions of an additional act, passed February 14th, 1787. In the consideration of these statutes, we ought to construe them liberally, that the remedy may be as extensive as the mischief. The statute of 1784, gives the remedy by petition, to any person or persons, interested in real estate with others. Therefore a parcener, joint-tenant, or tenant in common is entitled to this remedy. The act contemplates the case, when all the parties in interest are not known; consequently they may be made parties, not only by describing them by their names, but by a description of their interest in the land, according to the petitioner's claim. As the statute contemplates a case, where the parties are unknown, it must extend to a case, where the particular interests or rights of the parties are unknown. It is therefore enough for the petitioner to show his own right, not being consusant of the rights of others. And the showing of his own right to be an undivided interest in all the land, amounts to an allegation, that all persons holding the land, or any part of it, hold it together and undivided with him. If any man holding the land, or any part of it, by a sole seizin, is named a defendant in a writ of partition at common law, or in a petition

on the statute, and, after service of the process, is defaulted, there can be no doubt, that his right of possession would be concluded by the judgment. In this case, the tenant being described by his interest in the land, according to the petitioner's claim of title, and process being served on him, if he be not bound by the judgment, the remedy, where most necessary, and where the mischief is irremediable at common law, would be, at the least, useless. Perhaps it would be injurious to the petitioner. Having obtained partition, he certainly would be bound by the judgment, with respect to all who held together with him. But, if no right of possession, in the part severed, passed to him, his entry, although by judgment of law, would be tortious. And he could have no new partition, as there would be no eviction of him by an elder title, he never having a freehold in the part severed, by force of the partition. But, if a right of possession passed by the judgment, so that he became sole seized under it, then if the owner should bring his writ of right, and evict him by a title, paramount, he would be entitled to a new partition of the residue.

This reasoning is confirmed by the consideration that all the proceedings under this act, until the passing of the additional act were merely amicable. If any person, claiming an interest of any kind in the land, had come into court, and controverted any material allegation of the petition, all further proceedings were stayed, and the petitioner was driven to his writ of partition, or rather must have been deprived of any partition. By the additional act, if any material allegation in the petition be denied, an issue in law or fact may be joined, and regularly tried; and if it be determined in favor of the petitioner's right, he shall have judgment for partition, with costs.

But it is urged that the additional act authorizes only a tenant in common to controvert the petition. If these words are taken strictly, then the act does not extend to the case of joint-tenants or parceners. But taking the two statutes together, and considering that it was the intent of the last statute to change the amicable remedy, given by the first act, into an adversary suit, we are satisfied, that any person, who is described in the petition as holding the land together and undivided with the petitioner, and as such is notified to appear and answer, may controvert any material allegation of the petition, and be permitted to defend his own interest, whatever may be its nature.

It is also urged that the last act contemplates no other issues in fact, but whether the petitioner holds the same, or a less share than he has alleged, and therefore no one can plead to the partition, unless he admit the petitioner to have some undivided interest. This reasoning is founded on a mistake of the intent of the statute. By the first paragraph any plea may be filed, on which an issue in fact or in law may arise, and the provision of the statute, when the petitioner is found to have a less share than he claims, is intended to alter the common law. At common law, if on a writ of partition the jury had found that the parties held together, but that the plaintiff held a less share than he had claimed, he could have no partition on that writ; but by this provision, if it be found that the petitioner holds a less share than he claimed, he shall have partition according to his right. Upon this construction of the statutes, a complete and reasonable mode of obtaining partition is provided. The petition is the foundation of an adversary suit, in which all persons, having any interest in the land whatever, may appear and defend their interest. And the judgment has the same effect as a judgment on a writ: it binds the right of possession of those persons only, who are or might have been parties to the writ. If any man suffers by the judgment, he suffers by his own laches.

In a writ of partition at common law, the general issue is, that the parties do not hold together, in manner and form, &c. and as partition must be made

among all the parties, the jury are to enquire of the share of each party. If in a suit by petition, the co-tenants are all named, the plea, as at common law, is proper, but as the petitioner's share only is to be severed. the equiry of the jury, if the issue be joined, is confined to the ascertaining of his share: and the jury may find that the petitioner is seized of an undivided interest in all the land, or in part of it only, or in no part of it; or, if seized of any part, that he is seized of a less share than he claims, according to the evidense in the cause. If the parties interested are not known, any person concerned in interest may appear and plead; but the plea must conform to the petition, and the same enquiry must be made by the jury, if the issue be joined. In this last case, as it was not the intent of the statute, that the title of the petitioner should be controverted by a stranger in interest, to this plea the petitioner may reply, that the party pleading it has no estate or interest in the lands described, and may pray judgment, if he shall be received to defend against the petition. And if an issue in fact be joined on this replication, and tried, the verdict will be conclusive as to both parties.

32.

CHAMPION, Plaintiff in *scire facias*, v. NOYES, Bail of Leonard, 2 R. 481.

To a scire facias against bail, the defendant pleads in bar of execution that since the arrest the principal became bankrupt and obtained his certificate; and that the debt was due before the bankruptcy, and might and ought to have been proved under the commission. The plea is good; and the bail is not held to surrender the principal.

Where the bail are discharged without surrendering the principal, no costs are given to the plaintiff on the scire facias.

PARSONS, C. J. To this *scire facias* the defendant pleads in bar of the execution. The substance of the plea is, that the principal is a certificated bankrupt: that the original judgment was for a debt he owed the plaintiff before the bankruptcy, and which might have been proved under the commission: and that the certificate has been allowed since the rendition of the judgment. To this plea there is a general demurrer and joinder. If the facts thus pleaded are sufficient in law to excuse the bail from satisfying the judgment, and from surrendering the principal, the plea is good; otherwise the plaintiff must have his execution.

In determining this question it will be necessary to examine the cases at common law, and the English statutes of bankruptcy, which apply to the bail of a certificated bankrupt; and to compare them with our own laws relating to this subject.

As to bail in civil actions at common law, when the defendant is arrested on a *capias*, and holden to special bail, he must give bail by bond to the sheriff, conditioned that he shall appear according to the exigence of the writ. On this bond, although the plincipal is in the custody of his bail, yet they cannot surrender him to the sheriff; but to save the bond, the defendant must appear and put in bail to the action. This bail by bond is called the bail below. If the condition of the bond be broken, and a remedy be sought on the bond, it must be by action of debt in the name either of the sheriff or of the plaintiff, to whom it may be assigned. If the defendant appear and put in bail above, or to the action, it must be done by way of recognizance before the court, or some judge, or a commissioner, which is afterwards filed, so as to be of record. The condition of the recognizance is, in substance, that the principal shall pay the debt, or surrender his body to be taken in execution, or that the debt shall be paid by the bail. If the bail surrender the

principal before judgment, or after judgment, and before *non est inventus* be returned on the *capias ad satisfaciendum*, the condition of the recognizance is not broken. So if before that return be made, the principal be taken from the custody of the bail by death, or by the operation of an act of parliament, which they could not control, the recognizance is saved at law. But by the practice of the courts in Westminster Hall, founded on their own rules, if, after the recognizance be forfeited at law, the bail shall, within the times prescribed by their rules, surrender to the court the principal, that he may be committed to be charged in execution by the plaintiff, the bail shall be discharged. If the judgment remain in force, the bail are said to be fixed to the payment of it, when they cannot obtain a discharge, either at law or *ex gratia*, by virtue of the rules of court. Therefore if the principal die after *non est inventus* be returned on the *capias ad satisfaciendum*, the bail are then fixed; for they cannot afterwards surrender him. So if the time indulged by the rules for surrendering the principal be elapsed, the bail are then also fixed; for at all events they are liable to satisfy the plaintiff's judgment.

If we compare these provisions with our laws, we shall observe a great difference in form, although similar principles may in most cases regulate the practice.

In this state the original writ, on which a defendant may be holden to bail, is an authority to the sheriff, not only to attach him by his goods or estate, but for want thereof by his body, to appear and answer to the plaintiff, agreeably to the exigency of the writ. If the defendant, having his body attached, would give bail, it must be given by bond to the sheriff, with a condition that the defendant shall appear and answer the plaintiff, and, further, that he shall abide the order and judgment of the court in the action, and shall not avoid. The effect of this condition is, that the defendant shall satisfy the plaintiff's judgment or surrender his body to be taken in execution, or that the bail shall pay the debt. This bond, thus given, when returned by the sheriff, has immemorially been considered so far a matter of record that the plaintiff may sue out a *scire facias* on it in his own name against the bail. And this practice was sanctioned by a provincial statute passed as early as the W. and M.

The bail thus given answers the same purposes as the bail below, and the bail above, at common law. And nothing is a breach of the condition of this bond, which is not also a breach of the condition of the recognizance of the bail. Until the writ is (*not*) returned, the principal, although in the custody of the bail, cannot be surrendered by them to the sheriff. After the writ is returned, and before final judgment, the bail may surrender the principal to the court, in which the suit is pending, and be discharged; and the principal, when surrendered, shall be committed to the prison of the county, there to remain until thirty days after the rendition of the judgment, to be charged in execution, unless before judgment he gives new bail to the sheriff by bond as aforesaid, which if forfeited may be the foundation of a *scire facias* against the bail.

In twenty four hours after the rendition of judgment an execution may issue; of which there is but one form, where the defendant may be holden to bail on the original writ.

This execution the sheriff may execute as a *capias ad satisfaciendum*, by arresting the body of the defendant; or as a *fieri facias*, by which the debt or damage may be levied of his goods, or as an *elegit facias*, by which his lands may be assigned to the plaintiff to hold in fee simple; or the rents and profits in certain cases be received until the judgment is satisfied. If, after issuing the execution, and before the return, the bail surrender the principal

to the sheriff holding the execution, the bond is saved at law, and the sheriff is obliged to commit him in execution. It is also saved if the principal die before the return; for now it has become impossible by inevitable accident for the bail to surrender him. And it is enacted by the statute of June 30, 1784, which is a revision of former provincial acts, that if the bail, at any time after the execution be returned unsatisfied, with *non est inventus* indorsed thereon, and before judgment be entered against them upon the *scire facias*, surrender the principal in court, so that he may be committed to be charged by the plaintiff in execution, the bail shall be discharged, they paying the costs which had then accrued on the *scire facias*. The bail also are not liable, if the *scire facias* be not served on them within one year after the rendition of the judgment. But the death of the principal, at any time after the execution shall be returned unsatisfied, and *non est inventus* indorsed, will not discharge the bail. The bail then in this state, are not fixed until judgment against them, unless by the death of the principal after the return of the execution. For on either event they are obliged to satisfy the plaintiff's judgment: and until one of these events shall happen, they are contingent, and not absolute sureties for the debt.

We may remark two other differences in the proceedings against bail in the courts of this state, from the proceedings in Westminster Hall. If the plaintiff obtain judgment against the bail, his execution shall be not only to the amount of the former judgment, but also for the interest thereon from the time when that judgment was rendered until the award of execution upon the *scire facias*. The other difference is important in the decision of this cause. In Westminster Hall, as the privilege of the bail to a discharge on surrendering the principal after the return of the *capias ad satisfaciendum* within the limited time is derived from the rules of the court, so their remedy to obtain a discharge in this case cannot be by plea to the *scire facias*, but by motion to the court to stay proceedings, which is granted *ex gratia*: so also a discharge, by reason of any collateral matters happening after the recognizance is forfeited at law, must be obtained on motion, not on plea. But in this state it is the right of the bail to be discharged on surrendering the principal before judgment against them on a *scire facias*. And this right is founded on a statute, and is not *ex gratia*: the bail may therefore plead in bar to the *scire facias*, if the proceedings be not stayed, any matters sufficient to obtain their discharge. Thus *solvit post diem* to a bond conditioned for the payment of money, being a plea founded on statute, is a good bar to an action on the bond, although it is admitted by the plea that the bond is forfeited. As a consequence of this last distinction, the bail, if not become absolutely liable to the plaintiff for the payment of the debt, may plead in bar of the *scire facias* that an *alias* execution issued, on which the principal had been taken in execution: or that, since the return of the first execution, the principal had satisfied the judgment: or that the plaintiff hath released it: or that it hath been reversed or legally discharged.

Let us now consider the act of Congress establishing a uniform system of bankruptcy throughout the United States.

In the 34th section it is enacted that every bankrupt, conforming in all things to that act, and obtaining a certificate of his discharge, shall be discharged from all debts due or owing before he became bankrupt, and which were or might have been proved under the commission, unless the certificate was obtained unfairly or by fraud, or that the bankrupt had concealed effects to the amount of one hundred dollars. But this discharge is not to extend to a partner, or to one jointly holden or bound with the bankrupt.

The 38th section provides, that if any bankrupt be in execution on a judgment for a debt due before the bankruptcy, but rendered afterwards for want

of a certificate, he shall, on the allowance and production of the certificate, be discharged, without payment of any fee or reward.

Provisions similar to these are contained in the English statutes of 16 Ann. c. 15 sect. 3, and of 5 Geo. 2 c. 30 sect. 7. Adjudged cases therefore on this subject may be considered as in point, and so far as they are conformable to our jurisprudence, they deserve particular attention.

From the allegations in the plea, which are confessed by the demurrer, it appears that the plaintiff's judgment is within the act of Congress. The debt was due before the bankruptcy, and might have been proved under the commission: and the judgment was obtained before the allowance of the certificate. There is no suggestion that the certificate was unfairly or fraudulently obtained, nor that the bankrupt had been guilty of any concealment. The principal is therefore discharged from this judgment: and were he now in execution, it would be the duty of the court to discharge him from prison, he producing the certificate. And the bail not being partners with the principal, nor jointly held or bound with him for the same debt, are not within the restricting clause of the act.

Upon the reason of the cases of Woolley *et al.* v. Cobbe, (1 Burr, 244.) and Cockerill v. Owston, (Ibid. 436.) the bail, not being in this action absolutely liable to the plaintiff for the debt, ought to be discharged without surrendering the principal. The plaintiff having no longer any remedy against the principal, it would be unreasonable to permit him to proceed, and make the bail absolutely holden to satisfy his judgment, which is now legally discharged. If the bail were already fixed, the plaintiff might justly consider them as his debtors on their own contract; and the certificate having no retrospective effect as to the bail, they could derive no relief from it. It may further be observed that in this case the bail might obtain their discharge, without applying to themselves the benefit of the certificate: for on surrendering the principal, and paying the costs of the *scire facias*, they would be entitled to a discharge *ex debito justitiæ*. Whenever a surrender of the principal is necessary, it is done for the benefit of the plaintiff, that by charging him in execution, he may hold his body as a pledge for his debt. Were the principal in this case surrendered, the court could not commit him; or, if committed, he would the next moment be entitled to his discharge. To surrender him, under these circumstances, would be expensive to the bail, oppressive to the principal, and useless to the plaintiff. A surrender therefore in this case cannot be necessary: and where the bail are discharged without surrendering the principal, no costs are given to the plaintiff on the *scire facias*.

In the cases before referred to in Burrows, the remedy was sought by motion, conformably to the practice in Westminster Hall. Here it is sought by plea, because the right of the bail is given by statute. And deciding the cause on plea is more convenient to the parties, as the necessary issues in fact or law may be regularly joined and tried. But on motion the court must ascertain the facts by affidavit, and determine the law without remedy by appeal or error.

An issue in law being joined in this case, we are of opinion, and the judgment of the court is, that the plea in bar is good, and sufficient in law to preclude the plaintiff from having execution.

33.

ERSKINE v. TOWNSEND, 2 R. 493.

A bond conditioned to reconvey an estate upon payment of a sum of money, which

estate had been conveyed by the obligee to the obligor by deed of the same date, in a defeasance of the deed and shall make it a mortgage.

PARSONS, C. J. This action is a writ of entry, in which the plaintiff demands the land described in the writ against the defendant, and declares on his own seizin within two years, and on a disseizin by the defendant. The defendant very improperly prays oyer of the deed declared on, when the plaintiff did not count upon, nor make a profert of any deed; and the court grant oyer. Upon hearing the deed, it appears to be an absolute conveyance in fee simple of the land demanded, from the defendant to the plaintiff, for the consideration of 260 dollars, and it bears date Feb. 9, 1804. The defendant then pleads a bond dated the same day, in the penal sum of 500 dollars, with a condition, after reciting that the defendant owing the plaintiff 241 dollars and 30 cents, and for the better securing the payment of the same, had conveyed to the plaintiff fifty acres of land, that if the defendant should pay the plaintiff that sum in six months, and the plaintiff shall then re-convey the land to the defendant, the bond was to be void. The defendant then avers, that the land mentioned in the condition, is the same land described in the deed, and that the same bond was made as a defeasance of the deed. He then confesses the breach of the condition, and prays to be heard in equity, that he may have liberty to redeem the land demanded, and thus conveyed in mortgage. To this plea there is a general demurrer and joinder.

In deciding this issue in law, it may be convenient to explain the nature of a mortgage in fee of lands, and the rights and remedies of the parties agreeably to our laws. A mortgage in fee is an estate upon a condition, defeasable by the performance of the condition according to its legal effect. This condition may be either annexed to and a part of the deed conveying the estate, or it may be contained in another deed, executed at the same time, and part of the same transaction, and providing that the estate recited to have been conveyed, is to be defeated upon the performance of the condition.

The equitable powers of this court do not extend to relieve mortgagors in any other cases than those, in which the condition is a part of the deed of conveyance, or is contained in a deed of defeazance of that conveyance. After the creation of this estate upon condition, the mortgagee has presently the same right to enter *in pais*, and take the profits, or by jugdment and execution in a writ of entry, that he would have, if the estate were absolute; subject however to account for the profits to the mortgagor, if he should ever perform the condition, or redeem the estate. And in his writ he may count generally on his own seisin, and the disseisin of the defendant; and if he obtained judgment before condition broken, the judgment will be at common law, and not upon the statute.

The mortgagor, by performing the condition, according to its legal effect, may defeat the estate at law, and if the mortgagee be in possession, he may enter upon him, or eject him by a writ of entry, his title being now absolutely void. Thus it appears that, until the condition be broken, the rights and remedies of the parties are legal, and not equitable.

When the condition is broken, then the statute interferes, and provides equitable relief for the mortgagor. He may redeem the estate by paying the money due on the mortgage at any time within three years after the lawful entry of the mortgagee for condition broken. It is therefore necessary to fix the time when the three years commence, according to the different situation of the parties.

If the mortgagee had entered and taken possession before the condition

was broken, and had continued in the receipt of the profits after, the three years do not commence until he give due notice to the mortgagor, after the condition be broken, that he shall thenceforward hold the possession for the condition broken, or in other words, for the purpose of foreclosing the mortgage, if it be not redeemed.

If the mortgagee had not taken possession before the condition was broken, and he shall lawfully enter and take possession after the condition is broken, the three years will commence from the time of such lawful entry. This entry may be either *in pais*, or in execution of a judgment in a real action. In order to obtain this judgment, the mortgagee must sue a special writ of entry. Instead of declaring generally on his own seizin and on a dissesin by the mortgagor, he must count either on a seizin in fee and in mortgagee, so that it may appear that he claims to be tenant in mortgage, or he must allege a seizin in the mortgagor and a conveyance to himself by deed, which he must plead with a *profert*, so that on inspection of the deed it may appear to convey an estate in mortgage. The former manner of specially declaring is good in all cases, but necessary where the condition appears in a defeazance not in the possession of the mortgagee. The latter manner is sufficient, when the condition is a part of the deed of conveyance.

If the mortgagee is entitled to judgment in this action, after the condition be broken, the court will liquidate the sum remaining due on the mortgage and enter a conditional judgment that the plaintiff have seizin, unless the mortgagor pay that sum with interest, and the costs of suit in two months. If the money be not paid in that time, the mortgagee will sue out his execution, and the three years for redemption will commence on his having seizin delivered to him.

As by the statute the mortgagee can have no judgment, after the condition is broken, but this conditional one; thence results the necessity of his declaring as mortgagee, to bring himself within the statute. And it has been settled by this court formerly, that if he declare generally, and the mortgagor shall plead in bar, that the mortgagee is seized as tenant in mortgage only, the condition of which is broken, the action will be barred. Upon this principle, if the defendant in the case before the court had pleaded properly these facts in bar, and the bond on which he relies is a defeasance, he must have had judgment that the mortgagee take nothing by his writ. As he has not so pleaded, but prays only that the conditional judgment may be entered against him, that he may have the equitable right of redemption after judgment, the only point that remains for the opinion of the court, is the legal effect of the bond. If it be a defeazance, within the intent of the statute, the conditional judgment must be entered accordingly; otherwise the plaintiff must have judgment for his seizin at common law.

The plaintiff's objection to the bond as a defeasance is technical, because in the condition it is not expressed that the conveyance is to be void on the payment of the money secured in six month; but that upon such payment, the grantee shall reconvey. In looking into the bond and condition, we observe that the bond is dated the same day, on which the conveyance bears date, and that the condition recites expressly, that the conveyance was made as a security for money due. It is therefore manifest that the land conveyed was intended by the parties as a pledge only. And notwithstanding the manner of the grantor's recovering back the pledge, on his payment of the money, is by a re-conveyance, yet the nature of the conveyance remains the same. It is not absolute but conditional; and it must be considered as a conveyance in mortgage. When we examine the forms of defeasances, in books of conveyancing, the technical objection seems to have no weight.

There are in Wood's Conveyancer, two forms of a defeasance of a mortgage, in which the condition is, that upon payment the grantee shall reconvey.

We are therefore of opinion, that as the defeasance is by deed, as the two deeds are but parts of the same transaction, and as the conveyance was to secure the payment of money due, the plaintiff must be considered as a tenant in mortgage; and can have only the conditional judgment to have seizin, unless the money due with interest and costs be paid in two months by the defendant.

3.

WESTON v. HUNT, 2 R. 500.

Parsonage lands are holden by the minister in right of his parish; and in case of his death, &c. the fee is in abeyance until there be a successor.

The parish is entitled to the profits during a vacancy. If the minister aliene with the assent of the parish, it shall bind his successor: if without such assent, it will be valid during his incumbency, and his successor may enter without action, or he may bring his writ of entry *sine assensu Parochiæ*, counting on the seizin of his predecessor within 50 years. A minister may also have his writ of right, on his own seizin within 30 years, or on the seizin of his predecessor within 60 years. An alienation by the parish is void.

PARSONS, C. J. delivered the opinion of the court, as follows:

So far as we can collect from the declaration, the plaintiff demands the land described in his writ, as minister of the town of Gray, and in right of his town. After stating, very unnecessarily, the title, but without declaring on his own seizin, or the seizing of any predecessor, he concludes by averring, that he ought to have quiet possession, and that the defendant has turned him out of possession, whence by implication it may be inferred, that the defendant entered on him when in possession. Upon trial on the issue of not guilty, the judge reports that it was admitted by the parties that the plaintiff never had been in possession. Thus the part of the declaration that was most material was not proved, and the verdict for the defendant is right. Indeed if the verdict had been for the plaintiff, it is difficult to discover any legal principles, on which he could have had judgment upon his declaration; the nature of his remedy, if he had right, being totally misconceived.

By the provincial statute of 28 G. 2. c. 9. the ministers of the several Protestant churches were made sole corporations, capable of taking in succession, any parsonage lands, granted to the minister and his successors, or to the use of the ministry. And no alienation made by any minister of any parsonage lands, holden by succession, shall be valid any longer than he shall continue minister; unless, being minister of some particular town, district or precinct, such alienation be made with the consent of such town, district or precinct; or being a minister of some Episcopal church, the alienation be made with the consent of the vestry.

The provisions of this statute, on this subject, are re-enacted by the statute of Feb. 20, 1786, on which rests the right of ministers, to hold parsonage lands in succession as sole corporations, and also the restriction of the alienation of their parsonages.

Ministers being thus made sole corporations, their rights and remedies are clearly defined by the common law. They stand on the same foundation as to their parsonages, with all other sole corporations holding lands in succession, at common law.

The minister holding parsonage lands in fee simple, holds them in the

right of his parish or church; and therefore, on his resignation, deprivation or death, the fee is in abeyance, until there be a successor.

During the vacancy the parish or church have the custody, and are entitled to the profits of the parsonage.

If the minister alien with the assent of his parish, or of the vestry of the church, the alienation shall bind the successor; if without such assent, it will be valid no longer than he continues minister; and it will be no discontinuance of the estate, so as to drive the successor to his action, but he may enter.

An alienation of the parsonage by the town, district, precinct or vestry is void: for if there be a minister, the fee is in him; or if there be a vacancy, the fee is in abeyance. And a corporation cannot acquire a freehold by a disseisin committed by itself.

Because the minister holds the parsonage in succession, in all legal proceedings he must claim it in the right of his town, district, precinct or church.

If the minister be, or his predecessor has been disseised, he may enter, if the right of entry be not taken away; or he may bring a writ of entry, declaring upon his own seizin, or upon the seizin of his predecessor, according to the nature of his case.

If his predecessor has aliened without the assent of his town, district precinct or church, he may have a writ of entry *sine assensu parochiæ*, and in the writ he must declare on the seizin of his predecessor within fifty years, and this writ may be brought in the *per*, in the *per* and *cui*, or in the *post*. And the writ of entry *sine assensu capituli*, in the register, will be an authority for him.

The minister may also have his writ of right on his own seizin within thirty years, or on a disseisin done to, or an alienation without assent made by his predecessor, in which last cases he may declare on the seizin of his predecessor within sixty years.

In examining the declaration in the case at bar, it is not supported by any of these principles, nor by any other legal principle that occurs to us. If the verdict had been rendered in favour of the plaintiff, he could not have judgment, but as it is against him, judgment must be entered according to the verdict.

35.

NORCROSS, Executrix of NORCROSS v. WIDGERY, 2 R. 506.

A conveyance of land duly recorded, is good against a prior conveyance not recorded, if no notice, express or implied, has been given.

When a prior conveyance not recorded until after one of a subsequent date is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved.

PARSONS, C. J. The motion is to set aside the verdict, because it was given against evidence, and the direction of the court in a matter of law.

From the judge's report it appears, that in 1791, John Hankerson was seized in fee of the premises: that he was in the actual possession of the same, in that and the two succeeding years, living in a house which he had erected thereon; that on the 12th day of October, 1792, he mortgaged the premises in fee to Mary Hussey, by a deed acknowledged on that day, and recorded two days after; that Mary Hussey, by a deed dated July 25th, 1793, acknowledged February 12th, 1799, and recorded September 24th, in the same year, conveyed the premises in fee simple to Amos Stoddard, who on

the 6th day of September, 1799, conveyed the same in fee to the defendant. This was the evidence offered to the jury to prove that Stoddard was on the 6th of September 1799, seized in fee simple of the premises.

To encounter this title in Stoddard, the plaintiff gave in evidence a deed from Hankerson to Samuel Norcross, senior, which is without a regular date, but the grantee "is to have the land from this date, 1791." This deed was acknowledged, Feb. 23, 1793, and recorded the 26th of March following. If any estate was conveyed by this deed, it was only an estate during the life of Norcross, the grantee, who was proved to have died above five years before the trial.

As the deed to S. Norcross was not recorded until long after the registering of the deed to M. Hussey, it cannot impeach her title, unless the deed to her was fraudulent against the first purchaser.

The provision of the statute for registering conveyances is to prevent fraud, by giving notoriety to alienations. But if the second purchaser has notice of the first conveyance, the intent of the statute is answered, and his purchase afterwards is a fraudulent act. This notice may be express or it may be implied from the first purchaser being in the open and exclusive possession of the estate under his deed.

In this case it is not pretended that Hussey had any express notice of the sale to S. Norcross; and there is no evidence of implied notice, for the plaintiff's witness proved that, when the second deed was executed, Hankerson was on the premises, living in a house he had there erected.

It appears from the judge's report that S. Norcross, before the execution of the deed from Hankerson to Hussey, had built a house on the premises, in which he lived. It may be thought that, admitting his possession was concurrent with Hankerson's when the deed was executed to Hussey, yet, as there is no evidence that Hankerson lived on the land when Hussey sold it to Stoddard, the continuance of S. Norcoss' possession to the time when Hussey conveyed, was a disseizin of her, and so nothing passed by her deed to Stoddard. This reasoning is certainly insufficient to defeat Hussey's conveyance. For if S. Norcross' concurrent possession at the time of the second conveyance was not sufficient to defeat it, his continuance of that possession cannot amount to a disseizin, because it cannot be considered as an entry upon the land, and an ouster of the owner.

The verdict is therefore founded upon a manifest mistake, and must be set aside.

We would observe, that the statute requiring the registry of conveyances being so very beneficial, and it being so easy to conform to it; when a prior conveyance, not recorded until after one of a subsequent date, is attempted to be supported on the ground of fraud in the second purchaser, the fraud must be very clearly proved.

If the first conveyance to S. Norcross was good against the second purchaser, yet as S. Norcross had but an estate for his life, the reversion passed, by the second conveyance, to Hussey, and from her to Stoddard, from Stoddard to the defendant, and from him to the plaintiff's testator. If S. Norcross had been living at the time of the verdict, the damages should have been only the value of his life estate. As he was then dead, the damages were merely nominal. A new trial was ordered.

36.

HART v. FITZGERALD, 2 R. 509.

A part owner of a chattel cannot maintain a replevin for his undivided part; and if it

appear from the plaintiff's own showing that he is but part owner, the court will abate the writ *ex officio*.

When judgment is arrested for the insufficiency of the plaintiff's declaration, the defendant shall recover costs.

PARSONS, C. J. When a contract is made with two or more persons, and one only sues, the defendant may have the advantage of it on the general issue, without pleading it; *a fortiori* if it appears from the plaintiff's own showing that the contract was made with himself and others not named, nor any legal reason assigned for not naming them; because it appears that no such contract was made with the plaintiff as he has declared on. But if there are several part-owners of a chattel, and an injury be done it, regularly all the part-owners ought to join in an action to recover damages for that injury. In this case, although an injury be done to *each* part-owner, yet they ought to join to prevent the defendant from being harrassed by a multiplicity of suits. As the rule is established for the defendant's benefit, he may waive this benefit, by not taking the exception in abatement: and he cannot take advantage of the irregularity under the general issue. So if it appear from the plaintiff's own showing, that he is but a part owner, the defendant must take the exception in abatement; because the plaintiff should have an opportunity to show, that the defendant has settled with another part-owner, and discharged him from all interest in the *gravamen*; or that he had suffered any other part-owner severally to sue and recover his part of the damages; in either of which cases the plaintiff's writ shall not abate.

Replevin is an action founded on the general or special property of the plaintiff; and it is settled that when a chattel is illegally taken and detained, all the part-owners must join in replevin. And it is a good plea in abatement that the property is in the plaintiff and another.

In this action, this irregularity it not pleaded in abatement or in bar, but it appears from the plaintiff's own showing in the writ, in which he claims an undivided moiety of the chattels said to be unjustly taken and detained: and it is a question whether the defendant can take advantage of this defect thus appearing, or whether he must have pleaded it in abatement. If there is an analogy in the principles of law regulating the forms of actions for injuries to chattels, and of actions of replevin, it would seem from the case of Addison v. Overend, (6 Term R. 766,) that the defendant should have pleaded in abatement that there was another part-owner not named, in order to have the advantage of the omission. But is there such an analogy?

In trespass or case for an injury done to a chattel, each part-owner in fact is injured, and the damages, if not severed by the form of the action, must be divided among the plaintiffs after recovery. In these actions also there are cases, in which one part-owner may legally sue alone without joining his partners.

In replevin, which is founded on property, the chattel is to be delivered to the plaintiff, as well as damages to be recovered. This chattel is not capable in law of severance; and the whole or none of it can be delivered to the plaintiff: and if it be deliverd to a plaintiff, being but a part-owner, he must receive an undivided part, in which he claims no property. In replevin also we do not recollect any case in which a part-owner can sue for his undivided part only. If property in him and another be pleaded in abatement, such a plea cannot be confessed and avoided by any matter which the plaintiff can reply to it.

These are very strong distinctions between the principles applying to actions of trespass and of the case for an injury done to chattels, in which damages only are demanded, and actions of replevin, in which the property, said to be unjustly taken and detained, is to be delivered to the plaintiff. We

therefore think that the general rule of law must govern, that when a substantial defect in the writ appears on the record, the court ought, *ex officio*, to abate it.

Judgment arrested.

After judgment was arrested, the defendant moved for costs, which was objected to by the plaintiff, because by the English cases the defendant was not entitled to costs upon arresting judgment. The plaintiff also referred to the case of Brown v. Austin, in error, (1 Mass. Term. R. 219.)

Curia. No costs are given at common law; they are considered in the nature of penalties, and the English statutes giving them are construed strictly. By those statutes, the plaintiff does not pay costs when his writ is abated on plea, or when judgment is arrested. Neither does the plaintiff recover costs, if he obtains judgment in a popular action, not being the party grieved. Nor do executors or administrators pay costs, if judgment be against them in actions sued in right of the testator or intestate. There are many other cases, in which the party prevailing has not costs, which in all cases depend upon the construction of the several English statutes.

In this state costs have always been given the defendant, when by his plea the plaintiff's writ is abated; and when a writ is abated because in a transitory action it is sued in a county where neither party lives, double costs are given by our statute, (passed October 30, 1784, sect. 13,) to the defendant.

And no reason can be given why costs are given to the defendant, where the writ is abated on his plea, and that no costs should be given him when the writ on the face of it is bad, so that it is abated by the court *ex officio*, or judgment is arrested for its insufficiency. As we always give costs to the defendant when judgment is given for him on his demurrer to the plaintiff's declaration, he ought for the same reason to have costs, if the judgment be arrested for a substantial defect in the declaration.

We also give costs for or against the plaintiff in popular actions, when he is not a party grieved, also against executors and administrators, when judgment is against them, and in many other cases, where no costs are allowed pursuant to the English statutes.

By our statute, (sect. 9) the party prevailing in all cases within the jurisdiction of the court is entitled to costs, and no distinction is made as to the form or manner in which he shall prevail. And the endorser of the plaintiff's writ may, on the avoidance or inability of the plaintiff, be holden to pay the defendant the costs he shall recover, *when the plaintiff shall not support his action*; Ibid. sect. 11.

In the present case the plaintiff has not supported his action, but the defendant has prevailed, and is entitled to costs.

37.

LADD v. NORTH, 2 R. 514.

Goods are attached upon an original writ, and replevied out of the hands of the sheriff by a coroner. The creditor in the original suit cannot maintain an action against the coroner for taking insufficient pledges, upon the replevin, or for other misfeasances in the service of it. Such action lies for the sheriff only, who had a special property in the goods, the general property being in abeyance.

On the third day of the term the Chief Justice (after observing that the court, having agreed that this action was not maintainable against the present defendant, had not thought it necessary to give any opinion as to the defects suggested to be in the declaration) delivered the unanimous opinion of the court as follows:

When the sheriff seizes goods of a debtor on an execution, to make money of them, to satisfy the creditor, he has a special property in the goods; and if they are taken from him, he may maintain trover or trespass against the wrong-doer. The reason of the law is, because he is accountable to the judgment creditor for a sum of money equal to the value of the goods: and it would be unjust if he could not indemnify himself, by the recovery of damages, for the wrongful taking. But the creditor has no interest or property in, or possession of the goods, by reason of the levy, and can maintain no action against the wrong-doer in his own name, his only remedy being against the sheriff. If the goods of the debtor thus levied are replevied by any other person claiming them, the sheriff is entitled to a judgment for a return, and damages equal to six per cent. on the penalty of the replevin bond. And the goods being returned shall be holden responsible by the sheriff for twenty days. The damages thus recovered are also for the use of the creditor. This provision, when the goods are taken from the sheriff by replevin, is made by the statute of June 25, 1789.

At common law, the sheriff, notwithstanding the goods were taken from him by replevin, is obliged to return his execution, with the value of the goods seized thereon, and that they have been replevied at the suit of the plaintiff in replevin. And on the return of the goods, he might have sold them, in consequence of the property he acquired in them by the first seizure, and with the money satisfied the creditor's judgment, or indemnified himself, if he had been compelled to pay the debt. Or, if the *returno habendo* was returned unsatisfied, he might obtain indemnity by action on the replevin bond; or, if the pledges were insufficient, by suit against the coroner. This we consider as the common law here, because the late statute admits that a stranger to the execution may replevy goods seized by virtue of it.

It may be a question whether the return to the sheriff, and his holding them responsible twenty days, will be any bar to an action by the plaintiff against him, or whether it be the intent of the statute to give to the judgment creditor a cumulative remedy. But it is very clear that when, after judgment for a return, no return be had, the judgment creditor may have his remedy against the sheriff, who may seek his indemnity against the pledges, or, if they be insufficient, against the coroner. Any negligence or misfeazance of the coroner in the service of the writ of replevin, is a tort to the sheriff, who is the defendant in that writ, and who alone can demand damages of the coroner. Otherwise the coroner might be twice charged. For there seems to be no ground for determining that a judgment by the creditor against the coroner for misfeazance in executing the writ against the sheriff, and to which the creditor is not a party nor privy, would be a bar to an action by the sheriff against the coroner. And it is very clear that the creditor can maintain no action on the replevin bond in his own name, it being given to the sheriff. If therefore the pledges are insufficient, the injury is done to the sheriff, who alone can maintain the action on the bond, and not to the creditor, who cannot put it in suit.

In thus far considering the law as applying to this case, we have supposed the goods to be seized in execution: for to a case of this kind we have authorities to guide us. In the case at bar the goods were the original defendant's, and were attached on the original writ, at the suit of the plaintiff Ladd. But from analogy the law must be the same in this case as where the goods are seized on execution. In the latter case the general property is in abeyance; and the special property is in the sheriff, who is answerable for the value to the creditor, whether taken from him tortiously or by replevin. Unless when replevied, it may be supposed that, if he receive them on a *returno habendo*, and hold them twenty days, he is discharged from the plaintiff.

This special property is defeazible by the defendant's paying the execution in money before the sale of the goods.

If the goods are attached on original process, the special property is in the sheriff (the general property being in abeyance) defeazible by the plaintiff's failing in his action, or by his not suing out his execution within thirty days after judgment, or by the defendant's satisfying the judgment before sale of the goods. If the goods are taken from the sheriff tortiously, or by replevin, still he is answerable to the plaintiff for the value, unless in replevin he should hold them after return for twenty or thirty days, as the case may be after judgment. Whether by the sheriff's thus holding them after a return, the plaintiff would be barred in his action against him, it is not necessary to give any opinion. There is however a material difference between a return to the sheriff claiming a special property by attachment, and when he claims a special property by seizure on execution. In the latter case he may sell by virtue of the seizure; in the former case he cannot sell, until he seize them afterwards on execution.

In the case at bar, there does not appear to have been any return on the judgment in replevin. The plaintiff may therefore have his remedy against the sheriff; and the sheriff may have an indemnity either against the pledges, or against the coroner, if they, through his default, or against him for any other misfeazance in serving the writ, by which a damage has accrued to the sheriff. The plaintiff therefore having no cause of action against the coroner for his misfeasance, the judgment must be arrested.

38.

RANDALL v. BRIDGE, 2 Rep. 549.

If the sheriff permit a debtor, who has been surrendered by his bail in a civil action, and by the court committed to the custody of the sheriff, to go at large before the expiration of thirty days, he shall be chargeable for an escape although he was not furnished with a copy of the order of court committing such debtor.

PARSONS, C. J. This case comes before the court upon exceptions filed to the direction given the jury by the judge before whom the cause was tried. Randall, the plaintiff, having recovered judgment against Ezekiel Bray, in an action commenced by a writ, on which Bray was holden to bail, and his execution upon the judgment having been returned *non est inventus*, he sued out a *scire facias* against the bail. Pending the *scire facias*, the bail brought Bray into court, and surrendered him in their own discharge. The court allowed the surrender, and thereupon committed Bray to the custody of Bridge, the sheriff, that his body might be taken in execution. The sheriff received Bray into his custody, and before the expiration of thirty days, after the surrender, voluntarily suffered him to go at large. The sheriff's defence is, that the plaintiff never delivered him a copy of the order of court committing Bray to his custody. The judge directed the jury that this defence was sufficient in law, and they found accordingly. If this defence was sufficient, the direction was right, otherwise a new trial ought to be granted.

By the second section of the statute regulating bail in civil causes, it is provided, that if the bail shall bring the principal into court before judgment shall be given on the *scire facias*, and there deliver him to the order of the court, and shall pay the costs in the *scire facias*, then the bail shall be discharged. And the principle shall be committed to goal, there to remain for the space of thirty days in order to his being taken in execution. And if the creditor shall not take him in execution within that time the sheriff

shall discharge him paying the prison fees. Pursuant to this provision the principal was surrendered, and by order of the court committed to gaol, where it was the duty of the sheriff to detain him for thirty days. The commitment was legal, and the sheriff well knew it when the debtor was committed to his custody. Under these circumstances his permitting him to go at large was an escape, for which he is answerable to the plaintiff, unless there be some other legal principle which can protect him.

His counsel rely on the sixth section of the *Habeas Corpus* act, which provides, that if any officer, in whose custody any prisoner shall be, shall not within six hours after demand made, deliver such prisoner a true copy of the warrant or process by which he stands committed, such officer shall forfeit fifty pounds to the party greived. Hence it is argued that there can be no escape but from a lawful imprisonment; that the imprisonment is not lawful, unless a copy of the warrant or process of commitment be delivered to the sheriff, that he may deliver it to the prisoner if demanded, and avoid the forfeiture; and as it is stated in the exceptions that no copy of the order of commitment was delivered to the sheriff by the plaintiff, or any other person, they infer that the imprisonment was unlawful, and the sheriff justifiable in permitting the prisoner to go at large.

We are not satisfied with this reasoning, as it is founded on an erroneous construction of the *Habeas Corpus* act. It is the intention of that act to relieve against unlawful imprisonment, and not to alter the law authorising commitments; and the section referred to, applies only to cases in which the commitment is by warrant or process, a copy of which must be left with the sheriff to oblige him to receive the prisoner, and not to cases where no warrant or process need be shown to the sheriff.

A commitment for legal cause of any man present in court, by an order of a competent court entered of record, is still a legal commitment, and the sheriff is bound to obey the order. The prisoner knows for what cause and by whom he is committed; and he may at any time have a copy of the record. And the sheriff, if called upon to justify the imprisonment, or to certify the cause of it, may have access to the same record, a copy of which the clerk will give him *ex officio*.

The case of commitment of a debtor, on being surrendered by his bail, does not differ in principle from cases where a prisoner charged with an offence comes into court on recognizance and after conviction is sentenced to imprisonment. The sheriff is obliged immediately to obey the order of court and to commit the prisoner in execution; and on application to the clerk, he may have a copy of the sentence. And was it ever supposed if the sheriff neglected to apply for a copy, and to keep it in his possession, that therefore the imprisonment under it was illegal? To suppose this would be confounding the legality of the imprisonment with the legality of the evidence by which it may be proved. In the case at bar the plaintiff is in no fault. He was a party to the surrender; it was not made at his motion, nor could he have prevented it. And the defence set up by the sheriff appears to us all, upon full consideration, to be only a subterfuge to excuse a voluntary escape.

The verdict must be set aside, and a new trial be granted.

39.

REA v. HAYDEN, 3 R. 25.

The opinion of the court was delivered by
PARSONS, C. J. In the writ the plaintiff is named of Charlotte Town

in Nova Scotia, in the dominions of the King of Great Britain, and the defendant is called of Boston in this county. The action is transitory, the plaintiff counting on a promise made by the defendant to him at Charlotte Town, to wit, at said Boston. The allegations in the plea to the jurisdiction are, that the parties, at the time when the promise was made, were, ever since have been, and now are, aliens and subjects of the said king: and that the cause of action, if any, accrued to the plaintiff within the jurisdiction of the courts of the said king, and not within the jurisdiction of this court. To this plea there is a demurrer and joinder.

A plea to the jurisdiction in a transitory action is proper when some court of the nation has jurisdiction of the cause of action, but not the court in which the suit is instituted. The plea must therefore allege that some other court of the nation has jurisdiction. But if no court has jurisdiction of the cause of action, then by the law of the land the action cannot be maintained: and the defendant may avail himself of this defence under a plea which goes to the action. We are therefore of opinion that the plea is bad; the defence, which the defendant intended to make, not being a legal foundation for a plea to the jurisdiction in this action.

Pleas to the jurisdiction of this form have sometimes been made; and no exception being taken to the form, they have been considered upon their merits: but they cannot be considered as a precedent of any authority. The defendant must answer farther.

If it should appear on a trial of the merits, which seems to be admitted by the plea, that the defendant, after the making of the contract declared on, had removed to this state, and now dwells here, the court will decide whether by our laws he is protected from all suits on contracts made with his fellow subjects before his removal.

Defendant's plea bad.

40.

WARREN v. MERRY, 3 R. 27.

A party to a negociable security shall not be a witness to prove that at the time he gave it currency it was void.

But he may be permitted to testify to any facts happening afterwards, if he is not interested.

CURIA. In the trial of this cause the Judge rejected Hunting as a witness; and whether he was a competent witness is the question now for the decision of the court. The general objections to the competency of a witness arise either from infamy or interest. There is no imputation on Hunting's character; and the defendant's release discharges him from all interest in the event of this suit.

In actions on negotiable securities, an objection lies against a party to the security being received as a witness. And this objection is supported by the case of Walton v. Shelley. (1 Term R. 301.) A majority of the judges, in the case of Jordaine v. Lashbrooke & al., (7 Term R. 601.) deny that case to be law. But it appears from the case of Hart v. M'Intosh, (1 Esp. Rep. 298.) that the Judges of the Common Pleas adhered to the principle established in Walton v. Shelley. This court, soon after that case, adopted a similar rule, and similar decisions have been conformed to it. The sound reason, upon which the principle has been established in this court, arises from the injury to the public, if a negotiable security might be destroyed by the testimony of a man, who had given it currency. The law will not permit him to testify that, by holding out a credit to the world, he had put into

circulation a void security. The limitation of the rule clearly results from the reason of it. A party to the instrument shall not be a witness to prove that, at the time he gave it currency, it was void. But to any facts happening afterwards, he may, if not interested, be permitted to testify.

In this case Hunting is offered to prove that after the negotiation of the note to the plaintiff, and before it was payable, he paid the plaintiff fifty dollars, and gave him his note for the balance. These are facts, which are consistent with the good faith of the witness. His testimony would establish the validity of the note, when the plaintiff received it, and would not destroy it: and as he had no interest in the event of the suit, he ought to have been received as a competent witness. The verdict therefore must be set aside and a new trial granted.

41.

BROWN ET AL. v. BABCOCK ET AL., 3 R. 31.

The opinion of the court was afterwards delivered by

PARSONS, C. J. As the plaintiffs in their declaration* admit Glover to be their agent in this transaction, they are bound by this admission; and if they fail in this action, they cannot have recourse to him as the purchaser. If therefore he has any interest, he is called to testify against that interest. But in fact he has no interest; for if the defendants should pay the money to him on his account, he would then be chargeable to the plaintiffs as for money received to their use. And if the money is not paid to him, the plaintiffs can have no action against him for the price of the goods.

There does not appear to be any weight in the second objection. The rule that a man shall not be permitted to invalidate his own indorsement, is confined to negotiable securities: and in those cases he may, if not interested, testify to any facts, excepting such as may prove the security void at the time of his indorsement. But if the rule extended to the indorsement of bills of lading, in the present case Glover was not called on to invalidate, but to explain his indorsement. Upon his explanation the title of the defendants to the goods remains unimpeached: and as it does not appear that they have any cross demands against Glover, it must be immaterial to them, whether in the sale he acted as agent or as principal.

We are all satisfied that he was rightly admitted as a witness, and that judgment must be entered according to the verdict.

42.

PAUL v. FRAZIER, 3 R. 33.

PARSONS, C. J. This is an action of the case to recover damages against the defendant for seducing the plaintiff under a false pretence of courtship and intention of marriage, and for getting her with child, whereby her reputation has suffered, and her peace of mind been injured. After a verdict for the plaintiff on the issue of not guilty, the defendant moves to arrest the judgment. And we are of opinion that judgment must be arrested. An action of this nature is not given by statute; and there is no principle of the common law, on which it can be sustained. Fornication and adultery are offences in this Commonwealth created by statute. And the declaration

* One Count in the declaration charged the goods as sold "by the agency of Lewis Glover."

amounts to a charge against the defendant for deceiving the plaintiff and persuading her to commit a crime, in consequence of which she has suffered damage. She is a partaker of the crime, and cannot come into court to obtain satisfaction for a supposed injury to which she was consenting.

It has been regretted at the bar that the law has not provided a remedy for an unfortunate female against her seducer. Those who are competent to legislate on this subject will consider, before they provide this remedy, whether seductions will afterwards be less frequent, or whether artful women may not pretend to be seduced in order to obtain a pecuniary compensation. As the law now stands, damages are recoverable for a breach of promise of marriage: and if seduction has been practised under colour of that promise, the jury will undoubtedly consider it as an aggravation of the damages. So far the law has provided; and we do not profess to be wiser than the law.

43.

THE PRESIDENT AND DIRECTORS OF THE UNION BANK v. THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES, 3 R. 74.

If A, confiding, though improperly, in the mistaken affirmation of B, pay him money; A shall recover it back in an action for money had and received.

PARSONS, C. J. It appears from the case that on the 5th day of August, 1805, the Union Bank, being indebted to the Branch Bank, paid their debt to the messenger of the Branch Bank, who had sent him to the Union Bank to receive it. On the return of the messenger to the Branch Bank with the payment he had received, the officers of that bank supposing by mistake that the two checks drawn by Rawson were received in payment from the Union Bank, and those checks being bad, they sent them to the Union Bank, who crediting the affirmation of the Branch Bank, received the checks and paid the Branch Bank for them. This payment was made by mistake; and the Union Bank may well maintain an action to recover back the money, unless they have lost their right of action by their own laches, in not seasonably detecting the mistake, or in not collecting the money due from Rawson on those checks.

In considering the facts in the case it appears that the messenger was the servant of the Branch Bank only, and that if he committed any error in his returns of payment from the several banks, the Union Bank is not responsible for those errors. Whatever delay there was in that bank, in not collecting the checks, arose from their confiding in the mistaken affirmation of the Branch Bank; and although this confidence might be improper, yet the Branch Bank, whose affirmation was the occasion of it, cannot take any advantage of it, they committing the first fault.

Let judgment be entered for the plaintiffs according to the agreement of the parties.

44.

THE COMMONWEALTH v. SNELL, 3 R. 82.

The defendant moved for a new trial on the evidence as it should be reported by the Chief Justice, before whom the trial was had.

The report was, that upon the trial it was proved that the defendant passed

the note described in the indictment to Clement Bunker as a good note made by Raymond Smith: that Bunker showed the note to Smith, who examined it, took a copy of it, and declared it to be a forgery: that Bunker took out a warrant against the defendant to apprehend him for passing the said note as good, knowing it to be forged: that the defendant absconded: that Thaddeus Snell, a brother of the defendant, called on Bunker, and gave him his security for the note: and that by the contrivance of Bunker and Thaddeus Snell the note was secreted, and it was not in the power of the Solicitor General to produce it in evidence.

Raymond Smith, the supposed maker of the note, was then called as a witness, on the part of the Government, to prove the note to be a forgery. The defendant's counsel objected to his being sworn, because the note was not produced, and there was no evidence that it was secreted by the agency or privity of the defendant. The Chief Justice overruled the objection, proposing to reserve the question. Smith was then admitted, and swore that the note shown him by Bunker was forged.

If the note was duly proved to be forged, there was satisfactory evidence that the defendant, when he passed it to Bunker, knew it to be forged; but without R. Smith's testimony, there was not evidence that it was forged. If therefore he was improperly admitted a witness, the conviction is wrong, and the verdict ought to be set aside. At the defendant's motion the Chief Justice reserved this point for the opinion of the whole court whether the conviction was right.

The Chief Justice mentioned that all the Judges, after full consideration, were of opinion that the conviction was right; that in discussing the subject two points had arisen: the first, whether Raymond Smith, in whose name the note was alleged to be forged, was a competent witness; and secondly, if he was whether his testimony, under the circumstances of this case, was properly admitted.

On the first point his honour observed that formerly, both in civil and criminal prosecutions, the witness was held to be incompetent, if he was interested in the question; that in England, since Lord Chief Justice Parker's time, the rule had been altered, and no witness was now excluded from testifying by reason of any supposed interest, unless he was interested in the event of the suit; or unless the verdict in the cause, which ever way it may be found, could be given in evidence in any other action, in which he was a party; that in England the party, whose name is said to be forged, cannot now be a witness; for he is considered as interested, because, if the instrument is found by the verdict to be a forgery, it is impounded by the court, so that it cannot again be used as evidence in an action against him; that in this state, for a period of thirty years at least, a witness has been considered as competent, both in criminal and civil prosecutions, unless he was interested in the event of the suit; that in the present case, whether the defendant was acquitted or convicted, Smith might be sued on the note in question as a genuine note, and the verdict upon this indictment could not be given in evidence; for although an instrument found by verdict to be forged is retained on the files of the court, yet any person interested may have a copy, by which to form his writ, and a *duces tecum* to the clerk to bring the original into court on the trial; and therefore that Smith was properly admitted to testify, the objection against him going only to his credibility.

On the second point it was observed that on the trial of indictments for forging an instrument, or for knowingly passing it as genuine, no rule of law required, as indispensable, the production to the jury of the forged instrument; that the instrument alleged to be forged must be so far described in the indictment, that it may appear that forging it is an offence; and this de-

scription, as well as the forgery, must be proved by the best evidence the nature of the case will admit: that reading the instrument is better proof of its contents than any parol evidence; and that verbal testimony to the signature of a written instrument produced in court will be more satisfactory than testimony to the signature of an instrument only referred to by the witness. The production therefore of the instrument in evidence must not be dispensed with, where it is practicable. But if the instrument cannot be produced, the prosecutor being in no fault, and more especially if it be secreted to protect the offender, the next best evidence will be admissible, and if it satisfy the jury of the defendant's guilt, it is a legal foundation for a verdict against him. It may often happen that when the instrument is not produced, there may be no other evidence, which will satisfactorily prove the description, or the forgery, of it, in which case the defendant must be acquitted.

In this case the note was not produced, and there is evidence that it was secreted, if not by the agency of the defendant, certainly for his protection. Bunker swore that the defendant passed a note to him purporting to be a note signed by Smith, which he showed to Smith, who declared it to be a forgery, and took a copy of it. Smith swears that he took a copy of the note shown him by Bunker, that it comported with the description in the indictment, and that it was a forgery. The testimony was legal and direct, and if the jury believed it, the indictment was proved.

The defendant's counsel on the trial cited the case of the Commonwealth v. Hutchinson, where Castle, whose note was alleged to be forged, was rejected as an incompetent witness, because the note was not produced. But in that case the witness had never seen the note; and the present Court was informed by one of the Judges present at that trial, that the ground of the decision was on the incompetence of the evidence offered under all the circumstances of that case, as it was admitted by the Attorney General that he had no other evidence.

In the case of Rex v. Aickles, (Leach's C. L. 330,) the defendant was indicted for stealing a bill of exchange; and it appearing that he had passed the bill, and that the holder refused to produce it, parol evidence of the bill was for that reason admitted.

A new trial was not granted.

45.

BARTLETT v. WILLIS, JUN. AND OTHERS, 3 R. 86.

PARSONS, C. J. The defendants move for a new trial on two grounds. 1st. Because the judge admitted the bond declared on, to go in evidence to the jury, when there was no evidence that the sureties had been approved by two justices of the peace, *quorum unus*.

2. Because the evidence in the cause did not prove that Willis had committed an escape within the true intent of the condition of the bond.

The direction of the statute that the sureties should be approved by two justices is given to prevent oppression in the creditor by his refusing the bond, when the sureties are sufficient. If, therefore, he does not allege the insufficiency of the sureties, but is satisfied with them, and agrees to take the bond, the intent of the statute is complied with, and there is no necessity for the approbation of the sureties by the justices, to entitle the debtor to the privileges and liberty granted by the statute, or to indemnify the sheriff for allowing them. The debtor's not obtaining this approbation clearly cannot be given in evidence under the plea of *non est factum*. But if it

could have availed the defendants by specially pleading it, we should have been willing to have granted a new trial, with liberty for the defendants to plead it: but we are all satisfied that the objection, in whatever form it might have been made, could not have prevailed, and that a new trial on this ground ought not to be granted.

To support the motion on the second ground, the defendants insist that the yard appurtenant to the gaol is a part of the prison; that while the debtor remains in any part of the prison, he does not commit any escape; that at common law the sheriff might allow the debtor the liberty of the yard at all times; that the statute does not restrict the power, which the sheriff before had, but is only mandatory; and that it appears from the report of the judge that the prisoner was not without the gaol yard. From these premises they conclude that no escape within the condition of the bond has been committed.

If these premises are correct, the conclusion seems to be just.

At common law, the sheriff had power to appoint his own prison in any part of his county, in which he might confine debtors in execution. The intention of imprisonment for debt is that the creditor may hold the body of his debtor as a pledge for the payment of the debt. The value of this pledge must depend on the ability and inclination of the debtor to pay. If he is not able, it is worth nothing, and after the expiration of thirty days, two justices of the peace, each being of the *quorum*, may, on his application discharge him from his imprisonment. If he has ability to pay, he is to be restrained of his liberty, until he is willing to satisfy his creditor. And for this purpose the law obliges the sheriff to keep him *in salva et arcta custodia* until he pay the debt. And that he may be safely and closely kept, he must be confined in some house appropriated by the sheriff for his prison for debtors in execution. And it is a rule of law that a prisoner, who is in execution for debt, ought not to be suffered to go at large or at his liberty, neither within the prison, nor without the prison; Dalt. Sher. 485. And to suffer a prisoner to have greater liberty than the law allows is an escape; Imp. Sher. 224. The escape is committed by being out of the legal custody of the sheriff; and if the debtor has a liberty inconsistent with that custody, he cannot be said to remain in legal custody. These observations are confined to sheriffs, who have the appointment of their own gaols for debtors in execution. For if these sheriffs could lawfully make not only any house, but any lands of their own, a prison for debtors, and could give the debtors the liberty of all those lands, the design of the imprisonment, to compel a wealthy debtor to pay his debt, would be in a great measure defeated. A lord of an extensive manor might be made a sheriff, and he might make the whole manor his prison for debtors, taking bonds from them to continue true prisoners within his prison.

The defendants' counsel have cited some cases respecting escapes from the Marshalsea and Fleet prisons. These prisons come under a different consideration. They are not the prisons of the sheriffs; they are kept by the marshal and warden, and may be located by the rules of the courts, to which they respectively belong. By these rules, lands and houses adjoining to these prisons are made a part of them, so far that debtors in execution may be in lawful custody within the rules; and it is no escape, unless they go without the rules. This liberty arose from the prisoners being so numerous that the house would not hold them; 1 Lev. 254 But it is still in the power of the court, to which the prison belongs, to restrain any debtor from the liberty of the rules. And if, after such restraint, the debtor have the liberty of the rules, it will be an escape; Noy. Rep. 38; 1 Bulstrode, 145.

The common law upon this subject has been in some respects altered by

our statutes. Here the court of general sessions of the peace can alone erect and maintain gaols; and they have the power of locating them, so that they are placed within the towns, in which the courts are by law holden. Besides the gaol house, the sessions may erect houses or apartments belonging to the prisons, and may fix the boundaries of the yard appertaining to the gaol; and these houses and apartments, together with the yard may be considered as part of the prison. The sheriff has the custody of the gaol, and of all the prisoners lawfully committed. The county is answerable to him for any escape of a debtor through the insufficiency of the gaol, for which he has been holden liable to the creditor.

Neither the sessions, nor any other court, nor the sheriff, can alter the nature of that custody, in which he is obliged by the common law to keep debtors committed to him in execution. This custody must be safe and close, and the debtor must be confined, not only within the prison, but within the gaol house. This imprisonment, required by the common law, was supposed to be, in certain cases, unnecessarily rigorous; and the legislature, by the provincial statute of 4 G. c. 2. interposed for the relief of debtors. The provisions of that statute, long since expired, have been substantially re-enacted by the statute of 1784. c. 41. only substituting for the obligee the creditor in the place of the sheriff.

By this statute any prisoner for debt shall be allowed to have a chamber and lodgings in any of the houses or apartments belonging to the prison, and liberty of the yard within the same in the day time, but not to pass without the limits of the prison, upon payment of reaconable chamber rent. Provided he give bond with sufficient surety or sureties to the creditor in double the sum for which he was imprisoned, conditioned that from the time of executing such bond he will continue a true prisoner in the custody of the gaoler, and within the limits of the prison, until he be lawfully discharged, without committing any manner of escape.

From the language of this statute it is manifest that the legislature intended to give the debtor a privilege he could not before legally enjoy. It is not mandatory to the sheriff to grant indulgences to debtors, which he might have granted at his pleasure; but it vests in the debtor a right, which the sheriff is obliged to allow. If before the statute, the sheriff might have allowed to debtors chambers in the apartments belonging to the gaol, and the liberty of the yard at all times, he might have taken bonds from them, to indemnify him against their escape, if the intention of the bond was *bona fide* to secure their imprisonment; 1 Saund. 161; 1 Lev. 254. And if there was an escape, the debtor would only be obliged to pay the sheriff the debt, and the costs he had expended. The statute was therefore quite unnecessary, unless it be improperly supposed that the sheriff would refuse a reasonable indemnity, which the debtor now can more conveniently secure to him, than by stipulating to pay the creditor double the debt according to the terms of the statute.

This reasoning is confirmed by referring to some former statutes on this subject. By the provincial statute 4 G. 2, a prisoner for debt was to be allowed the liberty of the yard, at all times, on his giving bond to the sheriff for his keeping within the limits of it; and if there was an escape, the sheriff was protected against an action by assigning the bond to the creditor, who might thereupon have judgment for his debt. According to the argument of the defendants' counsel, that statute was merely mandatory, the sheriff having a discretionary power to make the same allowance, on receiving the same indemnity. And yet by the provincial statute of 7 and 8 G. 2, the provisions of this statute was considered as encouraging escapes, to prevent which more effectually, the creditor was enabled to recover on

his bond double his debt. Improvident must be the conduct of that legislature to revoke its mandate to the sheriff, because obedience to it encouraged escapes, and at the same time to leave with him a discretionary power, the exercise of which must produce the same mischief.

This reasoning is further supported by the construction of the statute, which authorised the giving of the bond declared on. By the eighth section it is manifest that prisoners for debt are to be received and lodged in apartments in the prison separate from felons; and must there be confined, until they have given the bond required in the ninth section. On giving that bond they may have a chamber and lodging in other apartments belonging to the prison, paying for them; and also the liberty of the yard in the day time within the prison. To prevent the excess of this liberty, the bond is the creditor's security; and if the debtor takes a liberty not authorised by the statute, he does not remain a true prisoner in the custody of the gaoler. Upon the defendant's construction, the condition of the bond allows further liberty than is expressly given by the statute; which cannot be admitted consistently with the manifest intent of the legislature.

We are, therefore, all of opinion, that upon principles of the common law, and upon the construction of our own statutes, if a prisoner for debt, having given a bond to obtain an easement from close imprisonment, be found in the night time, voluntarily without any apartment in, or belonging to the prison, and in the yard appurtenant to the gaol, it is an escape within the true intent of the condition of the bond.

In forming this opinion, we have endeavored to keep our minds uninfluenced by legal precedents. But in fact the present question is not a new one in our courts. In the case of Pond & Metcalf, in Norfolk, A. D. 1802, where the escape alleged was the debtor's lodging part of a night in a barn within the boundaries of the gaol yard, the court held that it was clearly an escape, and would not suffer the point to be argued, and declared that it had been frequently adjudged, that if the debtor was in the gaol yard in the night time, it was an escape, and a breach of the condition of his bond. Many other cases are also recollected, in which the same decision was had; and to give judgment in this case for the defendants would contradict other judgments of this court heretofore rendered, and which were acquiesced in by the parties; and destroy the authority of precedents arisings from former judicial decisions.

The case of Heard v. Baldwin in Middlesex, has been mentioned as recognizing a different principle. In that case the debtor had given bond to obtain the liberty of the yard in the day time, and in consequence thereof, had been indulged with that liberty. On examining the bond, it appeared not to pursue the statute; and of course it would not justify the sheriff in granting that indulgence; but it was holden, that as the debtor had not exceeded the liberty allowed by the statute, it was no escape. If that case be law, it does not militate with the present judgment, for the debtor was not within the yard and without any apartment in the prison in the night time. But we all exceedingly doubt whether that case is law; for a bond not pursuing the statute must be considered as no bond, and the indulgence of the sheriff was therefore not authorised by the statute, and was a liberty, to which the debtor was not by law entitled.

Judgment according to verdict.

46.

OLIVER v. GREENE, 3 R. 137.

PARSONS, C. J. On the facts disclosed by the case, the court are called

upon to determine what insurable interest the plaintiff had in the schooner Hiram, when she was lost, for which he is entitled to recover on this policy.

There is no question as to one moiety of the schooner, which was the absolute property of the plaintiff: the disagreement of the parties is confined to the other moiety, which he hired of Mayberry a part owner.

It appears from the facts that the plaintiff had hired of Mayberry his moiety for eighteen months: that for the time he was to pay a certain sum per month; and if the schooner was lost during the term, he was to pay Mayberry for his half part $1,800, which sum it is not contended was above the value of half the vessel.

By virtue of this contract the plaintiff had, immediately on its execution, a special property in Mayberry's moiety, which was at his risk during the term. The contract was fair and legal; and the plaintiff might indemnify himself against the loss by causing himself to be insured. When the schooner was lost, he lost the whole of her: of one moiety he was the absolute owner; and of the other moiety he was the special owner, being liable to pay for her at an agreed price. We are therefore of opinion that the plaintiff is entitled to recover of the assurers the sum insured on the vessel, he being interested in her to that amount.

It is stated that the insured gave no information of the nature of his interest in the schooner, and on this ground it has been contended that the plaintiff ought not to recover. If the concealment was of a material fact, undoubtedly the policy would be void; but it is not stated that the fact not communicated was material, and the court cannot presume that it was. Indeed, it appears from the case that this was not made a point; for it is admitted that the plaintiff is entitled to recover something from the underwriters. Judgment must be entered for the plaintiff conformably to the agreement of the parties.

There being in this policy a clause, that if there be an over insurance the underwriters shall be answerable for the interest insured according to the priority of their signatures: and it appearing, that of $5000, the whole sum insured, 2000 were on the cargo, of which there is no loss; each underwriter is to have 2-5ths of his subscription deducted. The remaining 3-5ths on the vessel not being an over insurance, the underwriters must pay respectively 3-5ths of their subscription, after deducting their several proportions of the sums agreed on by the parties.

47.

NEWALL ET AL., ADM'RS, v. WRIGHT, 3 R. 138.

PARSONS, C. J. This cause has been very well argued by the counsel on each side. The execution of the lease declared on being admitted: and it being agreed that no rent has been paid, the plaintiffs must recover, unless they are barred in consequence of some of the facts disclosed by the case.

The defendant insists that the plaintiffs are barred, because on the same day, and at the same time, the lease was executed, the intestate conveyed to him in fee simple, the premises demised, on condition that the conveyance should be void on payment of $1000, in five years, with interest, to be paid annually, which condition has never been performed: which mortgage, he says is in law an extinguishment, or at least a suspension, of the term created by the lease.

It is generally true that the conveyance of a greater estate, inconsistent with a less estate before granted, shall merge the less estate. But in this case we do not think the rule will apply. It is very clear that when a man, seized

of lands in fee, shall mortgage them in fee, if there be no agreement that the mortgagor shall retain the possession; the mortgagee may enter immediately, put the mortgagor out of possession, and receive the profits; and if the mortgagor refuses to quit the possession, the mortgagee may consider him as a trespasser, and may maintain an action of trespass against him; or he may, in a writ of entry, recover against him as a disseizor. But there may be an agreement that the mortgagor shall retain the possession until the condition be broken, which shall bind the mortgagee: in which case the mortgagor may demise the estate to a stranger, and receive the rents to his own use. 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 permitted to set up his mortgage against the lease. The demise is in law an agreement that the mortgagor shall retain the possession, and receive the profits to his own use.

To avoid this conclusion the defendant's counsel would induce the court to suppose that the lease was first executed, and afterwards the mortgage. When different instruments are executed at the same time, but are all parts of one transaction, it is the duty of the court to suppose such a priority in the execution of them, as shall best effect the intention of the parties. As the lease is for five years, and as the money secured by the mortgage was to be paid in the same time, it is apparent that the lease and the mortgage were intended to execute one contract: and to give complete operation to both these deeds, it is reasonable to suppose the mortgage first executed. For if the lease had been first executed, and the mortgage intended to control the lease, no reason can be given why the lease was not in fact surrendered, as of no effect between the parties. It is therefore our opinion that the execution of the first mortgage is no bar to the recovery of the rent due on the lease.

The defendant further objects that if the first mortgage is not a bar, yet the second mortgage made two days after, on his advancing the mortgagor a further sum of money, is in law a bar to the plaintiff's recovery.

This objection appears to deserve consideration. In considering it, we may lay the first mortgage out of the case, and suppose the question to arise on a lease made by a man seized in fee. who afterwards conveys the premises to the lessee in fee, on condition that the conveyance be void upon his paying a sum of money to the lessee at a future day. If the lessor, having the reversion in fee, make an absolute conveyance of the estate in fee to the lessee, without doubt the term is extinguished. If he convey the estate in fee to a third person, the rent shall pass, as incident to the reversion. But if he mortgage in fee the estate to a third person, the mortgagee may receive the rent as incident to the reversion, or permit the mortgagor to receive it, at his election. If he do no act to show his election to receive the rent, the mortgagor shall recover it of the lessee, who cannot plead the mortgage in bar. But as the mortgagee cannot put the tenant out of possession, if he demand the rent of him, the tenant must pay it to him; and if, after demand, the tenant shall pay it to the mortgagor, he will pay it in his own wrong.

In the case at bar, the mortgagee is the tenant; and he cannot demand the rent of himself. If he refuse to pay it to the mortgagor, he must be considered as claiming the rent, if by law he may be entitled to it: and this refusal is sufficient notice to the mortgagor.

The legal effect of this reasoning is, that when the mortgagee shall refuse to pay the rent, the rent is suspended until the condition of the mortgage be performed, or the estate be redeemed; and upon either event the rent will again be payable, if the term has not in the mean time expired. And during

the suspension the lessee will, as mortgagee, be accountable for the profits to the mortgagor towards the payment of the debt, first keeping down the interest: and of the value of the profits the reserved rent will *prima facie* be evidence. If however the lessee shall voluntarily pay the rent to the mortgagor, he shall not afterwards be accountable, as mortgagee, for the profits received for the same time.

To confirm this reasoning, let us consider the right of Harris, a subsequent mortgagee, which cannot be better than the right of the mortgagor which is conveyed to him. Harris could not put Wright out of possession, he might demand of him the rent. If Wright voluntarily paid it, Harris must account for it with Newall towards the payment of his debt. But Wright might refuse to pay it, claiming the possession under his prior mortgage: and then he must account for the profits to the mortgagor towards the debt. Otherwise the mortgagor, after a second mortgage, might, by collusion with the first mortgagee, receive the rent, and by not applying it to the discharge of the first mortgage, injure the subsequent mortgagee. For he, by his subsequent mortgage, is from the time it was made, entitled not only to the possession but to the profits, against the mortgagor, and subject only to the rights of the prior mortgagee. Therefore if the mortgagor should refuse to redeem, Harris may redeem Wright's prior mortgage; and if Wright had refused to pay Harris the rent when demanded, and had not paid it to the mortgagor, Harris, when he redeems, may compel Wright to account for the profits, as received towards the payment of his prior mortgage.

Upon these principles no injustice is done to the parties, but every equitable allowance is made. If neither the mortgagor nor any subsequent mortgagee will redeem, the presumption is violent that the land, together with the profits received, is not worth more than the debt and interest due. If it should be worth less, and the first mortgagee should sue the mortgagor to recover the deficiency, in that suit the mortgagor will be allowed, not only for the value of the lands when the mortgagee took possession, but also for all the profits he received after possession.

The right of the mortgagee, who had entered under a lease prior to the mortgage, to hold the possession as mortgagee, is admitted by the plaintiff's counsel, if the mortgagee had made his election so to hold; and he insists that the evidence of this election ought to be notice to the mortgagor that he shall no longer hold under the lease: and further, that no such notice appears in the case; but that it is expressly stated that he did not enter under the mortgage, until a time after the term was expired.

The objection that it appears from the case that the mortgagee did not enter until after the expiration of the term, deserves further consideration.

Our statute, granting equitable relief to the mortgagor, provides that he may redeem at any time within three years after the entry of the mortgagee, for the condition broken, in the presence of two witnesses, or by judgment at law. Generally, a mortgagee, when the mortgaged lands without the profits is a sufficient pledge for the debt and interest, does not choose to enter and take the profits for which he must account, until after condition broken. His entry then is to compel payment, by threatening to foreclose the mortgage.

But at the common law, if there be no agreement that the mortgagor retain the possession, the mortgagee has a legal right immediately to enter, an to put the mortgagor out of possession. And this right the statute, fixing the time when the three years shall commence, has never been construed to control. When the mortgagee enters after condition broken, the three years commence on that entry. If he enter before, the three years do not com-

mence until notice by the mortgagee to the mortgagor, after the condition broken, that he shall hold the possession for the breach of the condition.

In the present case the entry after the condition broken could give Wright no new possession, it being also agreed that he took possession when the lease was executed, and has ever since held the possession. The fair construction of the agreement stated in the case is, in our opinion, that Wright, from the time agreed, held the possession of the mortgaged premises for condition broken, and that he is not concluded by that agreement, from claiming the possession before that time under his second mortgage.

The counsel for the plaintiffs correctly contends, that the mortgagee shall be considered as holding under the lease, until he has made his election, and given notice of it to the lessor, to hold under his subsequent mortgage, or done some act equivalent. It is not necessary for us to determine whether the nonpayment of the rent when due is alone evidence of this election and notice. The argument for it is, that nonpayment of money when due is in law a refusal. If the mortgagee held under the lease, this nonpayment is an unlawful act: but if he held under his mortgage, it is justifiable; and the court ought to presume every act lawful until its illegality is proved.

The argument on the other side is, that as he once held under the lease, no mere nonfeasance shall be sufficient to transfer his right of possession to another subsequent title. But we are all of the opinion that Wright's never paying his rent, nor demanding his annual interest, during the term, connected with the lessor's never demanding the rent, nor paying any interest, and suffering Wright to enter for the purpose of foreclosing the mortgage, and not redeeming the same, is sufficient evidence of the lessee's election to hold under the mortgage, and of the lessor's assent that he should so hold.

According to the agreement of the parties in the case, the plaintiff must be called.

Plaintiff nonsuit.

48.

CHURCH, LIBELLANT, v. CHURCH, 3 R. 157.

Libel for a divorce *a vinculo matrimonii* for the cause of adultery. The allegation was, that the respondent within five years last past has deserted the libellant, and committed the crime of adultery.

BY THE COURT. The charge is too loose. It is impossible for the respondent to know, under such a general allegation as this, to what charge she has to answer. The allegations ought to be so certain and definite that the Attorney General may have the means of prosecuting the offenders. This offence seems growing to alarming degree. The *particeps criminis* must be named, or there must be an averment that he is unknown to the libellant. The libel was afterwards amended.

49.

HOPKINS, LIBELLANT, v. HOPKINS, 3 R. 158.

Libel for a divorce. The adultery was alleged to have been committed at Homer in the state of New York; and that appeared to have been the settled place of abode of the parties at the time. The libellant has since removed into this country.

PARSONS, C. J. This is a question upon the construction of the statute. The true meaning of the provision under consideration must be where the

parties live at the time of the adultery committed. I agree with my brother Sedgwick in the case put by him of the criminal party changing his domicil. It would be an unreasonable construction to refuse an application under such circumstances.

The only point we decide in this case is, that when the parties live in another state, and one of them commits adultery there, and the injured party removes into this state, and produces a libel for a divorce, such libel will not be sustained. The state, to which the parties belong, has jurisdiction, and will exercise it, if it appear expedient. Libel dismissed.

50.

AVERY v. THE INHABITANTS OF TYRINGHAM, 3 R. 160.

PARSONS, C. J. In this cause, after a verdict for the plaintiff, the defendant's move for a new trial, and also in arrest of judgment.

On the motion for a new trial we are called upon to decide a question of the first importance to the good order and peace of society, and to the best interests of our fellow citizens. The defendants' counsel insist that a congregational minister of any parish, regularly called, ordained and settled, according to the ancient usages of the country, and faithfully executing the duties of his office according to his capacity, holds his office at the will of his parish, who may remove him at their pleasure. The plaintiff's counsel contend that he holds his office for life, determinable on sufficient cause exhibited and proved before a proper tribunal. If the office be holden at will, the evidence rejected ought to have been admitted, and the action must be sent to a new trial, otherwise the verdict must stand.

It is a general rule that an office is holden at the will of either party, unless a different tenure be expressed in the appointment, or is implied by the nature of the office, or results from ancient usage. A consideration of the nature and duties of the ministerial office is important in determining its tenure. It is the duty of a minister to adapt his religious and moral instructions to the various classes comprising his congregation. He ought therefore to have a knowledge of their situation, circumstances, habits, and characters, which is not to be obtained but by a long and familiar acquaintance with them.

Vice is to be reproved by him in public and private; and the more prevalent and fashionable are any bad habits, the more necessary is it for the faithful minister to censure them, and to rebuke those who indulge them. But if it be a principle that his office and support depend on the will of his people, the natural tendency of such a principle, by operating on his fears, will be to restrain him from a full and plain discharge of his official duties. And it may be added, that the same principle, by diminishing his weight and influence, will render his exhortations and rebukes unavailing and ineffectual. And as it cannot be for the interest of the people to hold a power, probably dangerous, and certainly inconvenient to themselves, I cannot believe that a tenure at will, whence this power results, can accord with the nature and duties of the office. And it may be also observed, that, if the tenure of his office be at will, a minister, after a life of exemplary diligence in the exercise of his official duties, may, when oppressed with the infirmities of age, be removed from office and be dismissed to poverty and neglect. A consequence of this power in a parish will be the deterring of young men of information and genius from entering into the clerical profession; and devolving the public instruction in religion and morals on incompetent persons, without talents, education, or any suitable qualifications. Thus an office,

which, to be useful, ought to attract our respect and veneration, will be the object of general contempt and disgrace. And an effect of this kind surely every good citizen would wish the laws to prevent, so far as the laws may have power.

But considerations of irresistible weight result from the ancient usages established by our pious ancestors, and wisely continued to this day.

In the settlement of a minister, the parish invite some candidate to preach on probation, that they may have an opportunity to judge of his qualifications, and that he may have some knowledge of the state, temper and principles of the people. If a settlement be agreed upon by both parties, it is the general practice of parishes not having parsonages, to grant a sum of money or other property to the minister, exclusive of his annual salary, which is emphatically called his *settlement*. This name was derived from the uses, to which it was intended the money should be applied by the minister. With it he usually purchased in his town some domicil, where he might have a permanent abode among his people, and be conveniently situated to attend to all the duties of his office.

But if the tenure of his office be at will, it is unquestionably at the will of either party. The minister, therefore, if the parish can remove him at their pleasure, may, at his own pleasure, immediately after he has availed himself of the grant, abandon his office, and carry away his settlement, to the great loss and damage of the parish. The usage of granting a settlement is satisfactory evidence, that the tenure of his office is not at will, but that the ministerial relation must continue until it be dissolved for good cause.

As an encouragement to settle ministers in new towns, where the property of the inhabitants is not large, the practice of granting permanent settlements has been long confirmed by grants from the former Provincial Legislature, and from the General Court of the Commonwealth.

When new townships are sold, two rights are reserved by the government, one as a parsonage for the minister and his successors, and the other for the absolute use of the first settled minister and his heirs. Unwise indeed, and negligent must have been the legislature, in making this charitable provision, if the first minister, soon after his settlement, might resign his office at his own will, and retain for himself and his heirs the fruits of the public beneficence.

But in forming my opinion I am not confined to inferences drawn from the practice of towns or parishes in the settlement of ministers, or from the intent of legislative grants. Before and since the revolution, this question has been considered by the courts of law, in many actions sued by ministers for the recovery of their salaries. And it has been the uniform opinion of all the judges, who have successively filled the bench of our highest Judicial Court, that when no tenure was annexed to the office of a minister by the terms of settlement, he did not hold the office at will, but for life, determinable for some good and sufficient cause, or by the consent of both parties: and many cases have been mentioned, where this opinion was declared. And no case has been produced or referred to, by the counsel for the defendants, where a different opinion has been given.

The counsel for the defendants have contended that, admitting the contract of settlement before the revolution was not at will, the constitution has altered the law; and that now the tenure of the minister must be at-will. The part of the constitution relied on is the provision in the third article of the declaration of rights which secures to towns, &c. the exclusive right *at all times* of electing their public teachers, and of contracting with them for their support and maintenance. The argument is in this form: A town shall at all times elect its public teacher, but if after one be elected, the

town cannot remove him at pleasure, then there will be a time when the town cannot elect a public teacher, the office being full.

This argument certainly will prove much. If the town, in the election of a public teacher contracts with him for certain number of years, by this construction it must have a right to break its contract solemnly made. A conclusion so unreasonable and unjust, it is supposed, the counsel for the defendants are not willing to admit. The fair and natural construction of this provision is, that a town, &c. shall at all times, when it has no public teacher, have the exclusive right of election, but no right to violate its own contracts solemnly and deliberately made.

This article of the constitution has without doubt made some alteration in the ecclesiastical establishments of the state. Under the colonial laws, the church members in full communion had the exclusive right of electing and settling their minister, to whose support all the inhabitants of the town were obliged to contribute. And when the town neglected or refused suitably to maintain the minister, the county court was authorized to assess on the inhabitants a sum of money adequate to his support. Under the colony charter no man could be a freeman, unless he was a church member, until the year 1662; and a majority of the church constituted a majority of the legal voters of the town. After that time inhabitants, not church members, if freeholders, and having certain other qualifications, might be admitted to the rights of freeman. In consequence of this alteration, a different method of settling a minister was adopted under the provincial charter. The church made the election, and sent their proceedings to the town for their approbation. If the town approved the election, it also voted the salary and settlement. When the candidate accepted, he was solemnly introduced to the office by ordination, and became the settled minister, entitled to his salary and settlement under the votes of the town. If the town disapproved, and the church insisted on its election, it might call an ecclesiastical council; and if the council approved the election, the town was obliged to maintain the person chosen, as the settled minister of the town, by the interference of the court of sessions, if necessary; but if the council disapproved, the church must have proceeded to a new election.

By the constitution the rights of the town are enlarged, if it choose to exercise them, and those of the church impaired. If the church, when their election has been disapproved by the town, shall unwisely refuse to make a new election, or the town, for any cause, shall abandon the ancient usages of the country in settling a minister, it may, without or against the consent of the church, elect a public teacher, and contract to support him. And such teacher will have a legal right to the benefit of the contract, although he cannot be considered as the settled minister of the gospel agreeably to the usages and practice of the congregational churches in the state. An adherence to these usages so manifestly tends to the preservation of good order, peace and harmony among the people in the exercise of their religious privileges, it may be presumed that a departure from them will never be admitted by any town, but in cases of necessity.

It has been objected that a minister holds his office at his own will, because his town have no legal remedy, if he abandon his office, and therefore that he should also hold at the will of the town. The conclusion is certainly just, if the premises were correct. But a minister does not hold his office at his own will; and if he abandon it without cause, and without the consent of his town, the inhabitants may recover at law, such damages as they have sustained by his injurious conduct. In Cumberland before the revolution, Mr. Wiswall, a settled minister of the parish of New-Casco, in the town of Falmouth, left his parish without its consent, and was ordained over the epis-

copal church in that town. The parish brought an action against him to recover damages for his leaving his office. There was no objection made by the court, or the defendant's counsel, to the action, as not lying in such a case, but the cause went off from a variance between the declaration and the contract of settlement.

It is further objected that the minister ought to hold his office at the will of either party, because there is no jurisdiction competent to declare when the office is forfeited, or when the contract may be dissolved; and that the custom of applying to an ecclesiastical council may be rendered nugatory by either party refusing to concur in the appointment.

This objection deserves a particular consideration. It is the duty of a minister to teach by precept and example. If his example is vicious, he is worse than useless. Immoral conduct is then such misfeazance, as amounts to a forfeiture of his office. I do not mean to include mere infirmities incident to human nature, and to which an habitually good man is sometimes liable. Negligence also, or a wilful and faulty neglect of public preaching, or of administering the ordinances, or of performing other usual parochial duties, is such a non-feazance, as will cause a forfeiture of the office. In either of these cases, or in both, the town may, at a legal meeting, declare the office forfeited, assigning in their votes the causes of the forfeiture, and of their dismission. If the minister do not resist no further question will arise: if he still claim the office, and sue for his salary, the charges made by the town, as creating a forfeiture, are questions of fact properly to be submitted to the jury. If they find the allegations true, the minister will not be considered as holding his office after the vote of dismission. If the allegations are false, justice requires that he shall recover his salary. These allegations the jury are competent to enquire into, and, on such enquiry ultimately to decide. And doubtless they would be willing to relieve a town from the burthen of supporting a vicious and unworthy minister, as they would to aid an exemplary and faithful one, in recovering his stipulated salary.

There are also objections to a minister founded in questions of doctrine and discipline. A town may sometimes desire a dissolution of the ministerial contract, from its impoverishment, by a great part of its inhabitants annexing themselves toother denominations of christians, or from other causes. A minister may also desire his dismission from various causes. In all these cases therefore, and also on charges of immorality and neglect in the minister, the parties, if they cannot agree to dissolve the contract, may call to their assistance an ecclesiastical council mutually chosen: and their advice, technically called their result, is so far of the nature of an award made by arbitrators, that either party conforming thereto will be justified. If in a proper case for the meeting of an ecclesiastical council to be mutually chosen, either party should, unreasonably and without good cause, refuse their concurrence to a mutual choice, the aggrieved party may choose an impartial council, and will be justified in conforming to the result.

Thus a reasonable tribunal is established to decide on all cases of difficulty and controversy between a minister and his people: a tribunal founded in ancient usage, resorted to in practice, and probably in many cases, but certainly in one case, in which I was counsel, supported by the opinion of all the Judges of the Supreme Judicial Court. In the case of Fuller v. The Inhabitants of Princeton, the inhabitants had charged the minister with opposition to the Independence of the United States, and with hostility to the principles of the revolution, on the success of which depended the preservation of our civil and religious privileges. They stated that they had requested Mr. Fuller's concurrence in the choice of a mutual council; that

the unreasonable refused his concurrence; that thereupon they called an *ex parte* council, who advised to the dismission of their minister; and that they had dismissed him accordingly. Mr. Fuller contended that he was always willing to submit the controversy to a mutual council. On this point evidence was given on both sides. The court in their direction to the jury, instructed them, that if they were satisfied, that the town had offered Mr. Fuller a mutual council, and he had unreasonably refused to agree to one, then the town was justified in proceeding conformably to the result of an *ex parte* council. But if they were satisfied that Mr. Fuller had always been willing to submit the controversy to the result of a mutual council, then the result of an *ex parte* council, and the proceedings of the town pursuant to it, were in law a nullity.

Upon the whole view of the subject, I am entirely satisfied that the conduct of the judge excepted to was perfectly right.

I see no reason for arresting the judgment after verdict, for though there are informalities in the declaration, it appears there was a good cause of action. A title defectively set out is good after verdict, but not a title, which, in itself appears defective.

The whole court concurring, there can be no new trial, and judgment must be entered according to the verdict.

51.

BOYNTON v. KELLOGG, 3 R. 191.

PARKER, J. It appears from the declaration in this case that the plaintiff had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This of itself would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than a bare statement of it. A gentleman, under pretence of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy, which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, inadequate as it is, is to be resisted or reduced by urging her ignominy, as a reason why she should not recover. To permit such a defence would be a reproach upon the administration of our laws.

PARSONS, C. J. concurred, and observed that the doctrine laid down by Lord Kenyon, in the case cited for the defendant, was good law. In common cases, where character is in issue, undoubtedly evidence of the public opinion is to be received.

The only point decided in the case at bar is, that when, after a promise of marriage, a woman is seduced and deserted by her lover, in consequence of which she acquires a bad character, he shall not be permitted to avail himself of that character, in mitigation of the damages, in an action brought by her for the injury arising from the breach of his promise to marry her.

Judgment according to the verdict.

52.

COOKE v. GIBBS, 3 R. 196.

PARSONS, C. J. Notwithstanding the defendant, by having taken the oath prescribed for poor prisoners, has been liberated from imprisonment on the

execution issued upon the judgment disclosed in this count; yet an action of debt lies on this judgment, because the statute provides that it shall remain in force to all intents and purposes; but the debtor's body, his wearing apparel and tools shall not be liable to execution.

In this case the writ commands the sheriff to attach the defendant's estate, and to summon him to answer; and in the declaration the plaintiff has averred that the defendent has had the benefit of the poor debtor's oath. There is a demurrer to the declaration. The defendant has assigned several causes of demurrer. One is that the sheriff is commanded to attach the defendant's estate, without excepting his wearing apparel. This is an exception to the writ, the defects of which, when not apparent on the record, must be shown by a plea in abatement. But if the writ be bad and insufficient upon the face of it, the court may *ex officio* quash it. The defendant insists that the statute of 1784, chap. 28. prescribing the form of original writs, has not authorised the writ in this case; that pursuant to the statute, an original writ in debt must be either against the estate and body of the defendant, or only a summons to appear, and that this writ pursues neither of the forms.

The statutes have, in several cases, prescribed the outlines of the forms of several writs, but not of all the writs in use. Where the legal remedy sought by the plaintiff may be obtained by a writ conforming to these outlines, he must sue out such a writ: and if the writ he shall sue materially vary from those outlines, the court may *ex officio* abate it. But when the remedy he is entitled to cannot be obtained by any writ conforming, in its outlines, to these prescribed by statute, it has been the ancient and constant practice of the court to grant him a writ, by which he may obtain his remedy. Thus we have no form of writs of error, of review, or of *scire facias* against bail, or of execution in dower, where a woman has been divorced *a vinculo*; and yet when the remedy sought required any writ of these kinds, the court have always granted it. By an ancient English statute, the masters in chancery, whence all original writs issued, were authorised to form new writs in new cases, that there might not be a failure of justice. In this state that authority, when necessary, has been exercised by the court issuing the writ. Thus when an act passed, directing that an execution should not issue against the body of the sheriff when in office, the court altered the form of the execution given by statute, so as to conform it to this act. By the constitution no representative shall be arrested and held to bail on *mesne* process, while attending the General Court, or *eundo et redeundo*; but his estate may be attached, and when the plaintiff would attach his estate to secure his debt, a writ of attachment may issue, by which the officer is commanded to attach the estate of the defendant, and to summon him. By law executions do not lie against the bodies or estates of executors or administrators, on judgments against them for the debts of the deceased; and executions have been made conformable to this provision of law. So by statute of 1783, chap. 32. s. 9. writs of attachment shall run only against the goods or estate of the party deceased, in the hands of his executors or administrators, and not against their bodies. According to this section, and a former provincial law, of which it is a revision, writs have frequently issued, commanding the officer to attach the goods or estate of a person deceased, and to summon the executor or administrator.

In the case at bar, if the plaintiff had sued out a common writ of attachment, against the estate and body of the defendant, the writ, on plea, might have been abated: if he had sued an original summons, by that he could not have secured the debtor's estate to satisfy his judgment. A writ therefore in this form is the only writ adequate to the remedy, to which by law he is entitled.

In a case like the present, the plaintiff having sued an attachment in this special form, he has done right in showing the exemption of the defendant's body, in order to entitle himself to this special writ. If he had sued a common writ of attachment against the defendant's body and estate, it could not be abated, but by the defendant's plea; for the exemptions being in his favour, he may waive the benefit of them. If he had sued an original summons, the writ could not have been abated; but the defendant, to avail himself of these exemptions, might have pleaded them, so as to cause an execution to issue, with the exemptions pleaded. But if the plaintiff has gratuitously inserted in his declaration allegations, which will entitle him to this special writ, it cannot give the defendant any cause of complaint.

And the objection that, upon these principles, the plaintiff ought in his writ to have excepted from attachment the defendant's wearing apparel and his tools, does not appear to me to have much weight. It sufficiently appears that the plaintiff is entitled to a writ of attachment against the defendant's goods or estate; and the precept to the sheriff must be construed to extend to such estate only, as is by law liable to attachment on this writ. Thus a *fieri facias* at common law is issued against the goods and chattels of the debtor without any exception; but if the sheriff were to strip the debtor's wearing apparel from his body, he would be a trespasser, for such apparel, when worn, is not liable to the execution. Also by the statute of 1805. chap. 100. certain chattels therein described cannot be attached upon any original writ, yet the writ of attachment issues in the usual form, without including an exception of these chattels.

The causes of demurrer, which apply to the declaration, appear to me to be insufficient. It is enough, in a case like this, to allege the discharge in general terms; and if an *alias* execution had issued, and was not returnable, the defendant ought to have shown it.

It is the opinion of the court that the declaration is good.

53.

THE FIRST MASSACHUSETTS TURNPIKE CORPORATION v. FIELD AND OTHERS, 3 R. 201.

Assumpsit. The first count states that the defendants on the 4th day of May, 1798, contracted with the plaintiffs to make and complete a turnpike road from the house of —— Graves, in Palmer, to the house of Reuben Sikes, in Wilbraham, by the 15th day of September, 1798, in the manner specially stated in the count; and then alleges that, although the defendants proceeded to make the road, they did not complete it agreeably to their contract. The second count is *indebitatus assumpsit* for money had and received.

The defendants plead *non assumpsit* to both counts, upon which issue is joined; and having leave to plead double, they plead the statute of limitations to the first count, and the like plea to the second count.

To the second plea to the first count the plaintiffs reply that the defendants did the work fraudulently and deceitfully, so that until a long time after the contract was to be performed, the breach of it was not discovered; and that the action is commenced within six years after the discovery of the fraud.

To the second plea to the second count the plaintiffs reply that the defendants made with the plaintiffs a like contract to that mentioned in the first count, and that they so executed the work that the contract appeared to be completed; and they falsely and fraudulently affirmed that they had completed the contract, and were thereupon paid by the plaintiffs the money mentioned in the second count: that in fact the defendants fraudulently and deceitfully executed the work, and that the fraud was not discovered until a long time after the payment of the money; and that the action is commenced within six years after the discovery of the fraud.

Demurrer and joinder.

PARSONS, C. J. To support these replications, it must be competent for

the plaintiffs to avoid the statute of limitations by replying fraud in the defendants; and the replications must disclose a fraudulent transaction in the defendants, by which the time, when the cause of action accrued, must have been fraudulently concealed from the knowledge of the plaintiffs, until a period within six years before the action was commenced. The statute of limitations is a beneficial statute, when applied according to its true principles. It was made to prevent the delay of bringing suits so long, that the defendant might have lost the evidence necessary for his defence. His witnesses may be dead, or absent, or their memories may fail, or his vouchers may be lost or mislaid. It was not the design of the statute to deprive a man of his just right, because of his indulgence in delaying to support that right by a suit at law. If therefore in an action of *assumpsit* the defendant has acknowledged within six years, directly or indirectly, that the plaintiff's demand is just, this acknowledgment shall take the action out of the statute, upon the construction of law that such acknowledgment is evidence of a promise made within six years.

Neither can the statute be considered as intending to protect any man in the quiet enjoyment of the fruits of a fraudulent execution of a contract, if the action be commenced within six years after the discovery of the fraud. The delay of bringing the suit is owing to the fraud of the defendant, and the cause of action against him ought not to be considered as having accrued, until the plaintiff could obtain the knowledge that he had a cause of action. If this knowledge is fraudulently concealed from him by the defendant, we should violate a sound rule of law, if we permitted the defendant to avail himself of his own fraud. In chancery, where the statute of limitations is pleadable, as well as at law, it is a rule that the statute is no plea to a bill charging a fraud, if the bill be filed within six years after the discovery of the fraud; 3 P. Will. 143. We are therefore satisfied that the plaintiff may reply fraud to a plea of the statute of limitations, and avoid the plea. The principle is admitted in the case of Bree v. Holbech.

The next question is whether the plaintiffs' replications (for they are substantially the same) disclose a fraud in the defendants, sufficient to avoid their pleas of the statute of limitations. It appears that the defendants contracted with the plaintiffs to make for them, within a limited time, a turnpike road between the *termini* stated in the contract; that the road was to be made on a firm foundation; that suitable materials were to be used; that the work was to be faithfully executed; that the defendants proceeded to make the road, but that they made it on a bad foundation, used unsuitable materials, and unfaithfully executed the work; and that they fraudulently and deceitfully concealed the bad foundation, the unsuitable materials, and the work unfaithfully executed, by covering the same with earth and smoothing the surface, so that it appeared to the plaintiffs, and to their directors, that the contract had been faithfully executed. From the view of the allegations in the replications, which, if well pleaded, the demurrers confess to be true, it is certain that the contract was of such a nature as to admit a fraudulent and deceitful execution, and that the fraud was in fact concealed from the knowledge of the plaintiffs.

I am therefore satisfied, although the plaintiffs' cause of action mentioned in the first count literally accrued at the time when the contract was to have been executed, and the one mentioned in the second count accrued from the payment of the money mentioned in their second replication, yet that these causes of action were fraudulently concealed by the defendants themselves from the knowledge of the plaintiffs until long after, and that the plaintiffs brought their action within six years after the fraud was discovered. The necessary inference is, that the fraud of the defendants, disclosed

in the replications of the plaintiffs, is sufficient in law to avoid the statute of limitations pleaded in the defendants' bars, and that the plaintiffs' replications are good.

Replications adjudged good.

54.

HAYNES ET UX. v. MORGAN, 3 R. 208.

PARSONS, C. J. The defendant files his exception to an order of the Judge made in the course of the trial granting the plaintiffs leave to amend their declaration without the payment of costs.

The former part of the fifth section of the act authorizing exceptions, provides that any party aggrieved at any opinion, direction, or judgment of the justice, in any action or process, may allege exceptions to the same, at the term of the said court when such opinion, direction, or judgment shall be given. By the latter part of the section, power is given to the court to enter judgment when it shall appear that any exceptions made in or after the trial are immaterial or intended for delay. Taking the whole section together, it is manifest that exceptions may be made for causes arising during the trial, or from the rendition of judgment; and not for causes arising from any order of the court made in a cause preparatory for trial. An order for amending a declaration, although it may happen to be moved for during the trial, yet as it may be made at any time before the trial, is not a cause for filing exceptions. It is like a rule for bringing money into court, or to plead double. And if the rules for granting amendments are made absolutely against law, and the adverse party is entitled to relief, it must be obtained by writ of error. Judgment therefore must be entered according to the verdict. Although the legality of granting the amendment without costs is not now before the court, it may not be improper to observe on this subject, that at the common law very few amendments are authorized, and those when there was something in some part of the record by which to amend. The authority of this court to order amendments is derived from statutes. The statute of 1782, c. 9, § 4, impowers the court to make rules respecting modes of trial and the conduct of business at their discretion, so that the same be not repugnant to law. Amendments may therefore be the subject of the general rules of the court. By the statute of 1784, c. 28, s. 14, a general power is given to the court to order amendments on motion, without limiting the discretion of the court, as to the nature of the amendment, or the terms on which it may be ordered. The court heretofore have considered that an amendment by which the plea was so changed, as to alter a plea of the case to a plea of debt or trespass, was not within their discretion; for then it would be a different action. So in a writ of entry, to alter the writ and declaration to make it a writ of right, has been refused. So to file a new declaration for a new cause of action, not contained in any of the original counts, has been refused. But all amendments of declarations consistent with the nature of those originally made, and for the same cause of action, are within the statutes.

This discretion of granting amendments may be limited as to the time and the terms by rule of court, which is a law, until it be rescinded or altered. The rule on this subject was made at Concord term, 1780. Under this rule the plaintiff may, in all cases, except after joinder in demurrer, amend his writ and declaration, on paying costs, or agreeing to a continuance, at the defendant's election. In these cases the plaintiff has now a right to amend as of course upon those terms; and the discretion of the court is so far limit-

ed, that the amendment ought not to be denied. But the court may notwithstanding grant amendments in the same or in other cases, and upon other terms, according to its discretion, until it shall be further limited by some new rule.

The discretion of the court in ordering amendments, may be exercised as fully when the court is holden before one justice, as when it is holden before three or more justices: and the exercise of this discretion improperly in a case within it, is not more subject to the correction of the court at a subsequent term when holden by one justice, than when by three or more justices.

Whether it can be corrected, or the party aggrieved be relieved on error, cannot be regularly determined, until the question is before us by writ of error, if the party should be advised to sue out such writ.

55.

BROWN v. BULL, 3 R. 211.

PARSONS, C. J. It appears that the defendant had been employed by the promisee to sell tickets for him; that on an account stated by him there appeared to be due the sum mentioned in the note; and that the note was given for that sum: and it being agreed by the parties that the defendant may have the same defence in this action which he could have if the promisee were plaintiff, he offered to give in evidence that the account stated, according to which the note was given, made the balance too large by $118,25, which sum ought to be deducted: that he was authorized to sell the tickets on credit: and that on that sale there was a loss of that sum, for which he had not credit in the account. To prove these facts he relied on a memorandum on the account stated to prove the loss; and he offered a letter of the promisee, which is in the case, to prove that he was authorized to sell on credit. The judge rejected this letter as irrelevant, and for this cause the first exception is filed.

Upon looking into this letter, we are not satisfied that it contains a sufficient authority to sell on credit at the risk of the managers; nor does it appear that the defendant considered it to contain such authority; for he frankly appeals to the liberality of the managers or proprietors as to any loss he anticipated: but which he produced at the trial no evidence that he had finally sustained.

In the course of the trial, the defendant, to prove payment of $40 in part of the note, gave in evidence a payment of that sum to James S. Dwight to be paid over to the promisee or his attorney: that the attorney was Jonathan Dwight, jr. a brother of the said James: that at the time of this payment the attorney had the note in his custody: and that the two brothers kept their cash accounts together, and not separate. Jonathan Dwight jr. swore that he had no knowledge that the same money was ever received by him as attorney, or ever came to the use of the principal. This evidence the judge directed the jury was not sufficient to prove payment of the $40 to the promisee. And for this direction the second exception is filed.

As to this last exception we are likewise satisfied that the direction was right. To make the case the strongest for the defendant the evidence will admit, it appears that the principal had appointed an attorney with authority to receive this money. This attorney was in partnership with a third person as to other matters; but the third person had no concern or power in the attorneyship. The defendant pays the money to this partner of the attorney, and there is no evidence that the money ever came into the hands of the attorney or his principal. Certainly this cannot be evidence of payment to

the principal. The defendant paid the money to a third person, who had no authority to receive it, and who is accountable for it to the defendant.

It is the opinion of the court that the defendant take nothing by his exceptions.

56.

LANGDON v. POTTER AND OTHERS, 3 Rep. 215.

Trespass quare clausum fregit.

PARSONS, C. J. The plaintiff, to prove his title to, and possession of, the *locus in quo*, gave in evidence an execution issued on a judgment recovered by him against Potter, and the return thereon. By the return it appears that on the 17th of June, 1801, the execution was duly levied on the land of Potter, which included the place where, &c. and of which Potter was in possession: that seizin and possession were delivered to the plaintiff, and the execution was duly returned and registered. On this execution the plaintiff rested his cause, no objection being made to his not producing in evidence the judgment on which the execution issued. The defendants proved that Potter was in possession of the place where, &c. twenty years before the levy, and, notwithstanding the levy, had continued in possession thereof ever since; and they contended that the execution and return were not sufficient evidence of the plaintiff's possession to support his action of trespass. The judge was of a different opinion, and agreeably to his direction the jury found a verdict for the plaintiff. To this opinion and direction of the judge the defendants except and move for a new trial.

The objection to the sufficiency of the plaintiff's evidence is founded on the position that the levy of the execution and its return and registry do not amount to an actual livery of seizin and of possession, to enable the plaintiff to maintain trespass against the defendant Potter for continuing his possession; but that the plaintiff, after the levy, ought to have made an actual entry, before he commenced his suit. And this position is supposed to be justified by the principles of the common law, which apply to the extent of an *Elegit* on a moiety of the debtor's lands. For the sheriff returns on the *Elegit* that he had delivered a moiety of the lands to the plaintiff, which delivery does not give the plaintiff the actual possession, but only a right of entry and of possession.

In the levy of an execution on lands two things are to be considered: the authority of the sheriff, and the rights of the plaintiff resulting from the legal exercise of that authority. In the case of an *Elegit*, the plaintiff's right under the extent is correctly stated in the objection; and this right results from the authority of the sheriff, and from the manner in which it is exercised. It is the sheriff's duty to impannel a jury, who on oath enquire what freehold lands the defendant holds within his bailiwick, and fix the yearly value of them. When the jury have ascertained the lands, and appraised their yearly value, the sheriff delivers just one moiety according to that appraisement, to the plaintiff, to hold until out of the annual profits, as valued by the jury, he receive his debt and interest. The inquisition is then returned and entered of record in the court whence the *Elegit* issued. If the sheriff had in fact put the defendant out of, and the plaintiff in possession under the inquisition, which seems anciently to have been the practice, it was supposed that the defendant had no remedy, if the sheriff's proceedings were irregular, but by moving to set aside the inquisition, because the plaintiff was in possession by a title on record. The rule was therefore establish-

ed that the delivery by the sheriff of the lands to the plaintiff, was a complete execution of his authority without dispossessing the defendant; and that the plaintiff's right was a right of entry and of possession. The plaintiff having this right, might bring an *ejectione firmæ* and eject the defendant; or he might enter peaceably and retain the possession without being considered as a wrong doer. For every man having a right of entry into lands may assert that right; so that he does not commit such acts of violence as will subject him to a criminal prosecution. And this rule, intended to protect the defendant from an illegal dispossession, does no injury to the plaintiff. For, whether he enter peaceably and retain the possession, or whether he enter under an *Habere facias possessionem*, from the time of the entry he shall hold the lands until his debt with interest is paid out of the rents and profits. The postponing of his entry does not, therefore, lessen the fund, out of which his debt is to be paid.

Let us now advert to our statutes, making real estate liable to pay debts, and providing for the taking of it in execution.

The execution may be levied on all the freehold estate of the defendant; and in one case on the rents and profits.

When the execution is levied on real estate, all the defendant's title to, and interest in the estate is transferred to, and becomes the property of the plaintiff, at a reasonable appraisement of the value. In levying the execution the sheriff proceeds without the intervention of a jury. The plaintiff shows him certain lands as the estate of the defendant, and directs the sheriff to satisfy the execution by a levy on those lands. Three freeholders are then selected, one by the plaintiff, and two by the sheriff, if the defendant neglect to choose one, which he may do. These freeholders on oath appraise the land, or so much thereof as is equal in value to the execution and the charges of levying, describing by metes and bounds the land thus appraised. The officer is then expressly directed to deliver possession and seizin of the appraised lands to the creditor. It is also provided that the execution when returned and registered, pursuant to the statute, shall make as good a title to such creditor, his heirs and assigns, as the debtor had therein.

The creditor, therefore, is the purchaser of the estate for the full value according to the appraisement of it by disinterested freeholders; he has the possession and seizin of it, and his title is as good as the debtor had. Although there may be a concurrent possession, there cannot be a concurrent seizin of lands: and as livery of seizin is made to the plaintiff, the defendant can no longer continue seized, and he only being seized, the possession must be adjudged to be in him because he has the right: and having the actual and rightful possession he is immediately entitled to the profits against the defendant. If the defendant shall notwithstanding continue his former possession, it will be an injury to the possession of the plaintiff, who may maintain trespass for that injury. This conclusion results from construing the statute according to the natural import of the words. But justice to the plaintiff requires this construction. He has purchased and paid for the land in the state it was in with all the crops growing at the time of the appraisement, and his execution is satisfied. To consider him, therefore, as not actually seized, and entitled to receive the profits by force of the levy, but driven to an action, if the defendant choose to resist his entry, will be to deprive him of the profits, for which he has paid, and to permit the defendant to receive them, after he had received a valuable consideration for them: and for this injury the plaintiff must be remediless, or seek a remedy by a suit at law to recover damages. When we look into the terms, on which the debtor may redeem his land, it is manifest that the statute con-

templated the creditor as in the immediate reception of the profits. For the debtor to redeem must pay to the creditor, or to the tenant in possession, within a year from the levy, the debt and interest together with the charges and expenses of repairing and improving the estate, deducting the rents and profits that may have been received. This provision necessarily supposes the creditor or his tenant to be in possession, that he may have repaired and improved the estate, and that having received the rents and profits, he must account for them towards the expenses of repairs and improvements. There is also express provision made to turn a stranger to the execution out of possession, who is in under the defendant, when the execution is levied on the rents and profits, if he refuse to attorn and pay the rent to the creditor; and in that case to give possession to the creditor. It seems difficult to doubt the intention of the legislature, for language could not make it more plain.

By the statute of 1788, c. 51, it is enacted that when an executor or administrator shall have lands set off to discharge any execution, the executor or administrator shall be seized and possessed of the real estate so set off to the use of such person as would have been entitled to the money, had the execution been satisfied with money. And the court of probate may make distribution thereof as personal estate. In this statute, made *in pari materia*, the provision is express that the executor or administrator shall be seized and possessed of the estate set off. And no reason can be assigned why an executor or administrator, suing *in auter droit*, shall be deemed seized and possessed, and not a creditor suing in his own right.

It may, however, be objected, that this construction of the statute will be inconvenient, for the sheriff may levy the execution on lands not the defendant's and under color thereof wrongfully dispossess the right owner. When the construction of a statute is doubtful, an argument from inconvenience will have weight. The construction of the statute, which we are now considering, is not doubtful, but very clear; and besides, the inconvenience suggested, if it ever arise, cannot arise in this case, for the judgment debtor was the tenant of the land.

Our opinion is, that when an execution is regularly levied on lands of the defendant, and duly returned and registered, and seizin and possession delivered by the sheriff to the plaintiff, he may, by virtue of the seizin and possession so delivered, maintain either a real action counting on his own seizin, or he may maintain trespass against the defendant, who shall continue his possession after the levy without the plaintiff's consent.

Judgment according to verdict.

57.

RICE v. STEARNS ET AL, 3 P. 225.

Assumpsit by the indorsee of a promissory note against the promisors. The note was originally made payable to Jonathan Symonds or his order, who indorsed it to the plaintiff in these words. "For value received I order the contents of this note to be paid to Merrick Rice at his own risk."

PARSONS, C. J. The interest of Symonds must depend on the effect of his indorsement.

A security negotiable in its creation must, during its negotiation, preserve its negotiable quality; otherwise, when assigned, the assignee would hold a contract by the assignment different from the contract assigned. It is for this reason settled that a negotiable note indorsed in blank, or by a direction to pay the contents to A. B. omitting the words "or his order," is further

negotiable by the holder under such indorsement. It is also settled that when a negotiable security is indorsed, "pay the contents to my use," or "to the use of a third person," or "carry this bill to the credit of a third person," such an indorsement is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. There are other restricted indorsements also made: As "pay the contents to A. B. only." Whether this indorsement is only an authority to A. B. to receive the money for the use of the indorser, or for his own use, if made for value received, or whether in this last case the restriction is not void, and A. B. may further negotiate it, seems not to be settled If the property of the note be vested in A. B., perhaps he will hold it with its negotiable quality, notwithstanding the restriction. But of this we give no opinion.

The case at bar is a restricted indorsement of another kind, and which in practice is very common. The promisee of a negotiable note indorses it to a third person, or his order, for value received, stipulating that the indorser is not to be responsible if the maker does not pay it. If, notwithstanding this stipulation, the indorser is answerable, if the maker do not pay the note, then the witness, Symonds, is interested, and ought not to have been sworn.

Upon consideration, we are of opinion that the promisee, indorsing the note under this express stipulation, is not eventually holden to pay the note, if the maker should not. As the promisee had the property of the note, he might dispose of it on what terms he pleased, with the assent of the purchaser, and the latter cannot complain of the necessary effect of his own agreement: and the indorser cannot be charged upon his own contract, directly against the express intent of it. If this opinion is correct, Symonds, after this restricted indorsement, had no interest in the event of the suit, and was a competent witness.

Another point of some importance arises, which involves the question, whether by this restricted indorsement the property of the note passed to the endorsee, so that he may sue upon it in his own name. If the restriction applied to the quality of the contract, so as to render a negotiable security no longer negotiable, there would be some difficulty in allowing, consistently with legal principles, an indorsement of this effect, to operate as a transfer of the note. But this is not the effect of the restriction: the note remains negotiable in the hands of the indorsee, although he has no remedy against the indorser; and in whose hands soever the note may come, the maker is still liable according to the terms of his original contract to pay to the promisee or his order. The note therefore being the absolute property of the plaintiff, and Symonds being a competent witness, the verdict must stand; and judgment be entered accordingly.

58.

BARNARD v. HARRINGTON, 3 R. 228.

In trover the writ must abate by the defendant's death: and the executor is not compellable to come in and defend.

BY THE COURT. Without giving any opinion as to the second count, it is very clear that the executor cannot be compelled to defend an action for a tort, as trover unquestionably is. The writ is abated by the death of the defendant.

59.

CHASE ET AL. v. LINCOLN, 3 R. 237.

THE COURT observed that the legislature, in requiring three subscribing witnesses to a will, did not contemplate the mere formality of signing their names. An idiot might do this. These witnesses are placed round the testator to ascertain and judge of his capacity, and the heir has a right to insist on the testimony of all the three witnesses to be given to the jury. (Powell on Devises, 69, 70.) They must therefore all be produced, if living and under the power of the court. If it be impossible to procure any one of them, the court will proceed without him *ex necessitate rei*. But no such impossibility appears in this case. For any thing that appears, the absent witness might, with due diligence, have been found, and summoned. The not producing of him may lead to a presumption that his testimony, if produced, would be unfavorable to the probate of the will. At any rate, the rule is too important and too explicit to be dispensed with on light grounds. And they refused to examine the two witnesses produced.

The appellants afterwards waved their right to the production of the third witness; and the decree of the court below was afterwards affirmed.

60.

LEE v. BOARDMAN, 3 R. 238.

The defendant subscribed the policy declared on: and the plaintiff was interested in the ship and freight to a greater amount than the sum by him insured. The ship sailed from Boston on her voyage, December 15th, 1804, and arrived at Sumatra, from whence she sailed July 22d, 1805. with a cargo of pepper, bound to Lisbon or some other port in Europe, for the purpose of selling her cargo. When within three days sail of Lisbon, she was captured by a British frigate, and a prize master and crew put on board, who carried her to the Bermudas, where the ship and cargo were libelled in the Vice Admiralty Court as prize. In May, 1806, trial was had, and further proof ordered. In August following, after another hearing, both ship and cargo were decreed to be restored to the master; who under direction from the supercargo proceeded to New York, at which place he arrived on the 31st of said August. The cargo was there landed in good order, and full freight received by the supercargo. The ship was libeled and sold for the payment of the wages due to the seamen.

The first advice of the capture was received by the plaintiff in a letter from the supercargo, on the 21st March, 1806. On the 25th of the same month, the plaintiff offered to abandon all his interest in the ship and freight to the defendant and the other underwriters, who refused to accept it. the plaintiff never afterwards gave any directions respecting the property, but always referred the supercargo to the underwriters, who declined any interference.

The writ in this case was sued out and dated July 24th, 1806. but was not served on the defendants until the 15th of September following, which was after the arrival of the ship at New York. But it was agreed that this delay was owing to some arrangements attempted to be made between the plaintiff and the underwriters, and particularly an agreement on the part of all the other underwriters to be bound by the event of this action, which was not acceded to by the whole number of the underwriters, until the day on which the writ was served on the defendant in this case.

If upon these facts it should be the opinion of the court that the plaintiff was not entitled to recover anything of this action, he was to become nonsuit, and the defendant recover his costs: if the court should be of opinion that the plaintiff was entitled to recover as for a total loss, the defendant was to be defaulted, and judgment entered for the plaintiff accordingly: And if the opinion of the court should be that the plaintiff was entitled to a partial loss only on vessel and freight, or either of them the amount of such partial loss was to be ascertained by assessors to be appointed, by the court, according to such principles as should be prescribed by the court, and judgment accordingly.

PARKER, J. Upon this state of facts the plaintiff claims to recover as

for a total loss of ship and freight, upon the ground that his offer to abandon on the 25th of March, while the ship was actually in possession of the captors, and under legal process in the admiralty court, vested in him a perfect right to recover, which could not be impaired by any subsequent event not within his agency or control, and not produced by his consent.

The defendant denies that there ever was a total loss; but if there was, contends that the acquittal and restoration of the ship, her safe arrival at New York, delivery of her cargo, and earning freight, are facts which change the total into a partial loss, for which only, he says, the plaintiff can recover in this action. And he contends this with the more confidence, because he says that all these facts happened before the commencement of the plaintiff's action, the writ not having been served until the 15th of September, although it appears to have issued some time before.

On the question made by the counsel, whether the actual suing out of the writ, or the service of it, was the commencement of the action, no opinion need be given; as the decision of this cause rests upon a principle which renders a settlement of that question unnecessary,

That the capture of this vessel as prize, carrying her out of the course of her voyage, and libelling her as prize, gave the insured a right to abandon during the existence of those facts, and to claim for a total loss of ship and freight, can admit of no doubt. The only argument assumed by the defendant's counsel upon this point is, that there facts having happened through the intervention of a power in amity with the United States, they do not constitute a capture in its technical sense, and that the ordinary consequences of a capture cannot flow from them.

But whether there was a technical capture or not is immaterial in the present question, it being well settled that any detention by princes, by embargo or otherwise, gives the insured a right to abandon and claim as for a total loss, as well as a capture by enemies. (Marshal, 483.)

But it seems also well settled that facts like those agreed in the present case do, between insurer and insured, constitute a capture, and draw after them all the consequences of a capture.

English and other foreign writers place the taking of a neutral ship upon the same footing, as it respects a contract of insurance, with a capture by an enemy in open war.

For any loss occasioned by capture, whether lawful or unlawful, and whether by friends or enemies, the insurer is liable. He is also liable whether the property in the thing insured be changed by the capture or not. (Marshal, 423, 432.)

If a neutral ship be taken and carried into the port of a belligerent, under pretence that she belongs to the enemy, or is laden with enemy's goods, this is a capture, because it is done as an act of hostility: and if she be afterwards restored, still it must be considered a capture. (Emerigon Tom.537.)

The assurer is held, whether the capture be just or unjust, whether it is caused by hostility or be for plunder; for in whatever manner it is done, it is a marine accident or peril of the sea; and the insurer is held for all perils of the sea. (Pothier.)

Valin, also, in his commentary on the 26th article of the Ordinance of Louis XIV, says, the assurers are answerable, not only for captures made by enemies, but even for those which are unjustly made by friends, whether allies or neutrals; in one word, for all captures made by reason of hostility, robbery or otherwise.

The taking of this ship being with the intention to make prize of her, as is proved by her being libeled as prize, and as is agreed in the case, there can be no pretence but it was a capture within the principles laid down by the

eminent writers before cited. This capture constituted a total loss of vessel and freight; if the insured chose so to consider it, during its continuance, by abandoning his interest therein to the underwriters. Had he neglected to abandon, until after the restoration of the ship to the master or supercargo, he would have waved his right to consider the capture a total loss. But it appears here that the offer to abandon was during the detention of the ship by the captors, and while she was under admiralty process. His right thereto became vested, and was perfect: and the only question which can admit of an argument is, whether the subsequent restoration, without any act on his part showing an intention to wave the right acquired by the abandonment shall change this total into a partial loss.

And here the defendant contends that as the ship was restored to the master, who under the direction of the supercargo navigated her to New York, where she safely delivered her cargo, and earned her freight, before the commencement of this action, the loss, if ever total, had become partial; and that according to Lord Mansfield's doctrine in the case of Hamilton v. Mendes, the plaintiff ought to recover only for the damage actually sustained.

The doctrine thus advanced by Lord Mansfield is less accurately stated, than was usual for that great man upon subjects of this nature: and indeed, if true in the sense assumed by the defendants, militates with principles which he has established with much more precision, and greater strength of reason.

It should be remembered too, that in the case he was then considering there was no abandonment, until the temporary restraint upon the ship had ceased, and she had resumed the course of her voyage, and indeed nearly terminated it. The doctrine contended for by the assured in that case was, that the capture alone, without condemnation and without abandonment during its continuance, was a total loss. This doctrine he entirely and justly discountenanced; and then expressed his doubts, whether to entitle the plaintiff to recover: the loss should not continue total up to the time of the commencement of the action. It does not appear, that had there been an abandonment while the capture continued, he would not have considered the total loss as continuing. Indeed I see nothing in that case, from which it is to be inferred that a vested right does not accrue to the insured after the abandonment in case of capture, although the vessel be afterwards restored.

It appears to be perfectly well settled, taking the whole course of English authorities upon the subject of insurance into view, that whenever a total loss, in the legal contemplation of the phrase, has accrued, an abandonment or offer to abandon by the insured, gives a vested right to claim for such total loss, and throws the property upon the assurer.

It appears also that in such case the master, or whoever has charge of the property, becomes instantly upon abandonment the agent of the assurer, that the earnings of the ship belong to him, and that, where the cargo is insured, the rise and fall of the market is at his hazard, and to his benefit; so that, upon abandonment seasonably made or offered, the only question would seem to be, whether a right to abandon existed at the time; and if it did, the relation of the parties to the property is fixed by that act, unless where the assurer does not accept, and the assured waves his right, which has not been done in this case.

If this doctrine be not true, but the rights of the parties are held to be uncertain and fluctuating after a regular abandonment under circumstances, which by the laws of insurance constitute a total loss, there seems to be no reason why the commencement of the action should be fixed upon a period when this uncertainty is to cease, rather than the time of rendering the verdict: for until then, if it is upon principles of equity, the door is kept open,

and there is opportunity for an equitable adjustment. But how great the inconvenience would be to the public, and to the parties to the contract, that the degree of responsibility of the insurer should not be known until the end of a lawsuit is attained, must be obvious to every one who considers the importance of having some legal owner of the property abandoned, to prevent its waste and destruction. In the mean time it is out of the power of the assured to calculate with any certainty upon the extent of his funds: his commercial enterprise will be checked, and his plans embarrassed and defeated.

For these reasons, we are all of opinion that the interest of commerce, as well as that of the contracting parties in a policy, require that some period should be established, at which the right of the insured to his indemnity, and of the assurer to the property, should be fixed: and we think we are clearly warranted by sound principles, to fix the time of abandonment at that period.

No case, to our knowledge, has occurred in England precisely establishing this point, though the principles adopted there must lead to this conclusion, whenever a case happens, which will require a specification upon this subject. Indeed the principle seems to be fully admitted in the case of Kemp & al. v. Vigne, (1 Term R. 304; 13 Mass. 102.) where Lord Mansfield himself says that a temporary capture is such a total loss, as that an insured upon interest is warranted in abandoning at the time, if he please. Now no case has been cited, which shows that after an abandonment rightfully made the assurer can resist the payment of a total loss.

Emerigon, before cited, shows that the abandonment under such circumstances is the proper test of the assured's claim. His words are, "If upon a total loss happening, the ship be abandoned, but afterwards arrive safe, or otherwise recover her liberty, the insurer shall nevertheless satisfy the insured as for a total loss; but then they, that is, the insurers, are entitled to all benefits of the voyage."

This is all that is contended for by the plaintiff in the present action; and he seems to have made good his claim.

A case was lately decided in the Supreme Court in the state of Pennsylvania, which presented the same objections, besides others more forcible, against a recovery for a total loss, as we find in the case before us: but they did not prevail; and the principle we have now decided was unanimously assented to by the Judges of that court.

We see no difficulty in the application of this principle in relation to the ship or to the freight: the abandonment applied to both, and the case does not show any act of the assured amounting to a waver of his rights as to either of the subjects of the policy. Judgment must therefore be for a total loss both of vessel and freight.

61.

WAKEFIELD v. LITHGOW, 3 R. 249.

Case against the defendant, as sheriff of the County of Kennebeck for not returning an execution, and for not paying over to the plaintiff monies received by him in satisfaction of the execution after the return day.

The action was tried by review at the last July term in this county, before Parsons, Chief Justice, and a verdict found for the plaintiff, by consent of parties, subject to the opinion of the court on the following facts.

It was agreed that the plaintiff recovered against William Howard hereafter mentioned, the judgment set forth in the declaration, and that an execution issued on that judgment May 5th, 1803, returnable in three months; that in the same month it was

delivered to the defendant to be served; that on the 7th of September in the same year, the execution being then returnable, the plaintiff's attorney, J. Richardson, Esq. wrote the defendant a letter, in which was the following direction; "as the execution is run out, and Mr. Howard, as I learn, is a man of property, I presume the money is ready; and wish you therefore, on the receipt of this, to send me the balance, being 261 dollars 38 cents, as near as you can make it in paper, by mail, and direct the postmaster at Dedham to deliver me the letter immediately on receiving it;" that no letter from Lithgow to Richardson was ever received by the latter, or ever came to the Dedham post office; that the plaintiff, not hearing from the defendant, and the execution not being returned, in December of the same year sued him for not returning it, and the writ was sent to Mr. Whitwell of Augusta, with a request to procure the service of it; that in February following Mr. Whitwell's clerk wrote Mr. Richardson that on enquiry of Lithgow, he said that he had received the money, and had sent it to Mr. Richardson by the mail; that on the 16th of December, 1803, Lithgow received a receipt of Wakefield's dated May 23, 1803, acknowledging to have received of Howard 200 dollars, part of the sum due on the execution, and another sum of 261 dollars 38 cents in cash of B. & W. agents of Howard; that on the 21st of December, 1803, Lithgow enclosed in a letter directed to Richardson at Dedham 254 dollars in bank notes; sealed the letter, and caused it on the same day to be put into the post office at Augusta, which letter the said Richardson never received; that in March, 1804, Lithgow returned the execution fully satisfied.

If the court, upon these facts, should be of opinion that Lithgow ought to be allowed the said sum of 254 dollars, then that sum was to be deducted out of the amount found by the verdict, and judgment to be rendered accordingly, otherwise judgment was to be rendered according to the verdict.

By the Court. The plaintiff is entitled to judgment on the verdict, unless the defendant can, from the facts agreed, support his claim to a deduction of the sum of 254 dollars, sent by him to the plaintiff's attorney, through the medium of the post office, but which was never received by the plaintiff or his attorney. If the defendant was authorized by the letter of the plaintiff's attorney to remit that sum in that manner, at that time, the loss must fall on the plaintiff: if not, the plaintiff must have judgment on the verdict.

When a sheriff has received money to satisfy an execution, it is his duty to return the execution according to its precept; but, by our statute, he is not obliged to bring the money into court, but may retain it until it be demanded of him by the creditor. And if it be demanded of him at any time after he has received it, either before or after the return day, and he shall refuse to pay it to the creditor, the creditor may by action recover it of him, with interest at the rate of thirty per cent. The creditor is therefore to demand his money, and if he direct the sheriff to send it to him by the mail, the money is very properly at the risk of the creditor.

On this principle, presuming that the sheriff had levied the money, the plaintiff's attorney wrote his letter to the sheriff, directing it to be remitted by the mail. But, through the neglect of the defendant, the money had not been levied, and he had made himself liable to the plaintiff for the amount of his execution. The money, which the sheriff received after the return day, he had no legal authority to receive by virtue of the execution. And he might hold it against the debtor, as an indemnity for satisfying the damages the plaintiff had sustained by the defendant's own breach of duty; as the debtor, having paid it for the plaintiff's use, would be discharged, by the payment to the plaintiff, of these damages. The money therefore, which the defendant remitted, was sent on his own account, to satisfy a demand, which the plaintiff had against him; and it must be considered as sent at the risk of the defendant, and not as the money, which the plaintiff had authorized him to send by the post. The case might have been different, if the sheriff, on the receipt of the money after the return day, had given notice of it to the plaintiff, and he, after notice, had authorized the sheriff to remit it by the mail; as this subsequent authority might be considered as recogniz-

ing the conduct of the sheriff, in thus receiving the money, as the act of his agent. Judgment according to verdict.

62.

GROVER, PLAINTIFF IN ERROR, v. HEATH, ESQ. JUDGE OF PROBATE. 3 R. 252.

Error brought to reverse a judgment of this court rendered at October term, A.D. 1805, against the plaintiff in error, in an action of debt upon a bond given by him for the faithful execution of the last will and testament of Enoch Glover, deceased.

By the Court. In the present case the legatees producing no decree for the payment of their legacies, nor any judgment of any court, by which they are ascertained, the former judgment in awarding execution is erroneous, and must be reversed. But the court here will render the judgment, which ought to have been rendered in the original suit.

The Judge of Probate must have judgment for the penalty: and as the plaintiff in error has refused to account upon oath for the personal estate of the testator, which he has received, the Judge of Probate must have execution for the amount of the personal estate, as it stands in the inventory, to recover the same for the use of all persons interested therein.

63.

THE COMMONWEALTH v. ELIJAH MACOMBER, 3 R. 254.

The defendant was indicted at the last October term, for that he "at Berkeley, aforesaid, with force and arms, on the 15th day of December, Anno Domini 1805, wilfully and maliciously, in the night time of the same day, did set fire to, consume, burn and destroy two stacks of hay, and one stack of straw, the property of William Harvey, and then and there in his possession, and of the value of fifty dollars, against the peace of the Commonwealth, and the law in such case made and provided."

PARSONS, C. J. Upon this indictment, which was for maliciously and wilfully burning two stacks of hay and one stack of Straw, the property of William Harvey, the defendant has been tried and found guilty; and he moves in arrest of judgment, because the burning is not alleged to have been done feloniously, when the offence is made felony by statute.

The first question is whether the offence is felony by statute. The statute for the punishment of incendiaries passed March 16, 1805, and upon the construction of this statute must depend the determination of this question.

The first section, which prohibits the burning of any dwelling house in the night, provides that every offender, and every person present, aiding and abetting, and every accessary before the fact, who shall be duly convicted of the felony or offence aforesaid, shall suffer death.

The second section, which prohibits the burning of a dwelling house in the day, or the burning in the night of buildings erected for public use, or the store, barn or stable of another within the curtilage of a dwelling house, provides that every such offender, and any person present, aiding and abetting, or accessary before the fact, who shall be duly convicted of either of the felonies or offences aforesaid, shall be punished by solitary imprisonment, and confinement to hard labour for life.

The third section, which prohibits the burning of buildings for public use in the day, and of certain other buildings, including vessels, whether in the day or in the night, provides that the offender, and any person aiding or con-

senting (leaving out the word present) being duly convicted thereof, (not of either of the felonies or offences aforesaid) shall be punished by solitary confinement, hard labour, fine or imprisonment,

The fourth section, which prohibits the offence, of which the defendant is indicted, and other malicious burnings of a similar nature, (not including buildings or vessels) provides for the like punishment of every such offender, and of any person aiding or consenting, on being convicted thereof, as is mentioned in the third section.

The fifth section, on which the question arises, provides for the punishment of any person as accessary after the fact, who shall, after such felony or offence committed by any incendiary in manner as aforesaid, knowingly conceal or assist such offender, or any accessary before the fact in any such felony or offence.

It is urged that, as this section provides for the punishment of accessaries, after the fact, to all the malicious burnings prohibited by the statute, all those burnings must necessarily be considered as felonies, for there can be no accessary after the fact to a misdemeanor.

It must be allowed that the legislature are not bound to use technical expressions in their statutes; but whatever manifestly appears to be the intention of the General Court, if within its constitutional powers, must have the force of law. It may therefore be admitted, that if the statute has provided for the punishment of accessaries after the fact, as such, to the offence of which the defendant is indicted, the offence, within the true intent of the statute, must be deemed a felony, because otherwise there could not be to it any accessary after the fact.

The offences referred to in the fifth section are there called felonies, and provision is made for punishing as an accessary after the fact any person who shall, after the felony be committed, maintain or assist the principal offender, or the accessary before the fact to such felony. If this section applies to the offences described in the fourth section, the objection to the indictment seems to be well founded.

The offences prohibited in the first and second sections are there considered as felonies, and the accessaries before the fact are expressly named. There are therefore offences described in the statute, to which the fifth section may apply, without extending it to the third and fourth sections. In these sections the offences described are not called felonies, and accessaries before the fact are not named expressly, nor by any reasonable implication; for the words "aiding and consenting in the commission of the offence," naturally include all thus aiding and consenting whether present or absent, and so are principles in a misdemeanor, and do not necessarily extend to accessaries before the fact, who in the statute are not described as persons aiding and consenting in the commission of the offence, but as counselling, hiring or procuring it to be committed.

The doubt has arisen from the very general words in the fifth section, which are "if any person, after any felony or offence done and committed *by any incendiary in any manner as aforesaid*, shall knowingly," &c. But it is reasonable that these last words should be restrained by the word *felony* preceding in the same sentence. For in the construction of penal statutes, where there is any doubt in the case, it is the duty of the court so to construe them as not to multiply felonies, unless the construction be supported by express words or by a reasonable implication.

There is also a particular reason for not considering the offences in the fourth section as felonies. Among the offences described in that section is the offence of maliciously maiming or disfiguring the cattle of another; which cannot be considered as an offence committed by an incendiary. And

it would be unreasonable to suppose that the Legislature should prohibit, in the same section of a statute, a variety of offences, annexing the same penalty to all in the same words, and at the same time should contemplate some of those offences as felonies, and others of them as misdemeanors.

And there is another reason why the provisions in the fifth section should not refer to the offences described in the fourth section, for the punishment that may be inflicted on a principal convicted of any of the offences in the fourth section is less than is provided for an accessary after the fact by the fifth section: and it cannot be presumed that the legislature intended that an accessary after the fact should in any case be punished more severely than the principal offender.

We are therefore of opinion that the words of the fifth section are satisfied by confining them to the offences described in the two first sections; and that they do not extend to the offences prohibited in the third and fourth sections; and that the judgment be not arrested.

As to the second objection that a misdemeanor cannot be indicted as a felony, it ought to prevail, if the offence charged in the indictment is a felony. The cases of Rex v. Cross and wife, Lord Raym. 711; Rex v. Wild, 8 Mod. 264, in a note to the case of Rex v. Pollard, and also Foster's Crown law, Disc. 3. s. 6. are authorities in point.

64.

WHITE, Administratrix, v. BAILEY, 3 R. 271.

Case upon a promissory note dated October 5th, A. D. 1785, and payable to the plaintiff's intestate in two months from the date.

The defendant pleads 1st. *Non assumpsit*, which is joined. 2. *Causa actionis non accrevit infra sex annos.* The plaintiff replies that when the action accrued, the defendant was out of the Commonwealth, and so continued from that time to the purchase of the writ in this action, leaving no property, which could be attached. The defendant rejoins that after the action accrued, and more than six years before its commencement he returned into the Commonwealth. Upon this fact issue was joined.

Curia. This proviso must have a construction consonant to the manifest intent of the legislature. When the creditor's cause of action accrued, if he could not then sue with any prospect of benefit, because his debtor was without the jurisdiction of the state, having no property within it, the statute should not then begin to run; for the creditor could not then take the body as a pledge, or seize the property as a security. But as soon as the creditor could have a beneficial remedy by suit, either by attaching the body or effects of his debtor, then the statute should begin to run. The statute therefore, in providing that the limitation should commence on the debtor's return into the state, must intend such a return, as would enable his creditor, using reasonable diligence, to arrest his body as security for the debt.

In the present case, it is true that the defendant came into Bridgewater, where he formerly lived, and remained there eighteen days. But he came privately, and secreted himself except on Sundays. The creditor therefore is chargeable with no neglect in not arresting him. It does not appear that he knew of his debtor's being in Bridgewater; and if he had known it, he had no opportunity of arresting him. Under these circumstances, we cannot consider the defendant as having returned into the state, within the true meaning of the proviso. By returning into the state, must here be intended a return with a design again to dwell within the jurisdiction of the Commonwealth, and not to lurk in it as a place of concealment.

The defendant must be defaulted, and the plaintiff have judgment according to the agreement of the parties.

65.

JOSSELYN v. AMES, 3 R. 274.

The declaration was in case, and set forth a promissory note from one John Ames, payable to the defendant, for 118 dollars, with interest, after which the declaration proceeds, "and the said Oliver there afterwards on the same day by his writing under his hand on the back of said note, in consideration that the plaintiff had loaned to the said John, brother to the said Oliver, and with whom the said Oliver then had a subsisting connection, 118 dollars, the said Oliver then and there promised the said Elisha to guarantee to him the payment of the contents of said note on demand and then and there, in consideration of the premises, promised the plaintiff to pay him the contents of said note agreeably to the tenor of the same: yet though requested," &c.

Per Curiam. The guarantor in that case was not the promisee, but a stranger who warranted the payment to him. He cannot himself warrant to a third person payment of a note made payable to himself and not negotiable. The plaintiff cannot recover in this action, but according to the facts reported, he may cancel what he has endorsed on the note, and instead thereof may write, "For value received I undertake to pay the money within mentioned, to E. J." And upon such an endorsement he may maintain an action, on the facts reported.

The parties afterwards agreed that judgment should be entered for the plaintiff for the damages found by the verdict without costs.

66.

COMMONWEALTH v. ATHEARN, 3 R. 285.

In Suffolk, B. Whitman filed a motion for a rule of court against the respondent to show cause why an information in the nature of a *quo warranto*, should not be awarded against him for claiming to hold the office of town clerk of Tisbury, in Duke's county. The court granted a rule, *de bene esse*, returnable at this term.

PARKER, J. I should not be for granting an information in any case, where the judgment of the court upon the information can have no effect. The officer may be liable to a fine, in case judgment of amotion be rendered, but not otherwise, as I now recollect. When the information comes to a hearing, this man's tenure in the office he claims will have expired. We could not then pass a judgment of removal. Upon this ground I am against granting the information.

SEWALL, J. I consider this rather as a proceeding *in rem* to obtain a specific remedy, than as a mode by which the respondent is to be punished. But before judgment can be rendered, the mischief will be gone. To proceed further in the case would be futile.

PARSONS, C. J., concurred, and added that if the court should remove a town officer, who is chosen for a year, he did not know that there was any provision in law, by which a vacancy thus created might be filled. The court will be understood by this decision to have determined, not that they have no authority to grant an information whenever they shall think a case exhibited to them shall require it, but only that in the present case it would not be a discreet and proper exercise of their authority.

As the town clerk for the preceding year holds over until another clerk is

chosen and qualified, perhaps the proper remedy is for the successor to take the oath of office, and to demand of the former clerk the records: and if they are refused, then to move for a *mandamus*, to command him to deliver over the records. The rule is discharged.

The Attorney General, of counsel for the respondent, moved that he should have judgment for his costs, as the party prevailing. (Stat. 1784, c. 28, s. 9.)

But the Court said they had no authority to give costs to the respondent in this case.

67.

THE CASE OF ARCHIBALD M'NEIL, 3 R. 283.

W. Austin moved for a writ of protection to issue in favor of Mr. M'Neil, who was returned as one of the Grand Jury, and who was apprehensive of an arrest.

CURIA. A juror has no occasion for a writ to protect him. If a juror, or any other person, whose duty brings him to court, whether as a party or a witness, is arrested while attending the court, or *eundo et redeundo*, the court, upon motion, will take order for his discharge. A writ of protection will not protect one who is not lawfully entitled to it; and is of no other use to one who is so entitled, but as *prima facie* evidence to the officer who is about to arrest him.

68.

WILDER v. BAILEY, and JOSEPH DARLING, his trustee, 3 R. 289.

A sheriff having collected money upon an execution not yet returnable, and of whom the money has not been demanded, cannot be held as the trustee of the judgment debtor on a process of foreign attachment.

PARSONS, C. J. The question submitted to the court is whether Joseph Darling, on the facts disclosed by his answers to the interrogatories in the case, is the trustee of the defendant Bailey.

The facts material to the decision of this question are, that before the service of this writ on Darling, Bailey had recovered a judgment against one Caleb Wilder; had sued out and delivered Darling, a deputy sheriff, an execution on that judgment: that Darling had by virtue of that execution levied the sum of $99,47, which at the time of the service of this writ he held in his hands: that the execution was not returnable till a day after he was summoned as trustee: and it does not appear that Bailey, the judgment creditor, had ever demanded of Darling the money he had so levied.

If Darling, therefore, was a trustee of Bailey at the time he was so summoned, it must be in virtue of the moneys he had levied on that execution. Those moneys must at that time have been the effects of Bailey; or by reason of the levy he must have been a debtor to Bailey, and held Bailey's credits in his hands.

The statute, on which this process is founded, [illegible]ng that the goods, effects and credits of persons are oftentimes so intrusted and deposited in the hands of others, that the same cannot be attached by the ordinary process of law, provides that any goods and effects so intrusted and deposited may be attached in whose hands or possession soever they may be found, by virtue of a process there described: and when the attachment is made by virtue of that process, the goods, effects and credits of the principal in the hands and possession of the trustee shall stand bound and be held to satisfy the judgment,

which the plaintiff in the process may recover. If therefore the money, thus levied and holden by Darling, are goods, effects or credits of Bailey, intrusted to him, or deposited in his hands, within the true intent of this statute, then Darling must be adjudged to be the trustee of Bailey.

It may be useful to consider the relation at common law between the sheriff and the judgment creditor, after the sheriff has made the debt on a *fieri facias*. If before the return of his execution he voluntarily pay the money to the creditor, the court will allow of it, because the creditor is satisfied; but he is not obliged to do it, for if he bring the money into court on the return of his execution, the writ will be obeyed. While he holds the money, it is not the property of the creditor, and no action will lie against him until he is guilty of a breach of his duty in not returning the execution with the money into court at the return day. In Cro. Car. 166, 176, there is reported the case of Benson & wife v. Flower and the assignees of Benson. Benson and his wife in her right had discovered against Flower a judgment for £12, which Flower on a *capias ad satisfaciendum* had paid to the sheriff. Afterwards, and before the return of the execution, Benson became a bankrupt; and his effects were duly assigned. The sheriff brought the money into court, and the assignees moved to have it paid out to them. But it was refused, because it was not the bankrupt's money, until it was paid to him; and in the mean time it was in the custody of the law. A further reason was given, because the assignees were not parties to the record, and could not discharge the judgment.

When we advert to our own statutes, a different duty is prescribed to the sheriff, who has levied money on an execution. He must return his writ, with his doings thereon; but he is not obliged to bring the money into court. The money remains in his hands, in the custody of the law, until the judgment creditor demand it of him. If on demand made, after he has received the money, either before or after the return of the execution, he refuse to pay the money to the creditor, he is then guilty of a breach of duty; and the law will no longer protect him in holding the money. From that moment an action lies against him by the creditor to recover the money received, with thirty *per cent.* interest until he pay the money: and the sheriff may be considered as holding the credits of the judgment creditor. But so long as he holds the money as a servant of the law, the law will protect him in the possession. The same rule applies to chattels. In 1 Show. 174, and 4 Term R. 651, Farr v. Newman, it is holden that goods lawfully seized on a *fieri facias* are in the custody of the law, so that they cannot be seized again by the same or any other sheriff.

Let us now apply these principles to the case before us. Darling, not by any authority from Bailey, but as a minister of the law, levied the money of Wilder. After he had received the money, it was in his possession in custody of the law; and was not the goods or effects of the judgment creditor. And it does not appear that Darling, at any time before he was summoned as trustee, had been requested by Bailey to pay him the money. At that time therefore he had been guilty of no breach of duty: no action could be maintained by Bailey against him, as nothing was then due from him to Bailey. Darling consequently had in his hands or possession no credits of Bailey. And if he had not in his hands any goods, effects or credits of Bailey, certainly he was not his trustee.

This reasoning, deduced from the principles of the common law, which is always a safe guide, is confirmed by the natural import of the words of the statute, on which this process is founded. The statute speaks of goods, effects and credits intrusted to and deposited with others, so that they cannot be attached by the ordinary process of law; a language implying an agency

or privity of the debtor to place his property beyond the reach of ordinary attachment. Now the sheriff levying money upon an execution is not the agent of the creditor. He can name no agent; but is obliged to deliver his execution to an officer appointed by the Supreme Executive, and deriving all his authority from the law. Indeed before a different decision can prevail, the design of the legislature must be very clear, that any person claiming to be a creditor, when perhaps there is no color for his claim, but his real object is to assist the judgment debtor, or the officer to detain the money, may arrest the process of a court of record issued to execute a judgment, by controling or suspending the powers and duties of the ministers of the law, deriving their authority from precepts which they ought to obey.

Trustee discharged.

69.

MELVIN, Plaintiff in error, v. BRIDGE, 3 R. 305.

A writ of error does not lie where the proceedings in any stage of them are not according to the course of the common law.

CURIA. This suit is a criminal prosecution for an offence created by a statute. It was originated by a complaint to a justice of the peace, who issued his warrant, on which the plaintiff in error was apprehended, and on trial before the justice, was convicted. Upon conviction, besides the pecuniary fine, there is a judgment of forfeiture of the engine used in taking the fish. On appeal to the court of Common Pleas, exercising the criminal jurisdiction formerly vested in the sessions, he was acquitted by verdict of a jury.

These proceedings are given by statute, and are not according to the course of the common law. For although at the Common Pleas the trial was by jury, yet if the plaintiff in error had been convicted, the judgment would have been a fine, and imprisonment until the fine was paid, and also a forfeiture of the engine used; which judgment this court is not empowered to render upon this process. The case cited from East was a common law remedy, pursued according to the course of the common law: and the judgment was prescribed by the common law.

The writ of error must be quashed. If the court were to consider these proceedings as certified on a *certiorari*, the plaintiff in error could not be relieved, as a judgment for costs could not be rendered, but only the proceedings affirmed or quashed.

70.

GEDNEY v. THE INHABITANTS OF TEWKSBURY, 3 R. 310.

PARSONS, C. J. The declaration of rights prefixed to our constitution provides that whenever the public exigences require that the property of an individual should be appropriated to public uses, he shall receive a reasonable compensation therefor. In pursuance of this constitutional declaration, the legislature have given a specific remedy, where lands are taken for an highway, which is a public use. That remedy must be pursued. Should we support an action of debt in this case, we should defeat the useful provision of the statute, which allows a reasonable time, in the discretion of the court of sessions, to pass before a warrant of distress issues, by which the property of individual inhabitants of the town is liable to be taken; thus giving to

the party the independent exercise of a right, which the statute has wisely subjected to the discretion of an impartial tribunal, so far as respects the time for inforcing it.

The regular course for the plaintiff in this case is to move the court of sessions for an order of payment, upon which he may take out his warrant of distress. Should they deny the motion, he may apply here for another remedy, which will not probably be refused.

Plaintiff nonsuit.

71.

Moors v. Parker, et al, 3 R. 310.

Trespass for taking, carrying away, detaining and converting certain goods and chattels of the plaintiff.

Parsons, C. J. recited the substance of the declaration and plea, and added: Among the causes of demurrer, there are two which go to the substance of the bar, and two which go to the form.

The first cause is, that there is no allegation that the coroner had taken a replevin bond in the form prescribed by law, without which bond the coroner himself could not justify the delivery of the goods; the bar only recites the return, in which he says, "having taken the bond, which I return," without adding any description of the bond.

The second cause is, that the plea in bar does not allege that the goods were not detained upon *meane process*, &c. as the property of Parker, the plaintiff in replevin.

For each of these causes the plea is bad in substance. A plaintiff in replevin cannot protect himself by the execution of his writ, unless the officer pursue the authority, which he derives only from the writ. The authority to the officer to replevy and deliver the goods to the plaintiff is conditional. The plaintiff must first give him a bond, with sureties, in the penalty, and with the condition, required by the writ. And if the plaintiff give him this bond, yet the goods are irreplevisable, if they are detained as the plaintiff's on *mense process*, warrant of distress, or on execution; and if the officer should deliver goods so detained, he will be a trespasser, the writ being no justification for him. The defendant therefore ought to have alleged in his bar, that before the delivery he had given the coroner the bond required by his writ, and also that the goods were not so detained as to be irrepleviable by that writ. But neither of these allegations are made, and the bar is an insufficient justification or excuse for Parker: And if several defendants join in pleading in bar, if the plea is bad as to one defendant, it is bad as to all the defendants.

The two causes of demurrer, which go to the form of the plea are, 1. Duplicity, because the allegation that the goods, at the time of the taking, were the defendant Parker's is *prima facie* a good defence, without justifying under the replevin. And 2. That the plea amounts to the general issue, because it is a direct denial of taking the plaintiff's goods.

There seems to be weight in each of these exceptions, but it is unnecessary for the court to give any opinion upon them.

72.

Hunt and wife v. Sprague, 3 R. 312.

In a plea of non tenure with disclaimer it is not necessary to allege that the tenant doth not make any claim to the demanded premises.

Curia. Non-tenure to this action may be pleaded either with or without disclaimer. In this plea there is much surplusage. It would have been enough to allege, that at the time of suing the writ, he did not hold, never since has held, and now does not hold the tenements demanded. In its present form it is substantially a plea of non-tenure with disclaimer, and, being demurred to, it is sufficient to defeat the plaintiff's suit.

73.

GOODWIN v. JONES, 3 R. 105.

An administrator, who has received letters of administration under the authority of another state, cannot prosecute or defend an action in the courts of this commonwealth by virtue of such letters of administration.

PARSONS, C. J. This question comes before the court on the motion of Nathaniel Goodwin, that he may be admitted to prosecute a suit, pending in this court, and commenced by Daniel Goodwin against Ebenezer Jones.

The facts on which this motion is founded are, that Daniel Goodwin of Hartford, in the state of Connecticut, sued out the original writ in this cause against the said Jones, in an action, the cause of which by law survives to his executor or administrator: that he prosecuted his action, until the same was regularly pending in this court by appeal, and then he died; and that at the next term Nathaniel Goodwin of the same Hartford, having obtained from the probate court for the district of Hartford, under the authority of the state of Connecticut, administration of the goods and estate of the said Daniel Goodwin, moved the court that he might, in his said capacity, be admitted further to prosecute this action against the said Jones.

The motion is founded on the statute of this commonwealth, 1784, March 4, c. 32, which provides that when an action is pending, the cause of which will survive, if either party die, his executor or administrator may take upon himself the prosecution or defence of the action. And if an administrator deriving his authority from the laws of any other state is within the true intent of this statute, the motion ought to be granted.

As this statute extends only to actions, the causes of which survive to the executor or administrator, it is manifest that the administrator cannot be admitted to prosecute this action, unless he could have originally commenced an action for this cause, in a court of this state, after his intestate's death by virtue of his letters of administration granted in the state of Connecticut. The motion may, therefore, be considered as requiring a decision of the question, whether an administrator, by virtue of his administration granted in any other state, can maintain a personal action, founded on contract, in any of the courts in this state.

The counsel in favor of the motion have argued that all the personal estate of any person, wherever it may be, follows the person, and must be governed by the law of the place where the owner has his domicil; and they have compared an administrator to the assignee of a bankrupt, who may sue to recover the bankrupt's effects in any state where they are found. It is admitted that the assignee of a bankrupt duly appointed, pursuant to the laws of the state where the bankrupt dwells, may maintain an action in that character in any other state, the laws of which are not repugnant to his recovery. And it is also admitted that the personal effects of a deceased intestate, remaining after his debts are paid, shall be distributed according to the law of the state, to which at his death he was subject. But it may be questioned whether the interest the administrator has in the per-

sonal estate of the intestate is as general as the interest of the assignee. The assignment of a bankrupt's effects may be considered as his ownact, as it is the execution of laws by which he is bound, he himself being competent to make such assignment, and voluntarily committing the act, which authorised the making of it. The administrator's powers result from the provisions of law made to dispose of the intestate's effects, after his death had extinguished his property in them; and these provisions cannot extend to effects not within the jurisdiction of the state from which such provisions of law derive their force.

The common law limits the power of the ordinary, in granting administrations, to goods within his diocese; and if the intestate left *bona notabilia*, the granting of administration belongs to the Metropolitan, whose power is limited to his own province. An administration granted by him does not extend to Ireland, though under the same sovereign; for if a man dies intestate in London, having goods in London and in Dublin, administration of his goods in Dublin must be granted in Ireland; Gibs. 472.

On this principle of the common law, an administrator, appointed in Connecticut cannot claim the effects of his intestate, that were not within that state at his decease.

But if it be admitted that an administrator so appointed might claim, on general principles, the intestate's goods in this state; yet that claim cannot be enforced, if the laws of this commonwealth are repugnant to it. Before we consider some of these laws relating to this subject, two principles are to be premised as unquestionable. That the title to, and the disposition of real estate must be exclusively regulated by the law of the place in which it is situated; and that there cannot be, at the same time, two administrators holding distinct and independent rights to administer the same goods of the same intestate.

An administrator in this state has all the powers over the goods of the deceased, which is possessed by an administrator at common law; and he must administer all the goods, chattels, rights and credits of the intestate, which are within the state. And further, by our laws, the real estate is assets, in the hands of an executor or administrator, to pay the debts of the deceased, if his personal estate be insufficient, and may be sold by him on obtaining a license. If the estate be insolvent, he must pay all the creditors their demands *pro rata*, the real, as well as the personal estate of the deceased composing the fund. If any judgment be recovered for a debt due from the deceased, the lands which were his, may be taken to satisfy the judgment; and for this purpose the law considers them as in the hands of the executor or administrator, and charges him with waste, if by his neglect in satisfying the judgment, the lands were so taken. He may satisfy any judgment recovered by him, by extending his execution on the lands of the debtor. And he may maintain a real action to foreclose a mortgage of lands, declaring on the seizin of the deceased: and the lands extended on or mortgaged, he may, on obtaining license, sell for the payment of the deceased's debts. And in all cases, where he shall sell lands for the payment of debts, he must account for the proceeds to the judge, who granted him administration, who may, in the last two cases, allow the charges of administration to be a lien upon the land.

From a view of these statutes it is very certain that the administrator, on whom these duties are enjoined, and to whom this power is given, must derive his authority from the laws of the commonwealth. He has the disposition of lands, and for their proceeds he must account to the judge of probate, to whom no administrator can be compellable to account, unless he who

received his administration from the judge. On one of the statutes a judicial decision has settled the point. Sherburne, an administratrix, sued Emery in the county of York, in a real action to foreclose a mortgage. The intestate living and dying in New Hampshire, the administration was there granted; and it was held by the whole court that the action for that reason, was not to be maintained. The administratrix afterwards took out letters of administration in York and foreclosed the mortgage.

If this motion should prevail, and the personal assets of the deceased be insufficient to pay his debts, how could his lands in this state be assets in the hands of the present administrator? Or if in this action he should recover judgment against Jones, and satisfy that judgment by a levy on the debtor's lands, by what legal process could those lands be made assets for the payment of the intestate's debts?

When any person, an inhabitant of another state, shall die intestate, but leaving real estate within this commonwealth, if administration should not be granted by some judge of probate of a county in which the estate lies, there would be no legal remedy for the creditors of the deceased to avail themselves of his real estate for the payment of the debts due to them. Therefore, to prevent a failure of justice, administration in such cases must be granted by some probate court here; and the administrator so appointed will, by virtue of his letters of administration, and of the laws, also have the administration of all the goods, chattels, rights and credits of the intestate, which were within the state. And if a foreign administrator of that intestate should also have the administration of his personal estate here, there would exist two administrators of the same goods of the same intestate, independent of each other, and deriving their authority from different states, a consequence which cannot be admitted. But the granting of administration here cannot divest the foreign administrator of any rights already vested in him; and the necessary inference is, that whether administration be, or be not granted in this state, an administrator appointed in another state cannot legally claim any interest in the goods of his intestate, which are subject to an administration granted in this state. And it is no objection to this reasoning, that debts due to the intestate on simple contract are to be considered as goods situate where he dies. For if the position be admitted, contrary to the authority of Wentworth, in his Executor, p. 46, where it is supposed that such debts are *bona notabilia* where the debtor lives; yet the administrator, if he recover judgment on such contract in this state, may satisfy it by an extent on lands, which certainly in their disposition are exclusively subject to the control of the laws of the commonwealth.

We have no particular statute relating to foreign administrators; but the manner in which an executor of a will proved without the state, may execute his trust within, is regulated by the statute of 1785, June 29, c. 12. The executor, or any person interested in any will proved without the state, may produce a copy of it, and of the probate under the seal of the foreign court which proved it, before the judge of probate of any county, where the testator had real or personal estate, whereon the will may operate, and request to have the same filed and recorded, which the judge, after notice and hearing all parties, may order to be done; and he may then take bonds of the executor, or may grant administration *cum testamento annexo* of the testator's estate lying in this government not administered, and may settle the estate, as in cases where the will has been proved before him. This statute needs no explanation. The executor of a will proved without the state, cannot intermeddle with the effects of the testator in the state, but with the assent of a judge of probate, to whom he must first give bond. Neither can an administrator with the will annexed intermeddle, unless he is appointed

by some judge within the state, who has authority to settle the whole estate within his jurisdiction. And it would be inconsistent with the manifest intent of the statute to allow an administrator of an intestate, not an inhabitant or resident within the state at his death, an authority derived from a foreign administration, which he could not have under the foreign probate of a will, of which he was the executor.

To obviate the inconvenience from the existence of two administrators, each having an independent right to prosecute a suit for the same cause of action, if a foreign administrator be allowed to prosecute a suit in the courts of the commonwealth, it has been said that our courts of probate cannot now grant administration of the goods and estate of a person who was not an inhabitant, nor resident within the state at the time of his death. This objection deserves some consideration.

The statute of 1784, March 12, c. 46, erecting the present courts of probate, enacts that a court of probate shall be held in each county by a judge for taking the probate of wills, and granting administrations of the estates of persons deceased, being inhabitants or residents within the same county at the time of their decease: and for such other matters and things, as the courts of probate within the several counties shall by the laws of the commonwealth, have cognizence and jurisdiction of. It appears from the latter part of the section, that this court, thus established, has general jurisdiction of all probate causes recognized by law. And all laws of the late province, not repugnant to the constitution, nor since altered nor repealed, now remain in force. The charter grants that the governor of the province, with the council, may do, execute or perform all that is necessary for the probate of wills, and granting administrations, for, touching or concerning any interests or estates, which any person or persons shall have within the province without any restriction to persons who are inhabitants or residents at their death. Under this charter, no inferior courts of probate were erected by statute; and the judges of probate in the several counties acted as the deputies of the governor and council, who were the supreme ordinary; and their powers were recognized, and their proceedings regulated by several acts of the provincial legislature. But no statute was ever passed limiting the probate jurisdiction, as granted in the charter. In cases, therefore, where the deceased, not an inhabitant or resident, left at his death any interest or estate within the state, the present courts of probate have jurisdiction. It may be added, that the former part of the section contains no negative words; and that the limitation there inserted, was probably introduced to regulate the jurisdiction of the several courts of probate, when the deceased was an inhabitant or resident. When the deceased intestate was not an inhabitant or resident, administration may be granted by the judge of probate of any county, where the estate lies: and from analogy to the several statutes relative to the powers of administrators, and to the jurisdiction of probate courts, the person first obtaining administration will have legal authority to administer all the estate of the intestate, although it may lie in several counties of the commonwealth.

Upon fully considering this subject, it is the opinion of the court that the motion cannot be granted, and that judgment be entered that the writ is abated by the death of the original plaintiff.

We are sensible that the courts in Connecticut admit administrators, receiving letters of administration in another state, to prosecute personal actions in those courts. This usage probably arose from an agreement of the four New-England colonies, made in the year 1648, that if any known planter, or settled inhabitant die intestate, administration shall be granted by the colony, to which the deceased belonged, though he died in another colony

and that the administration being duly certified, shall be of force for gathering in the estate in the rest of the colonies; Hazard's Collection, vol. 2, p. 124.

74.

GORE v. BRAZIAR. 3 R. 536.

PARSONS, C. J. The action is covenant broken, in which the plaintiff has demanded against the defendant his damages for the breach of certain covenants contained in a deed of conveyance of land in fee simple, with general warranty, executed on the 28th of December, 1801, to the plaintiff, by the defendant and one Henry Brazier, who died before the commencement of the action. The parties agree that the late Moses Gill, Esq. was seized of the premises in fee, and by his last will made his nephew, Moses Gill, his executor and residuary legatee, and that under the residuary devise the premises were devised to the executor in fee: that the testator died so seized: that his will has been duly proved: that the executor gave bond with sureties to the Judge of Probate for the payment of the debts of the testator, and of the legacies bequeathed in his will; that after the testator's death, his nephew, by his deed dated July 18th, 1800, conveyed the premises in fee simple to the said Samuel and Henry Brazier: that afterwards Ward Nicolas Boylston, as administrator with the will annexed of the estate of Thomas Boylston, recovered judgment in August, 1804, against the estate of the said Moses Gill, the testator, for 106,176 dollars 66 cents and costs of suit: that on the 19th of September next following, execution on that judgment was levied in due form of law on the premises then in the plaintiff's possession; and seizin and possession thereof delivered to the said Ward Nicolas Boylston, the plaintiff making no resistance to the levy; and that thereupon the said W. N. Boylston entered and took possession. If this levy, with the seizin and possession accompanying it, is a lawful ouster of the plaintiff, he must recover his damages, the defendant agreeing in that case to be defaulted, otherwise the plaintiff is to be nonsuit.

The plaintiff to maintain his action relies on several statutes of the Commonwealth. By the statute of 1783. c. 32. s. 1, when the goods and chattels belonging to the estate of any person deceased shall be insufficient to pay his debts and legacies, so much of his real estate as shall be necessary therefor may be sold by the executor or administrator on obtaining license. By the 7th section of that statute, the real estate of any testator or intestate is made liable to be taken and levied upon by any execution issuing on a judgment recovered against an executor or administrator, for any debt due by the deceased, and the manner of the extent shall be the same as in levying executions on other real estates, and the estate may be redeemed by the executor, administrator or heirs in like manner.

The statute of 1783, c. 57. s. 2, describes the manner in which executions may be levied on other real estates, and directs the sheriff after appraisement to deliver possession and seizin thereof to the creditor.

From the literal construction of these statutes we must conclude that, where lands liable to be taken in execution are legally extended on, the judgment creditor is in fact seized and possessed of them; but to this construction it is objected that these statutes ought to have a construction analogous to the law authorizing the extent of lands by an *elegit:* that after a reasonable extent ascertained by the jury, and the delivery of a moiety of the lands by the sheriff to the judgment creditor, he has not thereby the actual posses-

sion of the land, but only a right of entry, which he may exercise, if he can peaceably, or he must bring ejectment to get the possession.

If the authority of the sheriff in extending an *elegit* was the same which the sheriff has by our statutes in taking lands in execution, the argument would have great weight; but no act of parliament, or rule of the common law, has made it the duty of the sheriff to put the judgment creditor, suing an *elegit*, into the possession of the lands. Our statutes direct him expressly to deliver seizin and possession to the creditor. The satisfaction for his debt, which the tenant by *elegit* receives, is of a different nature from the satisfaction of an execution by an extent on lands pursuant to our statutes. In the former case, the tenant holds the lands at a reasonable extent until his debt be paid; and if prevented from entering by the debtor, at the time of the *liberate*, still he shall hold the lands from the time when he obtains possession until he is satisfied. In the latter case, the lands and not the annual profits are appraised at their true value, and the creditor holds the lands in fee, subject to redemption by the debtor. And the terms of redemption clearly suppose the creditor to have the possession from the time of the levy. For the third section of the act last cited, provides that the debtor may within a year after the extent, and not afterwards, redeem the land by paying to the creditor, or the tenant in possession under his title, the whole debt with interest, with the reasonable charges and expences of repairing and improving the same, deducting the rents and profits.

It is however urged that if this construction be admitted, when the debtor is the tertenant at the time of the levy, it ought not to be extended to cases where he is not in the actual possession, because the sheriff might levy the execution on lands not the debtor's, and might dispossess the right owner. It must be observed that our statute provides but one method of levying executions on lands, and by this method the sheriff must deliver seizin and possession to the creditor. If therefore the lands taken are liable to the extent, this method it is the duty of the sheriff to pursue. By the levy the creditor is to have a fee simple in the lands, or, in the words of the statute, *as good a title as the debtor had*. If the creditor be seized, he must in legal contemplation have the possession, and may maintain trespass against any person who shall invade his possession. The creditor ought also to have a remedy in law to recover seizin by an *habere facias seizinam*. To have this remedy, he must be able to maintain a real action, declaring on his own seizin; for a purchaser in fee cannot declare on any seizin but his own, when his title is derived from a tenant in fee. The construction therefore, which is put on our statutes, must extend to all cases where the lands are liable to the extent, or the creditor, not being seized by virtue of the levy, could have no remedy in law to recover his seizin. If it be said that the creditor, by virtue of the levy, may have a right of entry, and on entering may be seized, like the effect of an *elegit*, it should be remarked that the cases are dissimilar. The tenant by *elegit* has only a term, and claims only the possession, and his entry is on the possession: the tenant of the land is therefore immediately on the *liberate* a wrongful possessor, and the creditor may enter peaceably without writ, and remove him from the possession, (3 Term Rep. 295.) In a levy by execution in this case, the creditor claims a fee simple, and if he is not seized by virtue of the extent, the tenant remains seized, and his possession is rightful; and the right of entry thus supposed in the creditor must therefore be on a man lawfully seized, and having consequently a *rightful possession*.

There seems therefore no reason for construing the words of the statute, directing the sheriff to deliver seizin and possession to the creditor against their natural import. But there are further provisions in our statutes on this

subject, that remove all colour of doubt. The same section last mentioned, directs the sheriff, where the execution is levied on the rents, to deliver seizin to the creditor, and, if the person in possession shall refuse to attorn, to turn him out of possession, and to give the creditor the seizin and possession; and the debtor or his assigns are impowered to redeem by paying to the creditor or the tenant in possession under him the remainder of the debt, which shall be due at the time of redemption. And by the statute of 1788. c. 51. s. 3, when an executor or administrator shall recover judgment for any sum of money, the execution on which shall be satisfied by an extent on real estate, the executor or administrator shall be seized and possessed of the real estate to the use of the persons interested in the judgment.

As to the inconvenience suggested, it can have weight in the construction of a statute but in doubtful cases. But the inconvenience does not arise from the construction, which we give to our statutes. The plaintiff has a right to have his execution levied on lands of the debtor whether living or deceased, and on those lands only is the sheriff authorized to levy his execution. If he take other lands, he is a trespasser, and neither he nor the creditor can be protected by the execution. If the right owner, not being the debtor, be dispossessed, the act is tortious, and he may maintain trespass against the creditor and the sheriff, or he may bring his writ of entry against the creditor as a disseizor, or he may immediately re enter and defeat the disseizin. The inconvenience supposed may be the same in levying an execution on chattels. The sheriff may seize goods not the debtors, or in a *capias ad satisfaciendum* he may arrest the wrong person. In all these cases he cannot justify under the execution, but must answer for the trespass.

Our opinion is that when an execution is regularly levied on lands liable by law to the extent, whoever may be the tenant, and duly returned and registered, and possession delivered by the sheriff to the creditor, he is to be considered as in the actual seizin and possession, and may by virtue thereof either maintain a real action declaring on his own seizin, or he may maintain trespass against the tenant, who shall continue his possession without the creditor's consent, or may re-enter on him after the levy is completed. And if this opinion be correct, seizin delivered the creditor on such levy is a legal ouster of the tenant from the land.

We have considered this point more fully than seems necessary for the decision of this cause. It is stated in the case that the tenant, believing the lands liable to the extent, and, not choosing to be involved in a fruitless and expensive lawsuit with the creditor, did not resist his levy, but suffered him to enter it. If therefore the creditor was not *ipso facto* seized by virtue of the levy, yet if he had any right under the extent, it must be a right to enter peaceably, and acquire a seizin. A seizin thus lawfully acquired by a rightful and peaceable entry must amount unquestionably to an ouster of the tenant.

The defendant's counsel appear to have very fully considered the whole case; and they have argued that the lands in question were not liable by law to the extent. If this argument be well founded, the defendant must have judgment; for the ouster of the plaintiff by Boylston will not be lawful, but a disseizin, and so no breach of the defendant's warranty.

The argument was supported on two grounds: one was, that the statute authorizing the levy of executions on the lands of persons deceased, gives the right of redemption to executors, administrators and heirs, without including devisees or the assigns of heirs or devisees. And that in the present case the devisee had, for a valuable consideration, *bona fide* aliened the lands in fee. And if the lands are still liable to an extent to satisfy the debts of the deceased, they will always remain liable, which would be a general in-

convenience, for no man would ever venture to purchase of an heir or devisee, or of their assigns.

The other ground was that the executor of Moses Gill, who was the residuary legatee, and under whom the plaintiff claimed, had given bond with sureties to the Judge of Probate for the payment of all the deceased's debts, and of the legacies he had bequeathed, and that by virtue of this bond the lien on the testator's real estate was discharged.

It is the duty of the court so to construe the statute that it may have a reasonable effect, agreeably to the intent of the legislature. Immediately on the death of the testator, the devisee may be seized of the land devised, and if it be not liable for the debts of the testator in his hands, the statute would be nugatory in its application to the testate estates: And as heirs expressly have a right to redeem, it is admitted that lands in their hands may be taken in execution. But no good reason can be assigned why devisees, whose estates are derived from the bounty of the testator, should be favoured rather than heirs, who hold by operation of law.

With respect to the assignees of heirs and devisees, it may be observed that by the statute of 1783. c. 66. s. 2, no action can be maintained against an executor or administrator by a creditor, to recover his debt due from the deceased until a year after his death; and in that time an heir or devisee can easily learn whether there be a deficiency of personal assets, and can *bona fide* aliene the lands he claims from the deceased. If such alienation was to discharge the lien on the lands, the statute would be rendered useless, whether the deceased left a will or died intestate. And certainly the statute ought to have a construction as beneficial to creditors as a devise to executors of an authority to sell lands for the payment of debts: and in that case it is held that a descent from, or an alienation by devisees does not take from executors the power to sell the lands.

A *bona fide* alienation for valuable consideration by a devisee has been compared by the counsel for the defendant to a case, where a fraudulent purchaser has afterwards *bona fide* and for valuable consideration conveyed; in which case the last purchaser shall hold the land purged of the fraud. But the two cases are not alike in principle, for the consideration money received by the devisee cannot be personal assets in the hands of the executor.

Whether the devisee, or assigns of the heir or devisee, can redeem, it is not necessary now to determine. Perhaps, on examination it will be found that every tenant of the land lawfully holding under the deceased may within the equity of the act redeem, on the terms of paying the debt, for which the lands were taken. But on this point we give no opinion.

As to the inconvenience resulting from a perpetual lien on the deceased's lands for the benefit of his creditors, we are not disposed to say that the lien is perpetual. Certainly it ought to continue a reasonable time, and should not be defeated but by the neglect or laches of a creditor. What shall be deemed a reasonable time, has not, that we know of, been determined. In the case of Lee v. Gallison, in Essex, Gallison, a legatee, had lain by for more than twenty years, and the lands had descended to the heirs of a devisee. Under the circumstances of that case, the court held that the lands were discharged of the lien. If a rule were now to be established, perhaps, in analogy to various other maxims of law, twenty years of negligence in a creditor might be a period of time, which should liberate the lands from the lien created by the statute. But of this point also we give no opinion.

As to the inconvenience suggested, that the lands, when once extended on, and redeemed, may be afterwards taken in execution by another creditor, the inconvenience does not exist. For when the lands have been once legally appropriated for the payment of the deceased's debts, they are forever

after discharged, on the same principle that his goods and chattels, when sold upon *fieri facias*, cease to be assets in the hands of his executor or administrator.

The last objection that remains to be considered, is grounded on the probate bond given in this case for the payment of debts and legacies. And if the giving of this bond is in law a discharge of the testator's lands from the lien imposed upon them by the statute, the defendant must recover.

But we are all of opinion that this bond is no discharge of the lien. Before the Provincial Statute of 1 & 2 Ann. c. 5, all executors were bound to inventory and account for the testator's estate. This was necessary to furnish the creditors and legatees with evidence to charge them with waste, if any assets were embezzled or unaccounted for. When the legacies are specific, or to be ascertained without inventory or account, and the executor be the residuary legatee, if the legatees and creditors can be secured, there can be no occasion for an inventory or account. In this case that statute relieves the executor from his duty, on his giving bond with sureties to the Judge of Probate for the payment of the debts and legacies. On this principle also the 17th section of the statute of 1784, Feb. 6. c. 24, was passed. This section has no application to the lien on the testator's estate real or personal. This lien remains in full force, and the benefit to be derived by a creditor or legatee from the bond is merely cumulative.

Upon the best consideration we have been able to give this case, we are all satisfied that the levy by Boylston was a legal ouster of the plaintiff, and breach of the defendant's covenant of warranty, and that the plaintiff must recover his damages sustained by that breach.

The parties consented that the court should assess the damages, agreeing that the true value of the land at the time of the conveyance from Brazier to Gore was 9000 dollars, and at the time of the ouster 15000 dollars.

PARSONS, C. J. The court have considered of the rule, by which damages in this case are to be assessed. In a personal action of covenant broken, damages are demanded for the breach of a warranty by an ouster of the purchaser, by a right or title paramount. The plaintiff insists on the value of the lands at the time of the breach; and the defendant contends that the value when conveyed is the measure of the damages.

By the ancient common law the remedy on a warranty was by voucher or *Warrantia Chartæ*, and the recompense recovered in those suits was other lands to the value at the time the warranty was made. This was the general rule; but when the warrantor, on being vouched, entered into the warranty generally, he was bound to render other lands to the value of the lands lost at the time he entered into the warranty; (Vin. Abr. Title Voucher, T. pl. 1, 2, 3; Ibid. Title Warranty, K. pl. 11.) In valuing the land lost, when the vouchee entered into the warranty specially, no regard was had to any improvements made by the tenant, as by erecting edifices, or turning pasture into arable land; nor was the discovery of a mine in the land lost, after the warranty was made, but then not known, considered in ascertaining the value of the land to be recovered in recompense.

An effect originating in this feudal principle may be discovered in this State in the assignment of Dower against a purchaser. When the husband alienes with warranty during the coverture, and after dies, his widow shall not be entitled to the benefits of the improvements made by the purchaser, because he could not recover their value in other lands against the heir on the warranty of the husband. This rule is now supported in this State on principles of public policy, that purchasers may not be discouraged from improving their lands. If the lands have greatly risen in value, not from any

improvements made upon them, nor from the discovery of any new sources of profit, but from extrinsic causes, as the increase of commerce or population, it may be a question whether on the *extendi ad valentiam* the lands to be recovered in recompense would be valued at the increased price, so that the quantity might be proportionably reduced. This is here a question of mere curiosity, unless it should be considered as relating to the lands to be assigned to the widow for her dower. If the husband during the coverture had aliened a real estate in a commercial town, and at his death the rents had trebled from various causes unconnected with any improvements of the estate, and the widow should then sue for her dower, perhaps it would be difficult for the purchaser to maintain that one ninth part only, and not one third part, should be assigned to her.

This remedy, to recover recompense in other lands to the value, existed very anciently, when the principal consideration received on the alienation was the services to be performed by the tenant. The remedy might then be proper, as any improvements of the land thus paid for in services must redound wholly to the advantage of the tenant, as his services to the lord remained the same. But when lands were aliened for money when improvements in agriculture became an important object of public policy, and when the alienor might have no other lands to render a recompense in value, it became expedient that another remedy for the purchaser on eviction should be allowed. And it is certain that, before the emigration of our ancestors, the tenant, on being lawfully ousted by a title paramount, might maintain a personal action of covenant broken on a real covenant of warranty; 1 Brownl. 21; 2 Brownl. 164, 165.

This remedy was adopted by our ancestors as early as remedies for evictions of land sold with warranty were necessary. And in a personal action of covenant broken, it is a general rule of law, that such pecuniary damages be recovered, as shall be an adequate compensation for the injury sustained by the breach of the covenant. When this action was admitted to recover satisfaction for the breach of a real covenant of warranty, the same measure of damages was adopted, as is used in other personal actions of covenant broken; which does not vary in principle from the rule on voucher, where the vouchee entered generally into the warranty. And the general practice has been to give a sum of money in damages equal to the value of the land at the time of the eviction, which was a breach of the covenant, and sometimes with interest on that sum, according to the circumstances of the case. In the first settlement of the country, the value of the land consisted chiefly in the improvements made by the tenants; and if on ouster the warranty would not secure to him the value of his improvements, he could derive little benefit from it.

In the case of Leprilette v. Rand, in Suffolk, it was ruled by the court that the plaintiff should recover the value at the time of the eviction, which greatly exceeded the value of the land, when it was sold by the defendant. And in a case in Essex, the name of which is not recollected, the rule for assessing the damages was reserved by the parties, on a case stated, for the consideration of the court, who determined that the law was settled that the plaintiff should recover in money the value at the ti[illegible] the eviction. And in a late case where Bosson, who held under the C[illegible]awealth, was evicted by Martin, the lands were appraised at their v[illegible]e at the time of the eviction, which value was paid to Bosson by order of the Legislature.

The court are of opinion, conformably to the principles of law applied to personal actions of covenant broken, to the ancient usages of the State, and to the decisions of our predecessors supported by the practice of the legislature, that the plaintiff in this action ought to recover in damages the

value of the estate at the time of the eviction. And as the parties have agreed that the true value at that time was 15000 dollars, the plaintiff must have judgment for that sum.

As the plaintiff admits that immediately on the eviction he paid that sum to Boylston, and received back the estate, and has been ever since in the receipt of the rents, he can have no claim for interest as a compensation for any intermediate loss of profits.

75.

LARNED v. BUFFINTON, 3 R. 550.

PARSONS, C. J. This action is on the case for a malicious prosecution, and for defamatory words charging the plaintiff with stealing the defendant's horses. The defendant pleaded the truth of the words in justification, and issue was joined on a traverse of this plea: and a verdict found for the plaintiff.

The defendant moves for a new trial, because evidence, proper to mitigate the damages, was rejected by the judge: and because he misdirected the jury on the subject of damages: and on these two grounds exceptions are filed.

The defendant, failing in his justification, proposed to prove, in mitigation of the damages, the manner and condition of the plaintiff's life, and that, previous to the cause of action, his general character for honesty, integrity, and fair dealing, was not good. Evidence of this nature was not admitted by the judge.

On the argument it was observed by the court that a general statement of evidence, proposed to be given, without producing witnesses to testify agreeably to the statement, was not regular; and the defendant was called upon to state the facts he was ready to prove. He accordingly stated by affidavit, that he at the trial had witnesses to prove "that the plaintiff left his father, a few years since, before he was of age, and without any property: that since that time he had been a roving single man, without any fixed place of residence for any great length of time, and without having any regular business; having lived in Boston, Wilbraham, Springfield, Middleton, Worthington, and Northampton: that he has in some of those places been considered as a drover, in others a butcher; and in a very circumscribed manner had followed those branches of business: but that the principal part of his time had been employed in buying, selling, and exchanging horses in different parts of this and of the adjacent states: that he was without real estate: and that in the manner of gaining subsistence, and in his grade and standing with society, he was below mediocrity."

After this statement, the court, in forming their opinion, have considered evidence of these facts as regularly offered by the defendant, and as rejected by the judge.

As the defendant has not stated that any evidence was offered touching the plaintiff's moral character, it is not necessary to give an opinion whether such evidence would have been legal. But we are of opinion, that the plaintiff may give in evidence, to aggravate the damages, his own rank and condition in life; and also, that the defendant may avail himself of such evidence, when it will have a legal tendency to mitigate the damages; and that this may be done either on the general issue, or on a traverse of the justification, because the degree of injury the plaintiff may sustain by the defamation may very much depend on his rank and condition in society.

It is a rule of law, that in the prosecution of any cause neither party shall

give evidence of any matters which are not in issue, because the other party will have no opportunity of encountering this evidence by opposing testimony. Consistently with this rule, the plaintiff's rank and condition in life may be given in evidence, because it is in issue, as the knowledge of it may be necessary to a just assessment of the damages, and because it is a fact in its nature, of general notoriety. But the rule will not admit evidence of the particular facts in the defendant's statement, or the plaintiff must be considered as, at all times, prepared to give a history of his places of abode, and of his occupation during a great part of his life, even in his minority, and to have with him his title to real estate, if he has any. Neither does the knowledge of the facts appear useful in the assessment of damages, unless perhaps to aggravate them by proving to the jury that the plaintiff was very generally known among his fellow citizens, and that from this circumstance the injury from the slander would be more extensive.

We are now to consider whether the plaintiff's rank and condition in life, which the defendant offered in evidence, would have had, in this case, any legal tendency to mitigate the damages.

The allegation that the plaintiff's manner of gaining subsistence, and that his station and condition in society was below mediocrity, when connected with the other allegations in the defendant's statement, would, if proved, have satisfied the jury that the plaintiff gained his subsistence by buying, selling, and exchanging, horses, in this and the neighboring states, or, in other words, that he was a horse jockey. Now from the nature of this action, and from the evidence in the cause, it is not easy to presume that the jury had not evidence of these facts. It was the interest of the plaintiff that they should have this evidence, as its tendency in this case would have been rather to aggravate the damages. A man, with the reputation of a horse-stealer, is ruined as a dealer in horses. With this character hanging on him, no man would trust him to try a horse: and no man would buy a horse of him, through fear he should buy a stolen one. We are therefore of opinion that this evidence, if given by the defendant, would have no legal tendency to mitigate the damages, and consequently he is not injured by its rejection.

The defendant has also excepted against the direction of the judge, because he charged the jury, that, considering the circumstances which had been proved, the manner of speaking the words, and especially the justification by the defendant on record, no evidence whatever could be considered in mitigation of damages.

We are satisfied that evidence of certain facts and circumstances may be received under the general issue, which ought to be rejected under this justification. In the former case, the defendant may prove that the words were spoken through heat or passion, and not from malice; or that they were spoken with an honest intention, through mistake, and not with a design to injure the plaintiff. But if the defendant when called upon to answer in a court of law, will deliberately declare in his plea that the words are true, he precludes himself from any attempt to mitigate the damages by any of those facts or circumstances, because his plea of justification is inconsistent with them.

But we are not prepared to declare that there are no facts or circumstances, from which the jury may mitigate the damages under a special justification of the truth of the words, in which he shall fail. When, through the fault of the plaintiff, the defendant, as well at the time of speaking the words as when he pleaded his justification; had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages. The direction of the judge excepted against is predicated not only on the plea of justification, but

also on the circumstances, which had been proved in the case. He has, therefore, at the request of the court, furnished us with a report of the evidence in the cause.

From this report it substantially appears that the plaintiff had several horses at the defendant's stable in Worthington at livery: that all the horses were the property of the plaintiff, except a black horse, which was the joint property of the parties: that the plaintiff wanted the black horse to match another horse of his own; and that the defendant wanted him for the same purpose: that the plaintiff practised finesse in removing the horses from the defendant's stable; and in fact removed them, without the defendant's knowledge, to Mills's stable, distant about half a mile: that the next day the defendant knew they were at Mills's, and was there with the plaintiff attempting to adjust the controversy, and offered the plaintiff to arbitrate it, which he refused: that about two days after, the plaintiff took all his horses, and went on with them to the eastward: that the defendant followed him, and might have arrested him at Northampton, but declined it, because he might attach more property when the plaintiff had gone further on: that the defendant arrested him at Belchertown, on a writ which he did not prosecute: that about the time of the arrest, and also after the plaintiff was in custody, he repeatedly uttered the defamatory words: that about the same time he told a witness that the horses were not his, except half the black horse, but that it was best to use policy.

From considering the report of the evidence, we are satisfied that the judge's direction, predicated on this evidence, was right. It does not appear that the defendant ever supposed that the defamatory words were true. He knew that all the horses were the plaintiff's, except the black horse, and of him that the plaintiff was part owner: this he declared, but said it was necessary to use policy. Indeed the inference is, that he knew that the words were not true; for at Mills's he did not charge the plaintiff with theft, but attempted to settle the dispute, and offered to arbitrate it. Afterwards, when he has had time for reconsideration, and to obtain the information of counsel as to the law as applied to the fact, he comes into court, and publicly puts the slander on record.

76.

COFFIN v. COFFIN, 4 Rep. 1.

PARSONS, C. J. The plaintiff has commenced an action of the case, demanding damages of the defendant for an injury to his character committed by the defendant in maliciously uttering and publishing defamatory words, which imported that the plaintiff had committed felony by robbing the Nantucket bank.

To this demand the defendant pleaded not guilty, and also, by leave of the court, a special plea in bar, justifying the speaking of the words, because, as he alleged, at the time when they were spoken, he and Benjamin Russel were members of the house of representatives then in session, and that he spoke the words to Russel, in deliberation in the house, concerning the appointment of a notary public, and that the words had relation to the subject of their deliberation.

The plaintiff, in his replication, denies these allegations; and avers that the words were spoken by the defendant of his own wrong, and without such cause as he had alleged, and tenders an issue to the country. The defendant does not demur to the replication, but joins the issue thus tendered.

Both the issues came on to trial, and it appeared from the evidence, that

when the words were spoken, the defendant and Russel were members of the house of representatives, then in session. The occasion, manner and circumstances of speaking them are thus related by Russell, the witness. He having some acquaintance with the plaintiff, and thinking highly of his integrity, was applied to by him to move a resolution for the appointment of an additional notary for Nantucket, the town represented by the defendant. Russell made the motion, and had leave to lay the resolution on the table. The defendant, in his place, enquired where Russel had the information of facts, on which the resolution was moved. The witness answered, from a respectable gentleman from Nantucket. The resolution then passed, and the speaker took up some other business. Russell then left his place, and was standing in the passage-way, within the room, conversing with several gentlemen. The defendant, leaving his place, came over to Russel, and asked him, who was the respectable gentleman from whom he had received the information he had communicated to the house? Russel answered carelessly. he was, perhaps, one his relations, and named Coffin, as most of the Nantucket people were of that name. The witness then perceiving the plaintiff sitting behind the bar, pointed to him, and informed the defendant he was the man. The defendant looked towards him and said, "what that convict?" Russell, surprised at the question, asked the defendant what he meant? He replied, "Dont thee know the business of the Nantucket bank?" Witness said, "yes, but he was honorably acquitted." The defendant then said, "that did not make him less guilty, thee knows." It further appeared that this conversation passed a little before one o'clock, that the election of notaries was not then before the house, but was made that afternoon, or the next day, and that the plaintiff was not a candidate for that office. And there is no evidence that the resolution laid on the table by Russel, and passed, or the subject matter of it, was ever after called up in the house.

It does not appear from the report that it was contended by the defendant that the words testified to, did not import the slander charged in the plaintiff's declaration, nor is the verdict objected to on that ground; the judge, therefore, directed the jury, that if they believed the testimony, the plaintiff had maintained the first issue. But the defendant insisted that the evidence supported the justification contained in the bar, and that by law the second issue ought to be found for him.

The question of law, therefore, arises on the second issue. Both parties had submitted the trial of this issue to a jury. The issue involved both law and fact, and the jury must decide the law and fact. To enable them to settle the fact, they were to weigh the testimony; that they might truly decide the law, they were entitled to the assistance of the judge. If the judge had declined his aid in a matter of law, yet the jury must have formed their conclusion of law as correctly as they were able. But the judge was officially obliged to declare to the jury his opinion of the law. If this be denied as a matter not within the jurisdiction of the court, it must also be denied that the jury were legally authorised to decide on the law. The consequence of which would be, that when any defendant representative should plead his privilege in bar, whether the plea be true or false cannot be enquired into, because every such plea must involve both law and fact; and the judge must send the parties out of court.

If the judge was officially obliged to declare the law to the jury, he must necessarily take notice of the law, on which the defendant relied, and give it according to his judgment, a sound construction, applicable to the issue on trial. The law relied on, is the twenty first article of the declaration of rights.

This article he was obliged to notice and explain, according to what he judged to be its true intent and effect. If there had been any explanation of this article, by the act of any legislature, or by the judgment of any court, constitutionally obligatory on courts of law, such explanation is law, and ought to have governed the judge in his construction of the article. It is not pretended, that at the time of the trial, any such act or judgment existed. The only aid, which the judge could receive, must have been derived from other parts of the constitution, and from the principles of common law, by which sound rules of construction are established.

The judge accordingly gave to the jury his construction of the article, and declared to them his opinion, that the facts did not in law maintain the issue for the defendant; and the jury found a verdict for the plaintiff.

To this opinion of the judge the defendant excepted, and moves for a new trial; and on the correctness of it are we now to decide. As the jury found a verdict agreeably to the judge's direction it is to be presumed that they were influenced by it; and if the direction was wrong, the cause ought to be again tried by another jury, uninfluenced by an erroneous opinion of the judge in a matter of law.

The twenty-first article of the declaration of rights declares, that "the freedom of deliberation, speech and debate, in either house of the legislature is so essential to the rights of the people, that it cannot be the foundation of any accusation, or prosecution, action or complaint in any other court or place whatsoever." On this article the defendant relies for his justification. And if it were competent to the judge on the trial to declare his opinion of the true intent and meaning of it, it must be competent for this court to decide whether his opinion was, or was not legal: or the defendant can have no relief by his motion; unless the court are to decide, without enquiry or authority, that the opinion was against law. But I know of no action within the jurisdiction of a court, and regularly before it, in which it will not be the duty of the judges to decide all matters of law arising in it, so far as the court is competent to decide on them, according to their own apprehension of the law. Otherwise they will have no jurisdiction of legal questions; or they must act as ministerial agents, deciding according to the will of others.

In considering this article, it appears to me, that the privilege secured by it is not so much the privilege of the house, as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For if he does not hold this privilege at the plesure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. In this respect the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature.

These privileges are thus secured, not with the intention of protecting the members against prosecutions, for their own benefit, but to support the rights of the people by enabling their representatives to execute the functions of their office, without fear of prosecutions, civil or criminal. I, therefore, think that the article ought not to be construed strictly, but liberally, that the full designs of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution of the of-

fice. And I would define the article, as securing to every member exemption from prosecution, for every thing said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber.

He cannot be exercising the functions of his office as member of a body unless the body be in existence. The house must be in session, to enable him to claim this privilege; and it is in session, notwithstanding occasional adjournments, for short intervals, for the convenience of its members. If a member, therefore, be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article, and ought to be considered within the privilege. The body, of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought therefore, to be protected from civil or criminal prosecutions for every thing said or done by him, in the exercise of his functions, as a representative in committee, either in debating, in assenting to, or in draughting a report. Neither can I deny the member his privilege, when executing the duties of his office, in a convention of both houses, although the convention should be holden in the senate chamber.

To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. But he may have other compensation awarded to him by the house, who have power, as a necessary incident to demand of any of its members a retraction or apology, of or for any thing he has said, whilst discharging the duties of his office, either in the house, in committee, or in convention of the two houses, on pain of expulsion. But if it is allowed that the remedy is inadequate, then a private benefit must submit to the public good. The injury to the reputation of a private citizen is of less importance to the commonwealth than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecution.

A more extensive construction of the privileges of the members secured by this article, I cannot give; because it could not be supported by the language, or the manifest intent of the article. When a representative is not acting as a member of the house, he is not entitled to any privileges above his fellow citizens; nor are the rights of the people effected if he is placed on the same ground, on which his constituents stand. He is secured in the liberty of travelling to the house, of attending his duties there, of exercising the functions of his office as a member, and of returning home. But so careful were the people in providing that the privileges, which they, for their own benefit, had secured to their representatives, should not unreasonably prejudice the rights of private citizens; that a member may be arrested upon execution in a civil suit, in cases where he could not be lawfully arrested on original, or *mesne* process. And that offences against law may be duly and seasonably punished, this privilege is not extended to arrests on criminal prosecutions, in any case where by law the member may be prosecuted as a criminal.

If this very liberal construction of the twenty-first article be just; if it be warranted by its language; if it be consonant to its manifest intent and design, the question before the court lies in a narrow compass.

Was Coffin, the defendant, in speaking the defamatory words, executing the duties of his office? Or, in other language, was he acting as a represen-

fative? If he was, he is entitled to the privilege he claims: If he was not, but was acting as a private citizen, as a private citizen he must answer.

Upon information given by the plaintiff to Russell, a member, he had moved a resolution providing for the choice of another notary for Nantucket; and on Russell's stating that his information was from a respectable person from that place, the resolution had passed; the house had proceeded to other business; and the subject matter of the resolution, or of the information, was not in fact before the house: although it is certain that any member might have moved to rescind the resolution. Russell, his brother member, was in the passage way, conversing with several gentlemen: the defendant came to him, and enquired the name of Russell's informant, who, he had declared, was a respectable gentlemnn from Nantucket. Was this enquiry thus made, the act of a representative discharging his duty, or of a private citizen to gratify his curiosity? It was the former, say the defendant's counsel. Whether it was or not, certainly it was innocent. But to pursue the evidence: the defendant was answered; whatever was his motive, he had received the information. If upon it, he intended again to call up the resolution, he might have done it. But no motion, for that purpose, was ever made. He then utters to Russell the defamatory words. What part of his legislative duty was he now performing? It is said that he might apprehend that the plaintiff was a candidate for the office of notary; and that his motive might be to dissuade Russel from giving him his vote. But there is no evidence that the defendant supposed the plaintiff to be a candidate, and it is in evidence that the plaintiff was not a candidate. It is also apparent that the defendant believed that Russell was not ignorant of the indictment against the plaintiff, and of his acquittal. I cannot, therefore, assign to the defendant any other motive for his indiscreet language, but to correct Russell for giving to the plaintiff the appellation of a respectable gentleman; and to justify the correction, by asserting that an honorable acquittal, by the verdict of a jury, is not evidence of innocence. It is not, therefore possible for me to presume that the defendant, in using, thus publicly, the defamatory words, even contemplated that he was in the discharge of any official duty. This enquiry by the defendant, and his replies might have been made, for all the purposes intended by him, in State-street, or in any other place, as well as in the representatives' chamber; and it is not easy for me to conceive that any language or conduct of a representative must be considered as official, merely because he chooses the representatives' chamber for the scene.

But it has been urged, that the privilege must extend to a representative giving information to a brother member, on any subject before the house; or which may be expected to come before the house; for the information may be necessary to enable the member informed to discharge his official duty with ability and propriety. Without remarking the essential distinction between a man's seeking information on subjects relating to his office, and his actual execution of its functions; and without observing the extreme difficulty of supposing that defamatory words, maliciously uttered, can ever be considered as useful information; I do clearly admit, that a representative will certainly be entitled to his privilege in all cases, where he shall give information in the discharge of his official duty; although the manner may be irregular, and against the rules of the house. But when a representative pleads his privilege, to entitle himself to it, it must appear that some language or conduct of his, in the character of a representative, is the foundation of the prosecution, for in no other character can he claim the privilege.

But in actions for defamatory words against a member, he may, in cases, to which his privilege does not extend, defend himself, like any other citizen, by proving that the words were spoken for a justifiable purpose, not maliciously, nor with a design to defame the character of any man. And this defence will avail every man charged with slander, although it may be that the words uttered are not true. I do not, therefore consider any citizen, who is a representative, answerable in a prosecution for defamation, where the words charged were uttered in the execution of his official duty, although they were spoken maliciously; or where they were not uttered in the execution of his official duty, if they were not spoken maliciously, with an intent to defame the character of any person. And I do consider a representative holden to answer for defamatory words, spoken maliciously, and not in discharging the functions of his office. But to consider every malicious slander, uttered by a citizen who is a representative, as within his privilege, because it was uttered in the walls of the representatives' chamber to another member, but not uttered in executing his official duty, would be to extend the privilege further than was intended by the people, or than is consistent with sound policy; and would render the representatives' chamber a sanctuary for calumny; an effect which never has been, and I confidently trust, will never be endured by any house of representatives in Massachusetts.

It has been said, that although the judge at the trial had no other information of the nature and extent of the defendant's privileges, but what he derived from the constitution; yet, that since the trial, on the first of March instant, the house passed a resolution declaratory of the privileges of its members, to which declaration we are obliged to conform in our judgments; because the house is to judge exclusively of its own privileges.

That the house is to judge exclusively of its privileges, for certain intents and purposes, is very certain; but if it is to exclude courts of law from judging of the privileges of its members in every case, the consequences would be unfortunate to the members. If a member in any action plead his privilege, he submits it to the judgment of the court; and if it be allowed, it is by virtue of the judgment of the court. All, therefore, the court could do, upon such an hypothesis, would be to reject the plea, lest, in judging of it, it should invade the privileges of the house.

The resolution declares that words spoken by any member within the walls of the house, relative to any subject under their consideration, either in their separate capacity, or in a convention of both branches of the legislature, whether the member speaking such words addresses himself in debate to the chair, or deliberates or advises with another member respecting such subject, are alone and exclusively cognizable by the house; and that for any other tribunal to take congizance of words thus spoken, would be a violation of the twenty-first article of the constitution. And the words relied on for the defendant are, "whether the member speaking such words addresses himself to the chair, or deliberates or advises with another member respecting such subject."

As it is admitted by the defendant's counsel that this court is competent to construe the twenty-first article, in order to decide whether the facts in the case bring the defendant within it; so also it is admitted that the court is competent to construe this resolution for the same purpose. The resolution, judging from the face of it, does not appear to be an act of the house in any case of contempt on trial before it; but to be a general declaration of the privileges secured to the members by the twenty-first article of the constitution; because it is declared that an invasion of these privileges would be a violation of that article. I consider the house, there-

fore as defining the constitutional privileges of its members, relating to words spoken by them. In this declaration, the words must be spoken on a subject before the house, and either addressed to the chair, or by one member to another by way of deliberation and advice on the same subject. In either case, the words must be spoken officially, although in the latter case they may be spoken in a disorderly and irregular manner. The house has not therefore claimed any privileges for its members, when prosecuted for slander, unless the words charged were spoken officially in the character of a representative. This inference is inevitable, unless it should be unreasonably concluded that one member could deliberate or advise with another member, on a subject before the house, having abandoned his official duty, and acting as a private citizen. Whether I do, or do not allow to the resolution, thus passed, the force of law; I am satisfied that it claims no privileges, but what are secured to the members by the constitution, of which, as far as it extends, it is in affirmance. The resolution does not, therefore, in my opinion, aid the defendant; for it appears from the facts in the case, that the defamatory words, charged on the defendant, were not spoken by him on a subject before the house, either in an address to the chair, or by way of deliberation or advice with another member.

It has been urged, that a declaration of privileges made by the house, whether those privileges do, or do not belong to it, has the force of law, and is obligatory, in all cases, on the courts of justice. A declaration of that nature is not now before us; for I am satisfied that the house has all the privileges claimed by its resolution. Whenever a declaration shall be made by the house, claiming privileges not belonging to it in the opinion of the judges of a court of law, let the judges then decide the question. The merits of it must depend on a careful consideration of the constitution, with a due regard to the privileges and prerogatives of the house resulting from it. On this subject I give no opinion. But from the observations I have already made, it may not be improper to declare, that if it had appeared to me that the words charged on the defendant, had been officially spoken by him without the walls of the representatives' chamber, either, in a convention of the two houses holden in the senate chamber, or in a committee, while executing the commission of the house then in session, as I am now advised, I would have allowed him his privilege, although, by the resolution produced, the house seem to confine its privileges to words spoken within the walls of the representatives' chamber.

But the danger of conflicting jurisdictions has been insisted on with much ability and eloquence, if we should support the present action. I am sensible that where a conflict of final jurisdictions exists in any state, there must be a defect in the laws of that state. In my opinion, this state is not liable to the opprobrium; for I do not conceive that final conflicting jurisdictions here are consistent either with our constitution or statutes.

To introduce examples from the British house of commons, cannot much illustrate the subject. The privileges of that house are not derived from any written constitution, but have been acquired by the successful struggles of centuries, directed either against the monarchy or an hereditary aristocracy. The exertions of the commons have generally been popular, because the people were supposed to reap the fruits of them. In this state we have a written constitution, formed by the people, in which they have defined, not only the powers, but the privileges of the house, either by express words, or by necessary implication. A struggle for privileges, in this state, would be a contest against the people, to wrest from them what they have not chosen to grant. And it may be added that the grant of priv-

leges is a restraint on the rights of private citizens, which cannot be further restrained but by some constitutional law. These principles are perfectly consistent with the resolution of the house, which is not a claim of any further privileges not granted by the constitution; but a description of some, and only of some privileges there granted.

I consider the house of representatives, not only as an integral branch of the legislature, and as an essential part of the two houses in convention, but also as a court having final and exclusive cognizance of all matters within its jurisdiction, for the purposes for which it was vested with jurisdiction. It has jurisdiction of the election of its members; of the choice of its officers; of its rules of proceeding; and of all contempts against the house either in its presence, or by violating the constitutional privileges of its members. When the house is proceeding as a court, it has, exclusively, authority to decide whether the matter before it be, or be not within its jurisdiction, without the legal control of any other court. As to contempts, the house proceeds against the offender to punish the contempt. Courts of law proceed to punish offences against the state, and to redress private wrongs. The same act may be a contempt against the house, an offence against the state, and an injury to an individual; and in all these respects, proceedings may be had against the offender.

When the house decides in a question of election, it can conclusively decide on the right of voting claimed by an elector, so far as it is necessary to settle the election. But an elector, illegally deprived of his right of voting, may demand redress for this wrong against the selectmen by a suit at law. This was decided in the cases of Gardner and of Kilham against the selectmen of Salem, *vide* 2 Mass. Rep. 236, 244, where the only defence set up was that the plaintiffs had no right to vote. Upon this question the judgments of both courts, however rendered, could be executed without any interference. Let me illustrate the subject by supposing a case or two. A member is assaulted in the town, in which the house is in session, and is cruelly beaten, for words spoken in the house in the execution of his duty. The house may proceed against the assailant for a contempt; and cannot the member prosecute him at law for damages? And may not the grand jury indict him for a breach of the peace? And neither can the proceedings of a court of law control the proceedings of the house, nor can the proceedings of the house control the courts of law. The judgments of each court, whatever may be the result, can be executed without any interference. Suppose a public officer indicted for extortion, and upon trial acquitted at law; cannot he afterwards be convicted by the senate on an impeachment? Both judgments may be executed without interference. The courts of law proceed to punish the offender, and he is acquitted. The power of the senate is censorial, and exercised to preserve purity in office. If it should be supposed that the senate cannot proceed after an acquittal at law, it should be remembered that, by the express provision of the constitution, courts of law may proceed after a conviction in senate; and in the proceedings at law the jury may acquit; and it could not have been intended to place the senate as subordinate to a court of law. The true design of that provision was a mere cautionary declaration that the proceedings in the senate were not to punish offenders against the state, but for a different end. And I would add that, in the present case, if the house, of which the defendant was a member, had proceeded against the plaintiff for a contempt in suing this action; whatever had been the result of its proceedings, this court could not have interfered, or granted any relief, until the sentence had been performed. And this judgment could not have affected those proceedings, so neither could those proceedings have controlled the authority of this court.

The two courts are independent and have each exclusive cognizance of the matters within its jurisdiction; and although the transaction animadverted on may be the same, yet the proceedings are for different purposes, and the judgments of both courts may be executed without any interference. There cannot, therefore, be any conflict of jurisdictions.

Extreme cases of the abuse of power, either in the house of reresentatives, or in this court, may be imagined; but they are not to be argued from, to influence legal decisions.

Since the argument of this cause, I have examined the subject with as much attention as I have been able to give to it, amidst all the business of the court pressing on us, with a strong disposition to guard the privileges of the house, and of its members, because their privileges are essential to the rights of the people, and ought to be supported, by every good citizen, according to their true limits.

From this examination I am satisfied, that whatever may be our decision of the question, it is within our jurisdiction thus brought before us; and that no breach of the privileges of the house, or a conflict with its jurisdiction can result from our determination.

I am convinced after much consideration, that the facts presented by the case do not entitle the defendant to the privilege, which he claims; and that, for this cause, the verdict ought not to be set aside.

Under this impression, to give a different opinion would be a desertion of a solemn duty, and a gross prevarication with my own conscience.

Motion for a new trial, on the ground that the jury had given excessive damages.

PARSONS, C. J. The court having given their opinion that the verdict ought not to be set aside for the misdirection of the judge, the defendant no moves for a new trial, because the damages found by the jury are excessive.

That a verdict may be set aside for excessive damages, there can be no doubt; and it may be done in two cases: one case is where the law recognizes some fixed rules and principles in measuring the damages, whence it may be known that there is an error in the verdict. In this case are included actions on contracts, or for torts done to property, the value of which may be ascertained by evidence. The other case includes actions for personal injuries, where no rules are prescribed by law for ascertaining the damages, but from the exorbitancy of them the court must conclude that the jury acted from passion, partiality, or corruption, causes which naturally produce error or injustice. But to enable the court to draw this conclusion, it is not enough, that in their opinion the damages are too high, or that much less damages would have been a sufficient satisfaction to the plaintiff; for the law has not intrusted the court with a discretion to estimate the damages, but has devolved the power on a jury, as a matter of sentiment and feeling, to be exercised by them according to their sound discretion, duly weighing all the circumstances of the case, and considering the state, degree, quality, trade or profession, as well of the party injured, as of him who did the injury. Judges therefore should be very cautious how they overthrow verdicts, given by twelve men on their oaths, on the ground of excessive damages.

But as excessive damages may be a good cause for setting aside a verdict in an action for a personal injury, it may be proper to consider when damages are, for this purpose, to be adjudged by the court to be excessive. In Wilford v. Berkley, (1 Burr 609,) the principle stated is, that the magnitude of the damages must be such that the court can manifestly see that the jury have been outrageous in giving such damages, as greatly exceeded the inju-

ry. A verdict must be set aside for excessive damages, if they are such as are unreasonable and outrageous, and which all mankind might at first blush see to be unreasonable; (Leeman v. Allen *et al.* 2 Wils. 160.) And it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce the court to grant a new trial for excessive damages; (Huckle v. Money. 2 Wils. 205.) In the case of Boardman v. Carrington, *et al.* (2 Wils. 244,) it is observed by the court, that there is a great difference between cases, where damages may be seen, as in promises or trespass for goods, and where the damages are matters of opinion and speculation, and are ideal; that the judges are to advise and not to controul juries; and when a verdict is set aside for excessive damages, it must be in a case where the damages ar monstrous and enormous indeed, and such as all mankind will be ready to exclaim against at first blush. It is admitted in the case of Gilbert v. Burtenshaw, which was cited at the bar, that verdicts may be set aside for excessive damages, when their magnitude manifestly shows the jury to have been actuated by passion, partiality or prejudice. But it is observed that it is by no means to be done because the court may feel, that if they had been on the jury, they would have given less damages, or because they may think that the jury would have discharged their duty by giving a less sum. And that of all the cases delivered to a jury, none is more emphatically left to their sound discretion than an action of slander: and unless it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw a line.

The result of these cases seems clearly to settle the principles, which are to govern the court, in setting aside a verdict for excessive damages in an action for a personal injury. When the damages are so great, that it may be reasonably presumed that the jury, in assessing them, did not exercise a sound discretion, but were influenced by passion, partiality, prejudice, or corruption, the court may set aside the verdict, and send the cause to another jury for revision.

Let us now consider the evidence, so far as it can be collected from the record and the judge's report.

The words uttered imported a charge of an heinous crime, a felonious robbery of the Nantucket bank. They were not spoken privately, but in the chamber of the house of representatives, and in the hearing of some people there, for Russell was interrupted by the defendant, when conversing with several gentlemen. The defendant was in a respectable and honourable station, representing in the legislature the town of Nantucket. And there is no evidence of the condition, circumstances or profession of the plaintiff.

The defendant's counsel have argued that the damages are excessive on three grounds. That it appears from the record, that the jury at the common pleas in Nantucket, assessed the damages at fifteen dollars only. That the defendant did not wantonly seek occasion for uttering the slander, but that it was offered by the language the witness had used on a subject recently under the consideration of the house. And that it appears that the plaintiff, having been acquitted of the crime imputed to him, was not in danger of being prosecuted criminally in consequence of the defamation.

The first argument cannot have any weight, because we have no knowledge of the evidence offered to the former jury, and can therefore form no opinion of the impression, which the injury, the plaintiff complained of, ought to have made on their minds. And if we could presume that they had the same evidence that was given to the last jury; yet it is an established rule of law, that the jury on the appeal are obliged to try the cause uninfluenced by any former verdict.

The circumstance relied on in the second argument does not appear to us

to have much if any tendency to mitigate the damages. Russell had declared that his information was from a respectable gentleman: an epithet, when applied to the plaintiff, the defendant did not brook, but retorted the charge of felony.

The last circumstance relied on by the defendant's counsel certainly had a tendency, in one view of the subject, to mitigate the damages, for the reason assigned in the argument. But upon a consideration of all the circumstances, it is our opinion that its tendency was, upon the whole, to aggravate the damages. The plaintiff, having been accused of felony, had submitted his cause to his country, and a jury had acquitted him. This was all he could do in his own justification. If he is not now to be considered as an innocent man, he has no other remedy, no other hope. This public declaration of his innocence before a competent and impartial tribunal he has a right to consider not only as a defence against punishment, but as a shield against calumny. But the defendant, as far as in him lay, would disarm him of his defence, and expose him helpless and unprotected to obloquy and disgrace. He cannot have another trial for the offence, and when he seeks, in a civil action, a compensation for the injury, he ought to receive a liberal and exemplary satisfaction.

There is no objection to the direction of the judge to the jury on the subject of damages; and there is no evidence that they had been tampered with, or were connected with either party, or were influenced by any bias or prejudice to either side. The cause was left to them under all the circumstances either party thought fit to lay before them; and they found a verdict for the plaintiff, assessing his damages at twenty five hundred dollars.

Before we can set aside this verdict, on account of these damages, we must infer from their magnitude, under all the circumstances of this case, that the jury acted intemperately, or were influenced by passion, prejudice or partiality. To make this inference, we must have satisfactory evidence that the damages are excessive; (2 Wils. 348;) and in our opinion this evidence is not before us. The verdict therefore cannot be set aside.

Were we impressed with a belief that the damages were too great, and that a less sum would have been an adequate compensation to the plaintiff, yet whether our impression or the impression of the jury is the most correct, as judges we are not authorized to determine. The plaintiff's counsel has intimated that he did not wish for larger damages than the court should think reasonable, as the object of his client in the prosecution was to obtain justice for his character, and not to dispose of it for money. It is not the province of the court to advise either party; but as the jury have done ample justice to the plaintiff's character, we are satisfied that a liberal remission of a part of the damages could not in any manner operate to the plaintiff's dishonour.

Unless there be a remission of part of the damages, judgment must be entered according to the verdict.

77.

PUTNAM ET AL. v. SULLIVAN ET AL. 4 R. 45.

Case by the indorsees against the indorsers of a promissory note, dated December 1 1804, payable to the defendants or their order.

PARSONS, C. J., The first objection made by the defendants is founded on a want of a demand of payment on the promisor when the note was payable. As to this objection, the facts are, that on the first day of grace, which

was the last day of February, notice was left at the lodgings of the promisor, that the note would be due on the last day of grace, with a request to pay it then: but it also appears that before that time it was known to the parties, that he had absconded, and when the note was payable was not to be found. The condition on which an indorser of a note is holden is, that the indorsee shall present the note to the promisor when due, and demand payment of it, if it can be done by using due diligence. Now it appears that when the note in this case was due, it could not be presented to the promisor for payment, and that there was no neglect in the indorsees. We are all therefore satisfied that the indorsers are holden on their indorsement in this case, notwithstanding there was no demand on the promisor.

The second objection is, that the defendants did not, in construction of law, indorse this note.

On the facts in this case we are to decide who shall suffer the loss of the money, the plaintiffs, who it is agreed are innocent indorsees, or the defendants.

It is objected that this note ought to be considered as a forgery of the names of the indorsers; because a note was afterwards written on the face of the paper by the promisor, not only without the direction or consent of the defendants, but against their express instruction; and therefore, that it was a false and fraudulent alteration of a writing, to the prejudice of the indorsers.

This objection would have great weight, if when the indorsers put the name of the firm on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement: for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promisory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk who had the custody of them, to the promisor, who by false pretences had obtained it, the fraudulent use of it would not be a forgery: because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with the power of using these indorsements, although his discretion was confined, as a delivery by one of the house, whether he was deceived, as in the present case, or had voluntarily exceeded his direction. For the limitation imposed on his discretion was not known to any but to himself and to his principals.

It is further objected that, if the writing of this note under these circumstances is not a forgery, yet it is such a fraud as will discharge the indorsers against an innocent indorsee. The counsel for the defendants agree that generally an indorsement obtained by fraud shall hold the indorsers according to the terms of it; but they make a distinction between the cases, where the indorser through fraudulent pretences has been induced to indorse the note he is called on to pay, and where he never intended to indorse a note of that description, but a different note and for a different purpose.

Perhaps there may be cases in which this distinction ought to prevail: as, if a blind man had a note falsely and fraudulently read to him, and he indorsed it, supposing it to be the note read to him. But we are satisfied that an indorser cannot avail himself of this distinction, but in cases where he is not chargeable with any laches or neglect, or misplaced confidence in others. Here one of two innocent parties must suffer. The indorsees confided in the signature of the defendants, and they could have no reason to suppose

that it had been improperly obtained. The note was openly offered to the plaintiffs by a broker, and when they objected on account of the absence of both the indorsers, they were answered on the information of the promisor, whose character then stood fair, that blank indorsements had been left with the clerk, and that the indorsers had before indorsed a number of notes for the same person, which had been negotiated by a broker. On the other hand, the loss has been occasioned by the misplaced confidence of the indorsers in a clerk too young or inexperienced to guard against the arts of the promisor. It is to be regretted that the blank indorsements had not been deposited with the brother of the partners, who was directed to be consulted as to the use of them; for then no innocent person would have been a sufferer.

From a view of all the facts as they are presented to us, it is our opinion that the indorsers must be holden, and that judgment must be entered according to the verdict, with the additional interest agreed.

In forming this opinion we have been necessarily led to consider the effect of a different opinion on the commercial part of the community. How far it is common for merchants to intrust their clerks with blank signatures or indorsements is not known. But when merchants are in the habit of indorsing for each other at the banks, it is very common to put their names on blank paper, and deliver them to the party to be accommodated, for the express purpose of obtaining a renewal of certain notes when they become due. And if the party having these signatures should employ them as names to other negotiable securities not contemplated, and the signatures should for that reason be void, much injury might result to innocent indorsees, or the bank discounts would be greatly embarrassed.

78.

TAYLOR v. SUMNER, ET AL. 4 R. 56.

If an insurance be effected against the perils arising from a blockade, supposed by the parties to exist in a foreign port, and in fact no blockade existed at the time, or while the ship remained at such foreign port, the insurance is void, and the premium shall be returnable.

The opinion of the court was afterwards delivered by

PARSONS, C. J. The question referred to our decision in this case is, whether the direction of the judge to the jury was right.

As the schooner, by the first policy, was insured to, at, and from Martinico against all the usual risks, the assurers were already answerable for all those risks in which the risks resulting from a blockade are not to be included. The words of the memorandum are also general, and by it no property is covered, and no risks are insured against, but those which are contained in the policy. On this view of the subject, without considering the motives or grounds of making the memorandum, the insurance thereby effected must be considered as a double insurance, and the premium cannot be recovered.

But the plaintiff contends that the representation of the motives and grounds of making the memorandum is to be considered as part of it; and taking them in conjunction, it appears that the underwriters took upon them a new risk, for which they were not answerable by the policy; that by the memorandum they were made liable not only for all risks arising from the supposed existing blockade of Martinico, but also from any blockade that might afterwards be formed of that island.

If the plaintiff's construction of the representation and memorandum be

right, the conclusion seems to be reasonable. His case will then be within the rule, which entitles assurers to all premiums for assuming risks, for which they may, by any possibility, be answerable.

But we are satisfied that the plaintiff is mistaken in his construction. To us it appears from the representation, on which the memorandum was made, that the parties contemplated no other risks, but those arising from an existing blockade, and that the memorandum can be extended to no other risks; therefore, any loss happening from any future blockade could not be a charge on the assurers.

If we are right in this opinion, the memorandum does not extend to any risks, except those which might arise from a blockade, which the jury have found never existed. There could not therefore be any possible loss incurred by the underwriters in consequence of making the memorandum. And as the memorandum was made through innocent error, and without any fraud, it is void, and the premium, stipulated as the consideration for making it, cannot be recovered. It is, therefore, our opinion that the direction of the judge was right, and that the verdict must stand.

Let judgment be entered according to the verdict.

79.

Wells v. Prince, 4 R. 64.

Upon the death of a devisor dying seized, the devisee is not seized, until an entry be made for his use, unless the tenements devised be vacant and unoccupied.

The same law applies to a remainder man.

But if a stranger is in possession, under or acknowledging the title of the devisee or remainder man, it is equivalent to an actual entry.

Elizabeth Prince is attached to answer unto Ebenezer Wells in a plea of land,—wherein the said Ebenezer demands against the said Elizabeth one undivided fifth part of the following pieces of land situate in said Boston, &c. And whereupon the said Ebenezer complains and says that Francis Wells of said Boston, Esq. his father, at said Boston, on the 3d day October in the year of our Lord 1766, being seized of all and singular the above described lands and tenements, with the appurtenances, in his demesne as of fee, taking the profits thereof to the yearly value of one thousand dollars, made his last will and testament, duly executed to pass real estate, in writing, and therein and thereby among other things gave and devised the aforesaid lands and appurtenances to his wife, Susannah Wells, for and during her natural life, and at her death equally to his sons Ebenezer, &c. [naming six others] and his daughters Catherine, &c. [naming five others] to have and to hold to the aforesaid sons and daughters and their heirs forever, from and after the death of the said Susanna. And the said Francis, the testator there afterwards on the same day died so seized of said lands and appurtenances, and the said will of the said Francis was there afterwards on the 17th of October, in the same year, duly proved, approved and allowed, whereby the said Susanna became legally seized of the same described premises for and during her natural life, and the said sons and daughters of the said Francis, the testator, became seized as of fee and right of and in the remainder of the same lands and appurtenances, expectant on the death of the said Susanna, and afterwards, viz. at said Boston on the first day of January, in the year of our Lord 1795, the said Susanna, wife of the said testator, died, and afterwards on the same day at said Boston, certain of the said sons and daughters of the said Francis, the testator, viz. the said Samuel, &c. [naming seven others] died without issue and intestate, by means whereof the said Ebenezer Wells, the demandant, became seized of one undivided fifth part of the said lands and appurtenances, as of fee and right, and ought now to be in quiet seizin and possession thereof accordingly. Yet the said Elizabeth Prince hath since illegally entered into the same premises, and still unjustly deforces him.

The opinion of the court was delivered as follows, by

Parsons, C. J. It appears from the count that the plaintiff demands one

fifth part of certain lands therein described. The title he shows is, that his father Francis, being seized in fee, devised the lands to his mother Susanna for life, remainder in fee equally to him and to his twelve brothers and sisters; that his father died seized; that thereupon his mother was seized for her life; and upon her death, and upon the death without issue of eight of his brothers and sisters, he claims one fifth of the premises in fee, and of which he is deforced by the tenant.

The demandant, having this title, may have a remedy either by a Formedon in remainder, or, having entered after the death of the donee for life, by a writ of entry declaring on his own seizin. He has elected the former remedy, and he must set out the gift, the seizin of the first donee, and his title to one fifth, and that on the death of the tenant for life the right to one fifth remained to him. These are stated in his count, except that, instead of alleging that the right remained to him, he has averred that on the death of his brothers and sisters without issue, and of the donee for life, he by means thereof became seized as of fee and right.

On the trial, he proved the gift, his title to one fifth, and the death of the donee for life: but gave no evidence of her ever having been seized under the devise. The judge was of opinion, that if his declaration was considered as a count in Formedon in remainder, it was necessary, not only to allege the seizin of the first donee under the gift, but that it must also be proved.

As the demandant had also averred his own seizin in fee after the death of the donee for life, and if a verdict had been found for him, the declaration, though very informal, might possibly have been considered as a count in a writ of entry, and the informality cured by the verdict, on the ground that the title was good, but defectively set forth, the judge was of opinion, that on this view the demandant must prove a seizin in himself after the death of the donee; but he gave no evidence of any seizin in himself. The judge, therefore, directed the jury to find a verdict for the tenant.

This direction is objected to, not on the ground that seizin in the donee must be proved, if the count was considered as in Formedon, nor on the ground that the seizin of the demandant need not be proved in a writ of entry on his own seizin, but because, as it is urged, that such is in law to be presumed from the fact that the testator died seized. And a devise by will is compared to a conveyance by deed acknowledged and registered.

Upon considering the objection, we are all satisfied that the opinion and direction of the judge was right. It is a general rule of law, that on the death of the devisor dying seized, the devisee is not seized, until an entry be made for his use, or some other act done, which in law is considered as having the effect of an entry. The exception to the rule is, when the tenements devised are vacant and without an occupant. In such case an entry has been held not to be necessary. For although he may enter on the land, yet there is no person, on whom he can enter. But there was no evidence that the tenements devised were vacant, and it is not a fact to be presumed. The same law applies to a remainder man, who is a purchaser. There must be, after the death of the tenant of the particular freehold estate, an entry or an equivalent act, before he is seized, unless the land be vacant and unoccupied.

We have mentioned an act equivalent to an entry. We do not mean to confine this act to a claim, where no entry can be made; but if a stranger is in possession, under, or acknowledging the title of the devisee or remainder man, it is equivalent to an actual entry. In the present case there was no evidence that the tenant for life died seized, and *a fortiori* the entry of

the remainder man, or of some person for him or holding under him, must be proved.

The effect of deeds acknowledged and recorded is not analogous. The statute of 1783, c. 37, provides that conveyances of land, by any person having right to convey, by a deed executed, acknowledged and recorded, shall be good without any other ceremony. The intent of the statute was to provide a substitute for a feoffment with the livery of seizin. The livery of seizin is made to give notoriety to the alienation. This purpose is better effected by the registry. But there is no statute, which provides that the probate and registry of a will shall pass the lands therein devised.

Upon the whole our opinion is that the verdict stand.

Leave was afterwards given the demandant to discontinue paying costs.

80.

HAMBLET, ET UX. v. FRANCIS, 4 R. 75.

What possession of flats is sufficient to enable the tenant to take a release.

In this action, which was a writ of *entry sur disseisin*, the demandants claimed certain flats in Boston described in the writ, counting on the seizin of Joseph Hemmenway their father within fifty years.

The opinion of the court was delivered by

PARSONS, C. J. In this action the demandants count upon the seizin of their father, and upon a disseizin by the tenant. On the issue *nul disseisin*, a verdict was found for the tenant, agreeably to the direction of the judge, which the demandants move to set aside.

The parties claim under Thomas Kemble by separate conveyances; and the tenant derives his title immediately under the deed of Arthur Noble to him, dated August 4th, 1802, and it is agreed that if Noble was then seized in fee of the tenements demanded, which are a parcel of flats below high-water mark, and they were conveyed by that deed to the tenant, then the verdict is right. Noble purchased of Kemble by a deed, July 12th, 1785, when it is agreed, that Kemble was seized in fee, and that if by his deed the tenements were conveyed to Noble, then Noble was seized in fee when he executed his deed of August, 1802, to the tenant.

But the demandants insist that no estate in the tenements passed by Kemble's deed to Noble, he not then being in possession, and the deed being only a release. The evidence for the tenant was, that Noble, at and after the execution of Kemble's deed to him, used the flats for the purpose of laying wood-coasters and other vessels on them. This we consider as proper evidence of Noble's possession to be left to the jury.

If Noble was in possession, it cannot be presumed, without evidence, that he occupied for a particular purpose by a special license, or that he was a tenant at sufferance. He must, therefore, be in possession either by right or by wrong; either as tenant at will or as a disseizor. If the former, the release operated to enlarge the estate; if the latter, it passed the estate; and *quacunque via data*, Noble by virtue of it was seized in fee.

When Noble's deed to the tenant, which is also a release, was executed, the tenant had the same possession, which Noble had, when Kemble's deed to him was executed. The same conclusion must be inferred, that Noble's estate in the tenements passed to the tenant, and that the verdict must stand.

As the releasor was seized in fee, and a valuable consideration was paid, whether the release might, or might not be considered as a bargain and

sale, or other conveyance to effect the intent of the parties we give no opinion.

Let judgment be entered on the verdict.

81.

RUSSELL v. THE NEW ENGLAND MARINE INSURANCE COMPANY, 4 R. 82.

If a policy of insurance be effected in the name of A. as agent for B. this latter cannot maintain an action upon the policy, to recover a loss for the use of C. whom he declares alone interested in the property insured.

PARSONS, C. J. The policy in this case was effected in the name of Israel Munson, as agent for the plaintiff; by which the defendants undertook to insure the plaintiff. He now brings an action on this policy, to recover a loss for the use of Evarts and others, who were alone interested in the property insured: and it is made a question for our decision, whether the action can be maintained. We are all of opinion that the action cannot be maintained. From the natural import of the words of the policy, and from the necessary construction of it, no person is insured from loss but Russell: and the case of Graves v. The Boston M. I. Company, decided both in the Circuit and Supreme Courts of the United States, is an authority in point. The distinction attempted between that case and the case at bar, is that Graves had an interest, which the policy might protect: here Russell had no interest, and the policy will be void. That distinction does not appear to us to make any difference. The alteration of the policy from the old form was made, because the assurers would know the persons, for whom they would answer. But if any man having no interest, nor calling himself agent to excite the enquiry of the underwriters might cause himself to be insured, the intent and design of the alteration of the policy would be defeated, and the underwriters entrapped to insure the property of a man, whose property they must suppose they had not insured.

Plaintiff nonsuit.

82.

MUNSON v. THE NEW ENGLAND MARINE INSURANCE COMPANY, 4 R. 88.

When an abandonment is offered to underwriters by the assured, it is not necessary to produce evidence of the loss under oath.

Where by the terms of a policy of insurance a loss is payable at a given time after notice of the loss, if at the time of abandonment the assured had a right to recover for a total loss, this right will not be affected by the credit given to the assurers in the payment of the loss, although in the mean time the loss has ceased to be total.

PARSONS, C. J. The jury having found a verdict for a total loss, the counsel for the defendants make two objections to it. The first is that, at the time of the abandonment, no evidence of the loss was exhibited. The capture took place on the 25th of April, 1806, and on the 1st of May following, one of the owners wrote the plaintiff an account of it is stated that the intelligence was received by one of the pilots, who was on board the ship, and had been turned out by the captor. On the 5th of May he again writes, directing the plaintiff, in consequence of the capture he had mentioned in his last, to abandon the ship and cargo for him and his partner. On the 8th of May Munson communicates these letters to the office, and makes the abandonment according to the directions: and it appears from the report that the in-

telligence of the pilot was true, and that the ship and cargo arrived at Halifax, and were there libelled as prize, and were in custody of the admiralty, when the abandonment was made.

In this case it is our opinion that the evidence of the loss exhibited was sufficient. It came from the pilot, who was present at the capture, and was correct. Nothing can be objected against it, but the want of the affidavit of the pilot, which it is not usual to send; and which he is not obliged by law to make. The master was a prisoner, and could make no protest, which is the usual evidence, when it can be obtained. No objection was made by the underwriters to the sufficiency of the evidence, which was afterwards fortified by a copy of a letter from the master at Halifax, containing a particular account of the capture, which was forwarded on the 21st of May to the underwriters.

The second objection is, that the loss was not payable, by the terms of the policy, until sixty days after notice of the loss, and that before that time the property was restored.

We do not think there was any weight in this objection. The abandonment was made on the 8th of May, at which time the loss was total, and a right to recover for a total loss was vested in the assured: and this right cannot be affected by the credit given to the assurers in the payment of the loss, whether that credit was long or short.

Judgment must be rendered according to the verdict.

83.

LANE, ADMX. v. PENNIMAN AND R. HASKINS, TRUSTEE, 4 R. 91.

When and to whom freight is payable.

PARSONS, C. J. From the answer of Haskins, the facts are that Nathaniel Windsor was owner of the schooner Thomas Jefferson: that he chartered her to Penniman, the defendant, and Elpalet Loring, jointly, to make two trips to the southern ports and back; and on her return from Alexandria to Boston, the trustee had on board 872 bushels of corn, and 244 barrels of flour on freight, to be paid to Penniman and Loring, the hirers of the schooner, of which Loring sailed as master; that on the arrival of the vessel at Boston, and before any of her cargo was unladen, Windsor, declaring that the hirers had broken their contract, took the vessel from them, turned out Loring, the master, and refused to deliver the cargo, unless the freight was paid to him, which he claimed for the wages of the vessel; that Windsor accordingly, before the service of the writ, delivered Haskins his corn and all his flour, except 40 barrels, which he retains until the freight of the whole is paid to him. The plaintiff insists that Haskins is trustee for Penniman's moiety of the freight.

If Haskins is indebted for the freight, it is either to Loring the master alone, in which case he cannot be Penniman's trustee, or to Loring and Penniman jointly. In this last case, we know not whether Penniman is entitled, as against Loring, to any part of the freight. Loring was the master, subject to all the disbursements, and for them had a prior lien against Penniman for the freight. Loring ought to have been made a trustee, that he might have disclosed the transaction; and if it had appeared that any of the freight was coming to Penniman, the plaintiff might perhaps have holden Haskins as trustee for that part.

We however are not satisfied that Haskins is indebted to Penniman and Loring, or to either of them, for the freight. Although the master may re-

tain the cargo, until the freight be paid or tendered; yet he must be ready to deliver the cargo on payment or tender. But in this case, upon the arrival of the schooner, the charterers were dispossessed of her, the master turned out, and the cargo taken into the possession of Windsor. Part of the cargo Windsor has since delivered, and part he retains as security for the whole freight, which he claims on his own account. The master therefore never has delivered the freight, nor has he been ready, or had it in his power to deliver it. And if Haskins were now to pay him the freight, he must afterwards sue Windsor, to recover his 40 barrels of flour, or the value. On this ground we are satisfied that the defendant's trustee must be discharged.

84.

SELFRIDGE v. GILL AND LUTHER RICHARDSON, his Trustee, 4 R. 94.

The question before the court in this action, viz. whether trustee or not, arose out of the answer of the trustee to the interrogatory of the plaintiff, whether he, the trustee, had any goods, effects, or credits of the said John Gill in his hands and possession at the time of the service of the original writ upon him?

PARSONS, C. J. The plaintiff insists that Richardson is Gill's trustee, upon the following facts stated in his answer.

The trustee held a note made by Fullerton, indorsed by Kerr, and by Gill as second indorser. Kerr, the first indorser, became a bankrupt, and the trustee proved his debt, under the commission, arising on the note. He afterwards, and before a dividend was in fact made, demanded payment of the note of Gill, the defendant, who paid it. A dividend was then made of Kerr's effects by the commissioners among the creditors, including the trustee's claim which had been proved; the trustee being the legal assignee, under the commission of the bankrupt's effects.

The plaintiff insists that the trustee, being assignee, must immediately on making the dividend be considered as receiving it, because he was both payer and payee; and having before received the amount due on his note from Gill, the dividend, or a part of Gill's payment equal to it, must be money received to Gill's use.

The trustee contends that his dividend should be divided among the other creditors of the bankrupt, and that Gill should be left to his remedy against Kerr, or prove his demand under the commission against Fullerton, the maker, who has since become bankrupt.

The case of sureties under the bankrupt laws, who are absolutely liable, but, having no cross security, cannot prove their claims, because they are not creditors at the time of the bankruptcy, is a very hard one. The remedy against the bankrupt is generally useless, unless to gratify resentment, or to harrass an unfortunate debtor. To relieve a surety thus situated, as far as it can be done consistently with our bankrupt act, is to be desired. The holder of the note, if he does not call on his surety, until after he has received his dividend, must credit the surety with the amount of his dividend. But it is insisted, that if the holder demand and receive payment before the dividend be made, the surety can derive no benefit from it.

The surety certainly lies at the mercy of the holder of the note, whether he will prove his claim or not; or, if he has proved it, whether or not he will strike his name out of the list of claims, and receive no dividend. But when a dividend has been made on his claim, the matter appears by our bankrupt law to be fixed. The claimant is entitled to his dividend, and no

court is authorized to prevent his receipt of it, or to cause it to be distributed among the other creditors. As to the dividend, the commissioners are *functi officio:* they may make a second dividend, but they have no power over the first.

In this case Richardson, being assignee, has already received his dividend; and the other creditors have no remedy against him to refund it. Having received it, he ought not to hold all the full payment he received of Gill, but must be considered as holding a part of it, equal to his dividend, for the use of Gill.

Richardson is therefore a debtor of Gill, and must be adjudged his trustee.

85.

DAWES, JUN. ESQ. JUDGE, &c. v. HOWARD, ET AL. 4 R. 97.

This was an action of debt on a bond given by the defendants to the judge of probate as sureties with Samuel Treat, deceased, upon his being appointed guardian to his five minor children.

The commissioners reported, that the deceased guardian had received sundry sums of money for his minor children, as they were legatees named in the last will of Lemuel C. May, deceased, amounting in the whole to 2452 dollars 70 cents: that as to the account exhibited by the defendants, they found no charges made by the late guardian in his lifetime, nor any vouchers among his papers in support of said account, which they say was wholly assumed by the defendants, his sureties, as what they suppose he would have been entitled to exhibit and claim, had he seen fit so to do: that the charges were all reasonable: that he did in fact support his said children during the time the said account charges: and that he had little or no property of his own.

The court, after considering this cause, observed that, although in England guardians of infants were not permitted to trench on the principal of the funds belonging to their wards in any case, unless leave has been first given by the chancellor, upon application to him; our statutes have altered the law in this respect, and have even made the real estates of minors liable to be sold for their support and education, when the personal estate shall be insufficient.

In the present case they ordered the late guardian's account to be charged with interest on the several sums received by him, and to be credited with the support of the minors at the rate of one dollar per week for each, and execution to issue for the balance of the account thus adjusted.

86.

CLAP v. BELL, 4 R. 99.

The sheriff cannot retain goods attached by him on *mesne process* after judgment is rendered for the defendant although the plaintiff reviews the action.

PARSONS, C. J. Bell, the deputy sheriff, contends that on the facts in this case the attachment continued in force, and that it was his duty to retain the goods notwithstanding Clap's demand. But we are all of opinion, that when goods or estate are attached by virtue of an original writ to secure the judgment, which the plaintiff may recover, if on the appeal judgment be rendered for the defendant, the attachment is *ipso facto* dissolved; and the sheriff can no longer retain the property attached against the demand of the defendant. If the plaintiff should recover judgment, and should delay delivering his execution to the sheriff for thirty days, then the attachment is also dis-

solved. According to the agreement of the parties in this case, the defendant must be called.

37.

CROSBY v. PARKER, 4 R. 110.

Land is described in a conveyance to A. as bounded on B's land: B. owned at the time a piece of land, and had contracted to purchase another piece adjoining, which he occupied as his own, but had received no conveyance of it at the time of the conveyance to A, although he had paid the price for it: it was held that A's land was bounded by the land owned by B. and not by that occupied by him.

PARSONS, C. J. A verdict in this action was found for the tenant, which the demandant moves to set aside, that he may have a new trial.

The point in dispute may be easily stated, without having recourse to all the boundaries mentioned in the case, to understand which a plan might be necessary.

Elizabeth and Alice Jefts were once seized in fee of the several parcels of land mentioned in the case, one of which was claimed by Joseph Wilson, another by the demandant, and a third by John Jefts, by separate deeds from Elizabeth and Alice, and under John Jefts the tenant claims; and to find the issue in the cause, it was necessary to ascertain the north-east corner of the parcel of land conveyed to the demandant by the deed of the said Elizabeth and Alice, dated February 18, 1805. This deed places the north-east corner at a stake and stones by Joseph Wilson's land on a certain highway. The next enquiry then is, where was Wilson's land? He had before purchased his parcel of the same grantors by a deed duly executed, and the stake and stones standing by this land of Wilson's is agreed. The tenant insists that this stake and stones is the north-east corner of the demandant's land; and if it is, the verdict is right. The same Wilson had contracted with John Jefts, the brother and agent of the grantors, and had paid him for half an acre of land to the southward of his first purchase, and adjoining on the same highway, at the south-easterly corner of which was a stake and stones by the same highway, which would be the north-east corner of Crosby's land, if it bounded northwardly on the half acre, which he contends that it did: and if this last stake and stones is the north-east corner of Crosby's land, the verdict is wrong. The question is, therefore, reduced to this, whether Crosby's land adjoined northwardly on Wilson's first purchase, of which he had a conveyance, or on the half acre, of which he had no conveyance.

Wilson, after his bargain with John Jefts, occupied the half acre for two years, as he would occupy his own land, including the time when Crosby's deed was executed, but he did not claim the land and would have informed any enquirer that he had no title to it, but had contracted with John Jefts for one. In 1806, he applied to the owners, Elizabeth and Alice Jefts for a title, but they refusing to give him one, he abandoned the occupation. It further appears that Crosby's deed conveys to him his land, with all the buildings thereon, and if he is bounded on Wilson's first purchase, there will be only a barn on his land; but if he is bounded by the half acre, there will be a house also included.

For the tenant it appears, that neither the grantors nor Parker had any knowledge that John Jefts had bargained with Wilson for the half acre; and as to the expression of "all the buildings," it was found that the grantors purchased all these parcels of Solomon Pollard by a deed conveying them with all the buildings thereon, when in fact there were no buildings thereon

they having been erected afterwards; and that all the land, to which Wilson had any title on record, was his first purchase.

Upon considering this case, we are all of opinion that the verdict is right, because Crosby is bounded northwardly on Wilson's land, and Wilson's first purchase is all the land that he in fact owned; and all the land, of which he had any title on record, by which the tenant could ascertain the boundaries, and all the land, which the grantors of Crosby, who were also the grantors of Wilson, could contemplate as Wilson's land. And if the first purchase of Wilson is not a boundary of Crosby's land, then there will be half an acre between Crosby and Wilson, the property of the grantors, not conveyed and Crosby's northern boundary will be on the other land of the grantors. As to the words 'and all the buildings thereon,' they are often inserted by unskilful scriveners, without any particular meaning; and in fact have no legal operation. This unskilfulness appears in this case from Pollard's deed, in which they were introduced, when in fact no buildings were on the land.

Judgment according to the verdict.

38.

Bridge v. Austin, 4 R. 115.

The cause was tried before the Chief Justice, whose report was as follows:

"On the trial, the plaintiff, to maintain the issue on his part, gave in evidence a memorandum in writing signed by the defendant in the words following—" Boston Oct. 22, 1805. Received on board the ship Rodney, J. Hurd, bound for Charleston, S. C. a case of linens, amounting for the sterling cost to £84 5*s* 1-2*d*, which I promise to dispose of in Charleston for account of Nathan Bridge, and to account and pay to him the proceeds, and take on myself all risks, except those of the seas, for which I shall charge five per cent. David Austin." And it was agreed by the parties that the said case of linens was transported by the defendant in the said ship to Charleston, where it arrived, and was delivered safe to him by the said Hurd.

The defendant to maintain the issue on his part, gave in evidence that after the case of linen was delivered to him in Charleston, he stored the same in a suitable and convenient store there for sale; that before the same was sold, it was stolen from the said store by some thieves to him unknown, without any fault on his part; that he has never been able to discover the said thieves, or to recover the said linens or any part of them; and that the customary commissions charged by commission merchants in Charleston for the sales of merchandize and making returns, is five per cent. on the proceeds.

On this evidence the plaintiff insisted that the defendant was not discharged by the said larceny. The defendant insisted that he was discharged, and if he was not, that he was entitled to another five per cent. besides that mentioned in the memorandum.

I told the parties that as the merits of the cause depended on the legal construction of the written memorandum, I would reserve that construction for the opinion of the whole court: and as there were no sales, I should direct the jury to find a verdict for the plaintiff, and to assess his damages equal to the value of the linens at Boston when shipped, deducting therefrom five per cent commissions. They found a verdict agreeable to the directions; and the defendant, waiving his right to a review, moves for a new trial for the misdirection of the judge."

The cause was contiued *nisi*; and now at this term the opinion of the court was delivered as follows, by

PARSONS, C. J. We have considered the memorandum given in evidence, and are all satisfied that the construction of it is agreeable to the direction of the judge, and that the verdict cannot be set aside for his misdirection supposed by the defendant. Indeed the construction, for which the defendant contends, cannot be admitted; because it is repugnant not only to the express words, but to the manifest intent of the parties.

But in looking into the declaration, it clearly appears to us, that the written memorandum was not legal evidence to prove the plaintiff's count. The allegation is, that for five per cent. commission on the sales, the defendant promised to transport the goods to Charleston, S. C. at his own risk against all dangers, except of the seas. The risk of transportation, except of the seas, is the only risk the defendant is there alleged to take on himself, when from the memorandum he is liable to all risks, except of the seas, until he account for the proceeds. These contracts are materially different; and as a judgment in this action would not be a bar to another action on the contract stated in the memorandum, the verdict must be set aside, and a new trial granted, when the plaintiff, if he should think proper, may move to amend on terms.

89.

WALLIS, Executrix v. WALLIS, 4 R. 135

If one for a valuable consideration bargain and sell land with warranty, to hold from the grantor's death, no action lies during the grantor's life to recover the consideration money paid: although an action on the covenant may lie after the death of the grantor, if a title to the land be not made to the grantee or his heirs.

The declaration was *assumpsit* for 400 dollars, money had and received to the use of the plaintiff.

PARSONS, C. J. We do not know any legal principles, on which this action can be supported. The money was not paid through mistake, being supposed to be due when it was not. It was not obtained by deceit, fraud imposition, or oppression; nor was it paid upon an executory contract, which has happened to fail, or which has been, or might be lawfully disaffirmed by either party. The most that can be urged for the plaintiff is, that nothing passed by the deed, as it was intended to convey a freehold *in futuro*; but he voluntarily paid the money for such a conveyance, and took a covenant from the grantor, that after his death the grantee and his heirs should have the land; which covenant, at the grantor's death, may be broken, and the foundation for an action for damages, if a title to the land be not made to the grantee or his heirs.

But fortunately for the grantee, he is mistaken in the construction of his deed. For, although it is true that by a common law conveyance a freehold cannot be conveyed *in futuro;* yet by a covenant to stand seized to uses such conveyance can be effected. And every deed ought to be construed, if it be legally possible, so as to effect the intent of the parties. In this case, beside the valuable consideration expressed, a consideration of natural affection may be averred as consistent with it; for the consanguinity of the parties, though not mentioned in the deed, is agreed in the case. The intent of the parties is clear, and there is a covenant of the grantor, that after his death the grantee shall have the land. This conveyance is, therefore, to be considered in law as a covenant by the grantor to stand seized of the

land, to his own use during his life, and after his decease to the use of the grantee and his heirs. And upon the execution of the deed, the grantor was tenant for life, and a remainder in fee was vested in the grantee.

The plaintiff must be called.

90.

HILL ET UX. v. JOSHUA DAVIS AND ELEAZAR DAVIS, Executors of the last will of BENJAMIN DAVIS, 4 R. 137.

Debt *qui tam* for not causing the will of the said Benjamin to be proved, or presenting the same to the judge of probate, with their refusal to accept the trust, within thirty days of the decease of the testator.

PARSONS, C. J. By the statute of 1783, c. 24, s. 16, it is enacted that if any executor or executors of any will, knowing of their appointment, shall not within thirty days after the testator's decease, present the will to the probate court, every executor so neglecting his or her trust in that behalf, without just excuse made and accepted by the judge of probate for such delay, shall for his or her neglect forfeit £5 for each month he or she shall delay to present the will, to be recovered by action of debt, one moiety to the plaintiff, and the other moiety to the legatees.

This action was brought by the plaintiffs to recover this forfeiture against the defendants named as executors in the will, for their joint neglect. The writ was served only on Joshua, who pleaded that he did not owe the plaintiffs in manner and form as they had declared, and issue on this plea was joined to the country. On the trial there was no evidence that Eleazar, one of the executors who was sued, ever had any knowledge that the will existed. And the jury were directed that for this defect in the plaintiff's evidence, he had failed to maintain the issue on his part. For this direction a new trial is moved for.

The object of the statute was to compel a seasonable presentation of the will to the probate court. If either executor presents the will, no forfeiture is incurred by the other: if both neglect, a joint forfeiture is incurred by both, which may be sued for jointly: and perhaps separately, although but one forfeiture can be recovered. But if the neglect be in one executor, and not in both, the negligent executor alone incurs the forfeiture, and is alone to be sued.

In this case the plaintiffs might have demanded a several forfeiture from Joshua; but they have demanded, in an action of debt, a joint forfeiture of both the executors: and the defendant by pleading, denies that he owes a forfeiture jointly with the other; and upon this evidence it is very clear that the issue was with him, for the other executor had incurred no forfeiture.

In informations, on penal statutes for forfeitures incurred by malfeasance, against several, charging them all with the malfeasance, on not guilty pleaded, the jury may convict some of the whole or of part of the offence charged, and may acquit others. For the malfeasance in an information is several as well as joint; and each defendant incurs a forfeiture in proportion to his offence: and in such information judgment may be rendered against the defendants as trespassers. (Lane, 59.) But this action is *ex contractu*, (3 Black. Com. 117.) in which a joint forfeiture is demanded as a joint debt.

We observe here that the plaintiffs are man and wife, in whose joint names a popular action has not been heretofore sued. The wife can have no interest in the judgment jointly with her husband in this case, nor is his interest therein in her right, but the effect of his own suit. If the verdict

had been for the plaintiffs, no principle of law at present occurs to us, on which they could have judgment.

The verdict is not set aside; but judgment must be entered according to it.

91.

COOLIDGE v. WILLIAMS, 4 R. 140.

This was an action of the case brought in Middlesex pursuant to the private statute of 1797. c. 75, to recover treble the value of certain shad and alewives alleged to have been taken by the defendant within the limits of Watertown.

The action was tried before the Chief Justice, and a verdict found for the plaintiff by consent of the parties, subject to the opinion of the court upon the following facts, viz.

"That the defendant caught, with a seine, shad and alewives to the value of the sum mentioned in the verdict, in Charles river, within the times mentioned in the plaintiff's declaration: that the place in said river, where the said fish were caught, lies where the said town of Watertown is on the north shore, and the town of Cambridge on the south shore: that the defendant put the said seine into the said river on the Cambridge side, and extended it across the river over the flats on the Watertown side, and then drew the seine on shore on the Cambridge side, with the said fish in it: that one witness testified, that it was reputed, that the limits of Watertown, at the said place, extended into the said river towards said Cambridge, to the middle point between high water mark on each shore: that the deepest water was on the side of the channel nearest the said Watertown shore, where the greater part of the fish swim: that further up the river, over against the said Watertown shore lies Newton adjoining on the said river, or on the channel thereof: that still further up said river, Watertown lies on both sides thereof, and extends across it, in which place is a fishery for shad and alewives, commonly called the Watertown fishery; and in no other place, but the last mentioned, have the inhabitants of Watertown been accustomed to carry on the shad and alewive fishery: that higher up the said river, where the tide does not flow, lies the said town of Waltham, on each side thereof, and extending across the same, where is carried on the Waltham fishery: that still higher up, on the said river, lies the said town of Weston, on both sides of, and extending across the same, but the said town has no fishery within its limits: that the place, where the said fish were caught as aforesaid, is the most convenient place in said town of Cambridge for carrying on the shad and alewive fishery: that the seine fishery cannot be conveniently carried on in the same river, unless the seine be carried across the said river: And that the inhabitants of Cambridge have been accustomed to carry on the shad and alewive fishery at the place where the said Williams caught them it being a convenient place for that purpose."

"If upon these facts the court shall be of opinion that the verdict ought to have been found for the plaintiff, judgment shall be rendered accordingly: but if otherwise, the said verdict shall be set aside, and a verdict shall be entered for the defendant, and judgment be rendered accordingly."

PARSONS, C. J., after shortly stating the nature of the action, the provisions of the statute on which it was brought, and the terms of the agreement on which the verdict was found, proceeded as follows:

The defence relied upon is that the defendant took the fish in Cambridge; that he put in his seine from the Cambridge shore, and having extended it into the river, he drew it upon the same shore, and there took the fish; and that the fishery, thus carried on in Cambridge, is an accustomed fishery for the inhabitants of that town, in this place, and carried on in the accustomed manner.

The plaintiff insists that this fishery by the defendant is prohibited by the act, because Watertown is situate on the other side of the river opposite to this place, and the defendant extended his seine across the channel, and over the flats on the Watertown side.

The decision of the question must depend upon the construction of the

statute. It is stated that higher up the river Watertown is situate on both sides of the river, where there is a convenient place for the shad and alewive fishery, and which is called the Watertown fishery; and that the inhabitants of that town have been accustomed to fish there, and in no other place.

Towns adjoining, or extending across a navigable river, may own the soil of the flats, and even of the channel, if a grant has been obtained from the government: but the property in the fish, and also of all tide-waters is in the public. But it seems to be a part of the common law of the state, that the town may appropriate the fish, if not appropriated by the legislature: but for taking the fish no man could lawfully go on the soil of another without leave. This rule of our common law probably originated from a declaration of common liberties, made by the general court of the colony of Massachusetts Bay, as early as in the year 1641, which was cited at the bar. If therefore no appropriation has been made of the fish, any citizen may take them, so that he does not trespass on the land of others. But any town adjoining any river may appropriate the fish taken within its limits, and that the town on the opposite side of the river may have the same right, the limits must not include the tide waters ebbing and flowing, but the shores on which the fish are drawn and placed, when they may be said to be taken according to the intent of this privilege. If the fish, when caught swimming in the public tide-waters, are to be considered as taken within the limits of any town before they are hauled on shore, it will be difficult in many cases to define the interfering rights of towns situate on opposite banks; and when the channel is not granted, fish swimming there out of the limits of any town would not be subject to appropriation.

The power of appropriation not meeting the wishes of many towns, acts have been passed authorizing them, not only to fix the times and manner of taking the fish, but also the places, and the disposition of them when taken; and to sell the exclusive right of fishing; and guarding this authority by pecuniary penalties. And the place of fishing is always understood to be that part of the shore used for employing seines and nets, or other engines, and for bringing the fish to land; and not any part of the tide-waters in which they were swimming.

Independently of the statute in question, the defendant, or any other, might have put his seine into the river from the Cambridge shore, and might have landed his fish, if he had committed no trespass on the land; and the inhabitants of that town might have appropriated the fish, and have secured to themselves a several fishery. But the plaintiff supposes that these privileges are restrained, or at least that the fish shall not be caught on the Watertown side of the river.

Private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication. But every part of this statute may have a reasonable effect without any such construction. The object of it was to enable the towns of Watertown, Weston and Waltham to regulate their own rights then subsisting, and to secure to themselves the benefits arising from such regulation, and not to grant any new privileges. The two last towns lay on each side of the river, and a part of Watertown extended across it. Watertown had a fishery on its shores, where the people were accustomed to fish, and not at the place opposite to the Cambridge fishery. The defendant was fishing on the Cambridge shore, where the people were accustomed to fish, and in the accustomed manner extending his seine across the river towards, but not upon the Watertown shore, and taking his fish on the Cambridge shore. This privilege of the defendant, it was not the intention of the statute to in-

fringe. He may enjoy it consistently with all the provisions of the statute, giving them a reasonable construction.

It is therefore our opinion that the verdict be set aside, and a verdict of not guilty be entered, upon which the defendant must have judgment.

92.

PRECOTT v. TUFTS AND OTHERS. 4 R. 146.

This was an action of trespass pending in the county of Middlesex, and was tried before the Chief Justice at the sittings in Cambridge after the last October term.

The declaration originally contained two counts. The first was trespass at common law for pulling down an uninhabited house of the plaintiff's. In the second count for the same trespass, the plaintiff demanded treble damages on the provincial statute of 1 Geo. 2. c. 4.

After the evidence was given to the jury, but before the cause was committed to them, the plaintiff, by leave of the court, struck out his second count, the defendant objecting.

The jury found a verdict for the plaintiff upon the first count: and the defendant moved to arrest the judgment, because the plaintiff had joined two counts, which by law could not be joined: he contending that the treble damages could be recovered only by an action of debt upon the statute.

PARSONS, C. J. The statute giving the treble damages originally demanded by the plaintiff in a second count, directs that they may be recovered after the same manner of conviction, and by the same rules and methods, as are directed in the provincial statute of 12 Geo. c. 5. Looking into that statute, we find the manner of conviction there described is in cases where the defendant shall be charged in trespass. Trespass is therefore the proper action for recovering the treble damages here demanded, and the defendant's objection is unsupported.

It is holden in some cases, where there is a misjoinder of action, a verdict of a jury, finding the issue for the defendant on the count misjoined, will not cure the declaration, so that the plaintiff can have judgment on the count, on which a verdict is found for him. Whether this is now law, it is not necessary to determine: for we are satisfied that when a count is struck out of the declaration by leave of the court, the declaration must afterwards be considered as if the count struck out had never been introduced.

Judgment cannot be arrested.

93.

WYMAN v. BRIGDEN, 4 R. 150.

Lands specifically devised are liable to be levied upon by the creditors of the testator, equally with other lands, of which he died seized.

Lands of a deceased testator are liable to be taken in execution by a creditor, notwithstanding the executor, being residuary legatee, has given bond to pay the debts and legacies.

Lands of a deceased testator are liable to be taken in execution, although in the possession of an alienee of a devisee.

The extent of an execution on lands gives the creditor an actual seizin of the lands.

If an execution against the estate of a deceased testator be levied on lands in possession of an alienee of a devisee and within the year the land be redeemed by the alienee: in an action of covenant against the devisee, he will recover as damages the redemption money and interest.

PARSONS, C. J. On these facts the question arising is, whether the plaintiff was, or was not legally ousted by Boylstone, the judgment creditor.

The defendant, denying the ouster, has made several objections against the plaintiff's recovery.

First, that the devise of the lands conveyed were a specific devise, and were not liable for the payment of the testator's debts by the levy of a creditor, until all the lands given to the residuary legatee had been first applied: because until then the executor could not have obtained a license to sell them for the payment of the testator's debts.

It is our opinion that this objection cannot prevail. By the seventh section of the statute of 1783. c. 32, the real estate of any testator is liable to be taken in execution upon judg nt recovered against executors for debts due from the testator. And by the eighth section of the same act, any executor delaying or neglecting to pay the debts due from the testator, and thereby subjecting the testator's lands to be taken in execution, shall be deemed guilty of waste. And by the eighteenth section of the statute of 1783. c. 24, when real estate devised to any person shall be taken in execution for the payment of the testator's debts, the other legatees and devisees shall be held to contribute *pro rata*. From these provisions it is manifest that all the lands of the testator, as well as his chattels, are liable to be taken in execution for the payment of his debts, if not satisfied by the executor: and the judgment creditor may levy his execution on any of those lands at his election. If any devisee or his assigns are injured, the remedy is by action of waste against the executor, if he has been guilty of unfaithful administration; or by an action for contribution against the other legatees and devisees. The right of the creditor is the same, when the land taken in execution is devised by a particular description, or passes by general words to the residuary legatee. For in all cases a devise of lands is considered as a specific devise, whether it is devised by a special or general description, to a particular devisee, or to the residuary legatee. *Vide* 7 Ves. jun. 137.

Another objection is that in this case the executor had given to the probate court a bond, with condition to pay the debts and legacies agreeably to the seventeenth section of the statute of 1783. c. 24, and that by force thereof the lien of the creditors on the testator's lands was discharged.

We do not think that this objection has any weight. This bond is given at the election of an executor, who is residuary legatee, for his benefit, to excuse himself from returning an inventory, and from settling an account: and not to discharge the lien of the creditors by substituting a new security. Whatever remedy a creditor may have on the bond, it is a cumulative remedy. This point was determined in the case of Gore v. Brazier.

The third objection is, that at the time of the levy the plaintiff was seized under a conveyance by the defendant, and that the creditor's lien was taken away by a *bona fide* sale by the devisee.

We are satisfied that this objection ought not to prevail; otherwise the intention of the statutes, providing that the real estates of testators shall be liable for the payment of their debts, might be easily defeated. A creditor cannot recover judgment for his debt until the expiration of a year from the testator's death, during which time it would be easy for the devisees to aliene all the estates devised to them; and it is not supposed that they are accountable for the proceeds of the sales either to the executor or creditors. But we do not mean to be understood as deciding that a creditor, by unreasonable neglect and delay in pursuing his remedy may not be deemed to waive his lien on the testator's real estate. In this case the remedy was promptly and seasonably pursued. This point was also adjudged in the case of Gore v. Brazier.

The last objection is, that the plaintiff being seized and in possession when the levy was made, the levy did not give the judgment creditor an actual seizin, but only a right to be seized on a subsequent entry; and as the case does

not state such a subsequent entry, the plaintiff has not yet been lawfully ousted.

It appears to us that this objection must have the same fate as the others. The statute of 1783. c. 57. s. 2. & s. 3. expressly provides that when lands are taken in execution, the officer shall deliver seizin and possession to the creditor, who shall be answerable for the nett profits to the debtor, if he shall redeem by paying the debt and interest within a year. And by the statute of 1788 c. 51. s. 3. it is declared, that when lands shall be extended upon, to satisfy an execution recovered by an executor or administrator, for a debt due to the deceased, he shall stand seized of those lands for the use of the persons who were interested in the debt. It is therefore very clear, that when an execution is duly levied on lands liable by law to be extended upon in satisfaction of the execution, the judgment creditor is by virtue of the levy actually seized of those lands. This point was fully considered and settled, when the judgment debtor was the ter-tenant, in the case of Langdon v. Potter, *et al.* (*ante*, vol. 3. 215;) and when the alienee of the devisee was the ter-tenant, which is the present case, in the often cited case of Gore v. Brazier.

The parties having agreed that at this time the land is worth 3000 dollars, that it was in fact appraised to the judgment creditor at a much less sum, and that the plaintiff defeated the levy by paying within the year the appraisement with the interest, the defendant has argued, that in this case the value of the land at the time of the ouster is not the measure of damages, but that the sum paid to the plaintiff to release the same, with interest, is all that he can legally claim. And we think that the defendant is right. The plaintiff, by virtue of the defendant's deed to him, not only derived from the defendant all his estate in the land, but also an equitable right to redeem it, if it should be taken to pay the testator's debts. This equitable right thus obtained he exercised to defeat the levy, and what benefits he received by it must accrue to the defendant, from whom it was derived. The plaintiff cannot therefore be considered as now in possession under a new title, but as under his former title, having removed an incumbrance on it. For the necessary expences he incurred in extinguishing the incumbrance, he is entitled to demand a reimbursement from the defendant. The redemption paid by the plaintiff, with interest from the time of payment to the time of the judgment, forms the amount of the damages the plaintiff can recover.

Let the defendant be called, and judgment be rendered for the plaintiff.

91.

CHURCHILL v. SUTER, 4 K. 156.

Indorsers of a negotiable security are incompetent witnesses to prove it usurious.

PARSONS, C. J. This is an action of the case on a promissory note, ered by the indorsee against the promiser.

The parties have stated a case, and have submitted to the court to enter judgment according to the law resulting from the facts thus disclosed.

The defence is usury, and two questions are made for the decision of the court, viz. 1. Whether in this action the indorsers are competent witnesses to prove the contract usurious; and 2. if they are, whether from the facts disclosed by their testimony the contract is usurious.

As to the first question, the defendant has argued that the indorsers are competent witnesses; because they are not interested in the event of the suit, and have not been sentenced for any infamous crime.

The plaintiff admits the general rule advanced by the defendant; but he

has argued that there are exceptions to that rule, and among them it is one, that the parties to a negotiable security shall not be admitted as witnesses to prove the security originally void,

Let us consider this question as supported by the authority of adjudged cases. The first case, in which it is determined that witnesses of this description, and for this purpose, should be admitted is Jordaine v. Lashbrooke, *et al.* In that case the indorsee held a bill of exchange unstamped, purporting to be a foreign bill not liable to stamp duties. The drawer was admitted to prove that the bill was in fact drawn in London, but was dated abroad to defraud the public revenue of the nation.

Before that case we find no report, where the question was decided, until the case of Walton v. Shelley. There the parties to the negotiable security were not admitted to prove it usurious, because it was a rule, that no man should be allowed to defeat, by his testimony, a security, to which he had given credit as a party. And this rule was supported by a maxim of the civil law prohibiting every man from alleging his own terpitude. In this case the counsel for admitting the witness agreed to the rule, and endeavored to show the case not within it. In Bent v. Baker this principle is recognized by Lord Kenyon, if the reporter was not mistaken, and certainly by Judge Buller, who confined it to negotiable securities. But in the case of Jordaine v. Lashbrooke, *et al.* Lord Kenyon denies that he recognizes this principle. If Peake's Reports are worthy of credit, and I have never heard their authority questioned, Lord Kenyon certainly recognized this principle in the cases of Charrington v. Milner, (Peake's N. P. 6,) and Humphrey v. Moxon, (Ibid. 52,) and in Phetheon v. Whitmore, (Ibid. 49,) the same principle is admitted by Buller, J.

In Adams v. Langard, *et al.* (Ibid. 117,) involving the same question afterwards decided differently in Jordaine v. Lashbrooke, *et al.* Lord Kenyon admitted the drawer to prove the bill to be drawn in London, and for this cause a new trial was granted, but against his opinion. In Rich, *et al.* v. Topping, (1 Esp. Rep. 176,) Lord Kenyon persevered in his opinion, and admitted the drawer to prove the note usurious; and afterwards in Jourdaine v. Lashbrooke, *et al.* two other judges concurred with him, but Ashurst, J. adhered to the former rule. And it appears from the case of Hart v. M'Intosh, cited by the plaintiff, that the Common Pleas then adhered to the rule laid down in Walton v. Shelly.

From this short review of the adjudged cases, no conclusion, on either side, can with certainty be drawn. When we revert to the decisions of this court, the practice has been uniform. More than twenty years ago, after a full argument, the court unanimously decided that the testimony of the parties to the note should not be admitted; and the decision has been uniformly adhered to. In this court therefore there has been no diversity of practice; and if we admit the indorsers in this case, we must overturn a series of our own decisions.

Let us now examine the question upon the principles, which relate to public convenience and to private morals.

It need not be remarked, that when the consideration of a negotiable security is against law, yet on that account the security cannot, by the common law, be avoided in the hands of a *bona fide* purchaser not privy to the illegality of the consideration. But by statute usurious and gaming notes are made void, when holden by an innocent purchaser for valuable consideration. We therefore consider the question as applying generally to notes of this last description; because notes of the former kind, by being negotiated to any person ignorant, or who cannot be proved conusant of the original transaction, exclude the application of the rule in question.

The circulation of negotiable paper is extremely useful to trade, as it multiplies commercial credit, and the notes pass from man to man as cash. Any rule of law, tending unnecessarily to repress this circulation, is therefore against public policy. When a negotiable note is offered to a merchant or farmer, in payment for his merchandize or produce, all he can look to are the names of the parties to the note, and all his enquiry is as to their solidity. Whether there be any secret canker, which will destroy the note, is unknown to him; and the parties are interested to conceal it, until he has given the note his confidence. And he may fairly presume that all, who have given the note a currency by their signatures, are honest men, and have not combined to defraud him. If therefore the parties to the usury or the gambling having received the fruits of their illegal contract, and having given a circulation to the note, can be admitted by their testimony to destroy it; beside the injury to a fair purchaser, the nogotiation of paper will be greatly checked, to the no small injury of the public.

But further considerations arise, if we regard the immoral tendency of admitting these parties as witnesses. As the law abhors fraud, its rules of proceeding are framed so as to prevent fraud, by detecting and punishing it. No man shall be admitted to allege his own turpitude, when the allegation will tend to encourage or support fraud or illegality. Thus, in civil causes, the plaintiff shall not be permitted to show any illegality in his own conduct, to maintain his action, neither shall the defendant, in his defence allege his own wrong. In civil or criminal suits, persons may be witnesses against their accomplices, because their testimony tends to suppress fraud and injustice; and for the same reason, witnesses, whether subscribing witness or others, may disclose a fraud.

But in the present case, to admit the parties to the illegal contract as witnesses, would not tend to suppress fraud, but to encourage it, by enabling the parties to it to enjoy all the beneficial fruits of it, and to throw the mischievous consequences on an innocent indorsee. For any man, by contrivance with another, may take up money of him at usurious interest, and give him a negotiable note for security. The promisee may sell it for a valuable consideration, and when the indorsee attempts to recover his money, the promisor and indorser may, at least by releases, be witnesses for each other, and defeat the purchaser of his remedy, and quietly enjoy the money he has paid for the note.

We admit, as a general rule, that infamy and interest are the tests of the competency of witnesses. But to this rule, exceptions are allowed. To preserve domestic harmony, and to secure to husband and wife an unrestrained confidence, neither is, in any case, admitted as a witness for or against the other. Also it is well known, that interested witnesses are sometimes admitted on principles of convenience. A man robbed may be a witness in an action against the hundred for the robbery. And we are satisfied, that the exclusion of parties to a negotiable security, from testifying that it was originally void, is another exception, established to assist commerce, and to discourage fraud. We are, therefore, of opinion that the indorsers are incompetent witnesses in this case.

It is now unnecessary to decide the second question. 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 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.

The defendant must either confess judgment, or be called.

92.

COMMONWEALTH v. CLAP, 4 R. 163

The defendant was indicted for making and publishing the following malicious libel, against one Caleb Hayward, an auctioneer, and posting it up in several public places in State-st. in Boston, viz. "Caleb Hayward is a liar, a scoundrel, a cheat, and a swindler. Don't pull this down."

The opinion of the court was delivered by

PARSONS, C. J. The defendant has been convicted by the verdict of a jury of publishing a libel. On the trial, he moved to give in evidence in his defence, that the contents of the publication were true. This evidence the judge rejected, and for that reason the defendant moves for a new trial.

It is necessary to consider what publication is libellous, and the reason why a libellous publication is an offence against the commonwealth.

A libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the memory of one dead, or the reputation one who is alive, and expose him to public hatred, contempt or ridicule.

The cause why libellous publications are offences against the state, is their direct tendency to a breach of the public peace, by provoking the parties injured, and their friends and families, to acts of revenge, which it would not be easy to restrain, were offences of this kind not severely punished. And every day's experience will justify the law, in attributing to libels that tendency, which renders the publication of them, an offence against the state. The essence of the offence consists in the malice of the publication, or the intent to defame the reputation of another In the definition of a libel, as an offence against law, it is not considered, whether the publication be true or false; because a man may maliciously publish the truth against another, with the intent to defame his character; and if the publication be true, the tendency of it to inflame the passions, and to excite revenge, is not diminished, but may sometimes be strengthened.

The inference is, therefore, very clear, that the defendant cannot justify himself for publishing a libel, merely by proving the truth of the publication, and that the direction of the judge was right.

If the law admitted the truth of the words, in this case, to be a justification, the effect would be a greater injury to the party libelled. He is not a party to the prosecution, nor is he put on his defence; and the evidence at the trial might more cruelly defame his character than the original libel.

Although the truth of the words is no justification in a criminal prosecution for a libel, yet the defendant may repel the charge, by proving that the publication was for a justifiable purpose, and not malicious, nor with the intent to defame any man. And there may be cases, where the defendant, having proved the purpose justifiable, may give in evidence the truth of the words, when such evidence will tend to negative the malice and intent to defame.

Upon this principle a man may apply by complaint to the legislature to remove an unworthy officer; and if the complaint be true, and made with the honest intention of giving useful information, and not maliciously, or with intent to defame, the complaint will not be a libel.

And when any man shall consent to be a candidate for a public office, con-

ferred by the election of the people, he must be considered as putting his character in issue, so far as it may respect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not a libel. For it would be unreasonable to conclude, that the publication of truths, which it is the interest of the people to know, should be an offence against their laws.

And every man holding a public elective office, may be considered as within this principle; for as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a reelection, if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct.

For the same reason, the publication of falsehood and calumny against public officers, or candidates for public offices, is an offence most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and it may be to the loss of their liberties

But the publication of a libel maliciously, and with intent to defame, whether it be true or not, is clearly an offence against law, on sound principles, which must be adhered to, so long as the restraint of all tendencies to the breach of the public peace, and to private animosity and revenge, is salutary to the commonwealth.

The defendant took nothing by his motion, and was afterwards sentenced to two months imprisonment, with costs.

93.

SAVAGE, Plaintiff in error, v. GULLIVER, 4 R. 171.

This was a writ of error, brought to reverse a judgment rendered by a justice of the peace. The original declaration, was assumpsit for money, had and received, to the use of the original plaintiff, who is the plaintiff in error.

PARSONS, C. J. The proceedings of a justice of the peace, in an action commenced before him, in which either party aggrieved at his judgment, might have appealed to the court of common pleas, have been brought before us by a writ of error. We are satisfied, that the writ issued improvidently, and for that cause must be quashed.

This court, from the powers given it, has a general jurisdiction to correct errors, in the proceedings of inferior courts, either by a writ of error, or by *certiorari*, according to the nature of those proceedings, in all cases where another remedy for the party aggreived is not provided. From all judgments of a justice, where the party may appeal to the common pleas; and from all judgments of the common pleas, where an appeal lies to this court, the remedy by appeal ought to be pursued. It is less expensive and more convenient than a writ of error; and further relief may be granted on appeal, than can be on a writ of error. On appeal, the cause of error may be removed by amendment; mistakes in fact on the merits, may be corrected; neither of which can be done on error; and at the same time an erroneous judgment below may be amended by the court having appellate jurisdiction, The statute, in giving an appeal, has in our opinion taken away, by a reasonable implication, the remedy by error, unless in cases where the aggrieved party, without any laches on his part, could not avail himself of an appeal.

But if it appear on record, that the plaintiff in error might have appealed, the court will, *ex officio*, quash the writ; or the court will quash it, on a

plea in abatement, disclosing the plaintiff's remedy by appeal. In this case, it appears on the record, that the plaintiff in error might have sought his remedy, by appeal to the common pleas. He cannot come to this court *per saltum*, but he ought to have appealed, and if dissatisfied with the judgment of the common pleas, he might then have sued his writ of error.

As the point intended to be submitted to the court is of general importance to the militia, we give our opinion upon it.

The eighteenth section of the statute of 1793, c. 14, declares what arms and equipments each private soldier shall at all times be provided with. In the nineteenth, twentieth, and twenty-fourth sections, penalties were imposed on the neglect of the soldier to appear on the parade, with his arms and equipments. If he neglected to appear, he was liable to a fine of ten shillings, and also to a fine of twenty shillings, if his arms and equipments were not on the parade. If part of them were there, then to a fine of such a part of the twenty shillings, as the articles of his arms and equipments absent, were in proportion to the whole articles required; which proportion, from the nature of equipments, it must have been difficult to ascertain. But the justice was bound to exercise his discretion. If the soldier appeared with his arms and equipments not in good order, he was to be fined three shillings; and perhaps a proportion of the twenty shillings for the article not present. If he was absent, and his arms and equipments complete, he was then subject to a fine of ten shillings only. So that in every case, where he was liable to a fine, he was liable to more than one, except when all his arms and equipments were on the parade, and in good order.

To avoid this variety of fines, and perhaps to compel the personal appearance of the soldier on the parade, when he has no reasonable excuse, was the intention of the sixth section of the additional act; stat. 1805. c. 114. By this section, for every default of appearance, armed and equipped, at a battalion or regimental muster, the soldier forfeits four dollars, and the sum is forfeited, whether he is present, not armed and equipped, or absent, and his arms and equipments are, or are not on the parade. But if the default be at a company muster, the penalty is only two dollars. And no other fines is he, in our opinion, liable to forfeit; and the justice's discretion in the apportionment is taken away.

94.

Eager and ux. plaintiffs in error, v. The Commonwealth and Abraham Munroe, tertenant; 4 R. 182.

A writ of error must be sued within twenty years from the time when the title to it accrued, or within five years after the *same* disability, which existed at that time, has ceased.

Parsons, C. J. Error to reverse a judgment in favor of the Commonwealth, vesting by way of escheat certain lands claimed by the plaintiff's wife, as heir to Michael Martin and his wife, against whom the judgment was rendered in December, 1780.

The Commonwealth pleads, in bar of the writ, the statute of 1805. c. 35. limiting the bringing of writs of error to the term of twenty years from the rendition of the judgment.

The plaintiffs in error, to bring themselves within the proviso of the statute, reply that the wife's right first accrued when she was an infant, and that the plaintiff inter-married with her during her infancy.

The defendants, in their rejoinder, agreeing the infancy of the plaintiff's wife at the time her title accrued, and also their inter-marriage during her

infancy, say that, after her title to the writ of error accrued, and after she became of full age, five years had elapsed before suing out the writ in this case.

To this rejoinder there is a demurrer and joinder.

In the proviso of the statute before referred to, it is declared, that if any person, entitled to his writ of error, shall, at the time the title accrued, be an infant, *feme covert*, or *non compos mentis*, he may sue his writ of error after twenty years, so that it be sued within five years after the disabilities are removed, or the death of the person disabled, whichever shall first happen.

It is therefore very clear that the infancy of the wife, at the time her title accrued, cannot bring her within the exception, because the writ was not sued out within five years after her coming of age. But the plaintiffs contend that as another disability of coverture occurred before the termination of her infancy, which disability existed when her right accrued, they are within the proviso; because there has been no moment of time, since her right accrued, in which she has not been disabled.

As the plaintiffs are barred by the enacting clause, unless they are within the proviso, the effect of their replication must depend upon the construction of the proviso. And we are all satisfied that the disability, to be sufficient to bring the plaintiffs within it, must be existing at the time their right first accrued. This opinion is supported by the express words of the proviso, and we have no power, by an equitable construction, to defeat the operation of the enacting clause.

Statutes of limitation are beneficial statutes, made to quiet people in their possessions, and to prevent suits at law, after an unreasonable delay in commencing them. In the case of Lloyd v. Vaughan, (2 Str. 1257;) the reversioner brought error to reverse a common recovery, after twenty years from its being suffered, but within twenty years after his title accrued, and he was barred, because he was not a person within the proviso made to relieve against the disabilities there mentioned: and it was holden that he had no remedy, unless the reversion had fallen within twenty years after the recovery. And in Prideaux v. Webber, (1 Lev. 31;) where the statute of limitations was pleaded to an action of assault and battery, and the plaintiff replied, that the courts were shut up by a rebellion, the plea was holden good, because the exception replied was not within the statute. Both these cases may be considered as hard cases, but they were barred.

In the present case the husband might have sued his writ within the twenty years. He was not under any disability, and ought to have prosecuted the rights of his wife. If we were once to admit a disability not existing when the right accrued, as within the proviso, it would be difficult to decide how far we must go. In the limitation of personal actions, the plaintiff, a female infant, may marry after her right has accrued: or an infant, just before he is of age, and after the cause of action accrued may go abroad; and however long absent, he would prevent the effect of the statute until his return. We must therefore adhere to the express words, and natural and clear import of the proviso: and the rejoinder must be holden good and sufficient in law.

Let the plaintiffs take nothing but their writ.

95.

WILLIAMS AND ANOTHER v. HIGHBORN AND OTHERS, 4 R. 189.

Under the statute of 1791. c. 60. the guardian of a person *non compos* may, on being duly licensed therefor, lawfully sell in fee simple the estate tail of his ward during

his life, for the payment of his debts, and by such sale the estate tail is extinguished, and the remainders legally barred.

The opinion of the court was delivered by

Parsons, C. J. This is a *formedon in remainder*, on the gift of Mary Williams to George Baker in fee tail, remainder to Zebediah Williams, the ancestor of the demandants, in fee, after the death of Geoge Baker, without issue.

The parties have submitted the cause to the court upon a case agreed, on which two questions arise.

The first is, whether the gift to George Baker was in tail, or an executory devise in fee. The gift is a devise by Mary Williams in her last will. An estate tail is so clearly created by express words, that there is no room for construction; and we are satisfied that the devisee, George Baker, took an estate tail, remainder in fee to the ancestor of the demandants.

The second question arises on the effect of the conveyance of the demanded tenements by George Baker, father of the tenant in tail, to the tenants.

It appears from the case, that the tenant in tail had become *non compos mentis*; that his father had been duly appointed his guardian, and had, in due form of law, obtained a license from the Supreme Judicial Court to sell these tenements for the payment of the debts due from the *non compos*. And it is very properly admitted by the parties, that pursuant to the statute of 1783. c. 38. § 5. the tenements, if the *non compos* had been seized of them in fee simple, would have passed to the tenants by the deed of the guardian.

But it is contended by the demandants, that the guardian was not authorized by law to sell the estate tail of his *non compos mentis* ward, for the payment of his debts.

The authority of the guardian to sell these lands must depend upon the construction of the statute of 1791. c. 60. By the first section of this statute, tenant in tail may, by a deed for good and valuable consideration, sell his estate tail, to be holden by the purchaser in fee simple. By the second section, it is declared that all estates tail shall be liable and subject to the payment of the debts of the tenant in tail, *in the same way and manner* other estates are subject and liable, as well after his decease as in his life.

The estates in fee simple of any person *non compos mentis* may lawfully be sold for the payment of his debts by his guardian. In this way and manner, the estates of any person *non compos mentis* are liable and subject to the payment of his debts in his life: and this second section enacts that estates tail shall be liable and subject to the debts of the tenant in tail, in the same way and manner as his estates in fee simple in his life.

The conclusion is irresistible, that a guardian of a person *non compos mentis* may, on being duly licensed therefor, lawfully sell in fee simple the estate tail of his ward during his life for the payment of his debts, and that the estate tail is by such sale extinguished, and the remainders legally barred.

The demandants must therefore be nonsuit.

96.

Worthington et al. executors v. Hylyer and others, 4 R. 196.

When the description of an estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every particular of the description: but if the description be sufficient to ascertain the estate intended to be conveyed, although the

estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected.

PARSONS, C. J. If the description in a conveyance be so uncertain, that it cannot be known what estate was intended, the conveyance is void. But in a deed poll, where there is a doubt, the construction must be against the grantor; and every deed ought to be so construed, if it can, that the intent of the parties may prevail, and not be defeated.

It seems to be a general rule, that when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed; no estate will pass, except such as will agree to every particular of the description. Thus, if a man grant all his estate in his own occupation in the town of W. no estate can pass, except what is in his own occupation, and is also situate in that town.

But if the description be sufficient to ascertain the estate intended to be conveyed, although the estate will not agree to some of the particulars in the description, yet it shall pass by the conveyance, that the intent of the parties may be effected. Thus, if a man convey his house in D., which was formerly R. C's, when it was not R. C's but T. C's, the house in D. shall pass, if the grantor had but one house in D., because by the description of the house in D. the estate intended to be conveyed is sufficiently ascertained.

Let us apply these rules to the case before us. The mortgagor has described, as the estate to be conveyed, all that his farm of land in Washington, on which he then lived, containing one hundred acres, with his dwelling house and barn thereon standing. This description is sufficient to ascertain the estate intended to be conveyed; and if no other particulars were inserted there could be no doubt. But he adds that the farm on which he lived, was the lot No. 17, in the first division of lands there, and included within certain limits mentioned. The limits of this lot are truly described, but, in fact, the farm on which he lived was not No. 17, but a different parcel of land. By the rule then this particular of the description is to be rejected, because without it the description is sufficiently certain; and because, if it be considered as an essential part of the description, the deed will be void. For by no construction can lot No. 17 be considered as conveyed, to the exclusion of the farm, as the lot is mentioned as descriptive of the farm, and not the farm as descriptive of the lot. Indeed, rather than the deed should be deemed void, a construction ought to be adopted, on which both the farm and the lot should be conveyed; for a farm, on which the mortgagor then lived, is certainly intended to be conveyed; and the lot is also bounded as descriptive of, and may, therefore, be considered as a part of the premises.

But, on the first ground, we are satisfied that the description of the farm by a false reference to the lot must be rejected, because without that description the farm is sufficiently ascertained.

Let the verdict be set aside, and a general verdict that the said Hylyer is guilty in manner and form as the plaintiffs have declared against him be entered. Judgment for the demandants must be rendered as on a mortgage.

97.

DAWES, JUDGE, &c. v. SWAN AND OTHERS, 4 R. 208.

The opinion of the court was delivered as follows by

PARSONS, C. J. This bond is sued for the benefit of Samuel Clark, one of the legatees in the testament of William Dennie, deceased. The condi-

tion of the bond is to secure the payment of all the legacies: and the penalty being forfeited, the parties have been heard in equity upon the sum justly due to Samuel Clark, the legatee, for his legacy. And the question before the court is, whether, under the treatment of William Dennie, the legatee is entitled to receive his legacy, with interest after the expiration of three months from the testator's death, or only from the time when the legacy was payable.

The testator bequeaths pecuniary legacies to five of his friends; also, twenty shillings sterling to his sister, and ten shillings sterling to each of his nephews, nieces, cousins, and other relations not mentioned in his will.

He bequeaths to his nephew, John Merchant, £4000, ordering him to account with his executor for whatever he should be indebted to the testator at his decease. And also to his brother, Thomas Dennie, £10, to be deducted out of what his brother might owe the testator at his death. And to his brother, Joseph Dennie, he gives £1500, and discharges him from what he may owe the testator at his death.

The testator also gives to Nathaniel Norton, a minor, £150, appoints the executor his guardian, and orders the interest of this legacy, until the minor arrives at twenty-one years of age, to be appropriated for his support. He then gives to his nephew, Samuel Clark, for whose use this suit is commenced, £500, to be paid him on his attaining to the age of twenty-one years, and if he die before that time, the legacy to be void.

After a bequest of all these legacies, follows the clause on which arises the question before the court, which is in these words: "I order all the afore mentioned legacies to be paid in silver and gold, and not in paper money, at any rate or by any means whatever, with interest in three months after my decease till paid."

Mrs. Swan is made residuary legatee, and her husband, one of the defendants, is made the executor. The will was executed on the 16th of June, 1781, when, or not long before, the currency was paper money or public bills of credit.

In the interpretation of a will, it is our duty to give effect to all the words, without rejecting or controling any of them, if it can be done by a reasonable construction, not inconsistent with the manifest intent of the testator.

If there be a latter clause repugnant to a former, so that one must be rejected, the latter clause must prevail, because it is the final determination of the testator; unless the intention of the testator, apparent from other parts of the will, leads to a different construction.

The legacy to Clarke, independent of the subsequent order, we are satisfied does not carry interest, whether it be considered as vested absolutely or on a contingency. A vested legacy does not carry interest but from the time when it is payable. This is a general rule, and the exception to it is in the case of a legacy bequeathed to a minor, whom the testator was under a moral obligation to support, and for whom no support was provided until the legacy was payable. In this case the legacy shall carry interest from the death of the testator, because it is presumed that his intention was to fulfil a moral obligation.

The decision of the question before us must depend on the subsequent order. The legatee insists that his legacy is within the express words of the order, and that by it the interest is to commence in three months from the testator's death. The executor contends that the order does not extend to any legacy, to the payment of which a time had been prescribed, and therefore, that the legacies to Clarke and Norton are not subject to the order.

The words are "all the afore mentioned legacies;" which extend to

Clarke's legacy, as certainly as if the testator had repeated the legacies, expressly mentioning Clarke's amongst them. They are to be paid in silver or gold: and no good reason has been, or in my opinion can be assigned, why Clarke should not, as well as the other legatees, have the benefit of this order as to the mode of paying his legacy.

But it is objected that upon this construction as to the mode of payment, Clarke's legacy will be within the order as to the time of payment also, whence the order will be repugnant to the bequest to Clarke, in which is an express direction that his legacy is to be paid him at his attaining the age of twenty-one years.

If the conclusion be just, that Clarke's legacy, as to the time of payment, is also within the order, why should it not be admitted, and Clarke be allowed the benefit of the testator's last determination in his favor? And this admission will have on other effect on the legacy to Norton, than to fix the time when it shall begin to carry interest. For the executor being constituted his guardian, the payment must be considered as made the instant the legacy begins to carry interest, as the interest is expressly appropriated to the minor's maintenance.

But we are satisfied that this order may have a reasonable construction, by which every part of the will may have the effect intended by the testator.

The words are not that the legacies are to be paid in three months after the testator's decease, with interest, but that the legacies are to be paid with interest in three months after the testator's decease, till paid. And we are of opinion that by this clause it was not the testator's intention to limit a time of payment of any of the legacies, but only to provide that they should be paid with interest, and to fix the time when the interest should commence.

Expressions of this nature are very usual in common parlance, when they are understood not as fixing a time of payment, but as a direction when the principal shall begin to carry interest; and in this order the testator himself does not contemplate that any of his legacies are in fact to be paid in three months after his decease, because they are to carry interest after that time until paid. He has, therefore, left the time of payment subject to the directions before given in his will, or where none are given, to the operation of law, by which an executor is not obliged to pay legacies within a year of the testator's death, that time being allowed him to ascertain the amount of the assets in his hands after the debts are satisfied.

Upon this construction every part of the will has effect, no words whatever are rejected, and all repugnance between the several parts is excluded.

As to the two legacies given to the legatees, who are to pay their debts immediately on the death of the testator, the legacies, or so much of them as is equal to the debts, must be considered as then paid: and if the legacies exceed the debts, the difference will carry interest from the expiration of three months after the testator's death. Or if the legatees, by payments to the testator, shall owe him nothing at his decease, then their legacies are to carry interest in three months from his decease.

Neither does this construction of the order introduce any repugnancy to the terms of the bequest to Norton; for in that bequest no time is limited, when interest on his legacy shall commence.

Upon any other construction we must necessarily presume, either that Clarke's legacy is to be paid in three months after the testator's death, contrary to the terms of the original bequest, or that the words "all the legacies afore mentioned" comprehend not all but only a part of them.

It was accordingly ordered by the court, that interest be computed on the legacy to Samuel Clarke from the expiration of three months after the testator's death, and that execution issue accordingly.

98.

Wilcox v. Mills, 4 R. 213.

Parsons, C. J. Wilcox having sued out a writ against his debtor, returnable in the county of Worcester, and by the writ having attached the effects of his debtor in the hands of Mills, an inhabitant of another county, he being the only trustee summoned, the plaintiff recovered judgment for his debt, and had execution awarded against the effects of his debtor, in the hands of Mills. The execution being returned unsatisfied, Wilcox sues this *scire facias* against Mills, to have execution against his own body, goods and estate to the value of the effects attached. To the *scire facias*, Mills pleads in abatement, that he is only trustee, who was summoned by the original writ, and that he was not an inhabitant of the county of Worcester, where the writ was returned, but of the county of Hampshire. To this plea there is a demurrer and joinder.

Mills, to support his plea, relies on the express words of the statute, that when all the trustees live in one county, the writ shall be returnable in that county.

If Mills had appeared to the original writ, and moved to stay all proceedings against him as trustee, or if he had prayed judgment, whether he should be holden to answer, he would have been discharged as of course, and he would have been entitled to his legal costs, and perhaps to such further costs as would compensate him for his time and expenses, within the equity of the third section of the statute; because it would appear that he was not holden to answer as trustee to the plaintiff's writ. But he lies by, until after execution is awarded against the effects of the debtor in his hands, and he now pleads these matters in abatement of the *scire facias*.

It is a very reasonable rule of law, that a *scire facies* to have execution, must follow the original judgment, and that the defendant can plead nothing to the *scire facias*, which he might have pleaded on the original writ. On these principles the defendant now comes too late, and his plea cannot avail him. He must submit to an examination, and he cannot be charged beyond the value of the effects he confesses to have had, when the original writ was served. But if it appears on his examination, that he had no effects, he will not in that case be adjudged to pay any costs, but shall recover costs, because he is not resident in the county where the writ was returned.

Judgment must be rendered, that the plea is bad, and that the said Mills answer further, &c.

99.

Dorr v. The New-England Marine Insurance Company, 4 Rep. 211.

Whether the obligations and rights of the parties to a policy of insurance, are determined by the actual state of the fact, or of the intelligence received, at the time of an offer to abandon *quare*.

Parsons, C. J. [After stating the facts in the case.] Upon these facts, the plaintiff claims to recover a total loss, because the loss was once total, and if it was by any subsequent events turned into a partial loss, he had no intelligence of those events, when he made the offer to abandon; and also because the total loss was not in fact reduced to a partial loss by any subsequent events, before he made the offer.

The defendants admit a partial loss, but deny a total loss, because the total loss had in fact become a partial loss by subsequent events, before the offer to abandon, although the owner had received no intelligence of them.

By the capture, detention, and suit in the admiralty, to obtain a condemnation of the teas, there was a constructive total loss of the plaintiff's property; and if the suit had been depending when he offered to abandon, it is admitted by the defendants, that the plaintiff ought to recover a total loss. When he offered to abandon, he had intelligence of the capture, detention, and pendency of the suit; but while the intelligence of these facts was travelling to him, a restoration of his property was decreed to him, which he had in fact received, it is said, by his agent Wilson; but of this restitution and receipt he had no intelligence, when he offered to abandon.

These events, of which neither party had knowledge, it is said by the defendants, must operate upon the rights of the parties, and will defeat the election to abandon, which the facts known might have vested in the plaintiff. And the decision of the supreme national court, in the case of Marshall v. The Delaware Insurance Company, not yet reported, is cited in point.

Several objections of much weight have been urged against this position of the defendants, resulting from the nature of insurance, and the usage of merchants. It is said that in making the contract of insurance, the information of the parties, and not the facts, always govern; that if the risk on the property to be insured, is in fact terminated, either by a safe arrival, or by an absolute total loss, at the time of the insurance; yet if the parties were not informed of those facts, the policy will be valid; that mercantile convenience requires that some rule should be settled, by which the parties may know when the owner may elect to abandon, because the right of election, when once existing, is a vested right; but if the owner cannot govern himself by his intelligence, but must be governed by facts, of which he cannot have knowledge, the parties cannot know in most cases, whether he has a right to abandon at the time he makes the offer; that by law the owner must make his election within a reasonable time after he has intelligence of a constructive total loss, or he loses his right to abandon; his right must, therefore, depend upon the facts of which he has intelligence, and not upon facts which may afterwards exist, but of which he can have no knowledge, when he is obliged to make his election; that a contingent right to abandon is not recognized by the law merchant; for an owner calculating on the danger to which his ship is exposed, cannot elect to abandon on the contingency that she is lost, which may prove to be the fact, and avail himself of his offer to abandon, when subsequent information shall prove, that his right to abandon existed when the offer was made; but he must have intelligence of the loss before he is admitted to his election of abandoning.

There may arise great inconvenience from the defendants' position; for if the information of the parties is not to decide on the right to abandon, neither party, after the offer is made, will give any directions for the management or preservation of the property insured, as the offer to abandon will not be waived by the ower, nor admitted by the assurer, until future intelligence shall ascertain the state of the property, when the offer to abandon was made.

It is, also, the usage of merchants to consider the right to abandon as depending on the facts known, and upon this principle, premiums of insurance have been regulated.

There is no adjudged case directly in point in our books, but it is remarkable that there is no case to be found, where a total loss has been held changed

to a partial loss; unless the owner had notice of the change, before his offer to abandon. In an action against The Massachusetts Fire and Marine Insurance Company in the United States' circuit court, where the property insured, was captured and detained at Gibralter for some months, but liberated before the offer to abandon, although the liberation was unknown to the parties, one of the counsel for the defendants made the present objection to a total loss, because the parties are to be governed by the facts existing at the time when the offer to abandon is made, and not by the facts of which they have intelligence; but as the other counsel for the defendants, admitted, that it was the usage of merchants to be governed by the facts, of which intelligence had been received, the question was not discussed at the bar, and the court in directing the jury, considered the law to be according to the usage.

But we do not think it necessary to decide this question, because we are not satisfied from the facts in the case, that the constructive total loss, which it is admitted once existed, had ceased before the eighteenth day of July, when the offer to abandon was made.

It may be admitted as a general rule, that when a vessel is wrecked, so that she cannot carry her cargo to the port of delivery, but the cargo is safely delivered to the owner, who may ship it in a reasonable time on board other vessels to the port of delivery, he shall not abandon the cargo, but shall pay the original ship a *pro rata* freight. (Marshall 505, Manning v. Newnham.)

In the present case, the ship, by a sentence of the admiralty, having jurisdiction of the cause by reason of the capture was discharged of the teas, which were holden to pay the master his full freight; and when the teas were decreed to be restored to Wilson, he was obliged to give security for the freight. The captain refused to receive the teas on board, and the voyage insured was lost, and must be considered as continuing lost, until an opportunity offered to the owner, of shipping them on board another ship for Bremen. If Wilson be considered as the owner's agent, and a delivery of the teas to him as a delivery to the plaintiff, the case states no opportunity of shipping them to Bremen, in another ship, until the twenty eighth of July following, when it was put on board a Swedish ship. This was not done until ten days after the offer to abandon was made, and thirty-six days after Wilson had received the teas.

The loss, therefore, continued constructively total, when the offer to abandon was made; for the safety of the cargo will not change the total loss of the voyage existing, until there be an opportunity in a reasonable time to reship the cargo, and the owner is not obliged to wait for other ships.

This opinion is formed on the admission, that the principles in this case, are the same which apply to a ship wrecked, and also that Wilson was the plaintiff's agent; both of which are questionable.

In this case the cargo was not only taken and detained as a prize, but taken out of the vessel, and compelled to pay the full freight, and the master was discharged of his obligation to perform the voyage, when the ship was able; and we can find no case, where under these circumstances the owner receiving his cargo in a foreign port, is obliged to hire another ship to transmit his goods to the port of destination.

Neither does Wilson appear to be the plaintiff's agent, authorised by his act to bind the plaintiff's property. He had no previous authority from the plaintiff, who did not afterwards assent to his acts: and he must be considered merely as volunteering in the service, subject to the assent or dissent of the plaintiff upon notice.

Upon the whole view of the case, we are of opinion, that the total loss

arising from the capture, continued so to be total at the time the offer to abandon was made, and that the plaintiff recover a total loss.

100.

NICHOLS v. THOMAS, 4 R. 252.

Trespass for an assault and battery and false imprisonment.

PARSONS, C. J. The Union Turnpike Corporation was incorporated by that name in March, 1804. Willard, a creditor of the corporation, recovered judgment against it, by the name of The President, Directors and Company of the Union Turnpike Corporation, no notice being taken of the misnomer, although the corporation appeared to the plaintiff's writ. He sued out his execution on the judgment, which after reciting the judgment, contained the usual precept to the officer, to levy the damages and costs on the goods, chattels or lands of the said president, directors and company, and also a precept, that for want thereof, he should take the bodies of the said president, directors and company, and commit them in execution, until they paid the monies. The execution was delivered to the defendant, a deputy sheriff, to execute, who not finding any goods, chattels or lands of the corporation, on which to levey the money, arrested the body of the plaintiff, who was one of the proprietors of the Union Turnpike Corporation. I use the language of the parties in the case, presuming it to be meant that the plaintiff was one of the corporators, and consequently, by virtue of the act of incorporation, a proprietor of the turnpike, made pursuant to that act. And the defendant, having arrested the plaintiff, held him in custody until he paid the monies due on the execution. To recover damages for this arrest and detention this action is brought.

The defendant would justify himself, because he was commanded to take the bodies of the said president, directors and company, and because the plaintiff was one of the company; and although this command was irregular and voidable, yet not being void, and coming from a court having jurisdiction in this case, he ought to be justified by his obedience to the precept.

Under the circumstances of this case, the defendant is entitled to every favorable construction of the proceedings and of his conduct, which can be legally admitted.

It is a general rule, that when the authority, under which an officer acts, is voidable only, he is justified by it, but not when the authority is void.

In this case, the corporation, as such, is sued. It has no body, which can be arrested; and in the execution the words "the president, directors and company," are the names of an aggregate corporation, and are not the description of any individual persons, whose bodies were to be arrested. The precept is, therefore, absurd and impracticable. The defendant's error is owing to a mistake in the construction of his writ, and not to his obeying a voidable command. And he cannot be justified in his defence. If an execution should illegally issue against the body of an executor, or administrator, on a judgment against the estate of the deceased, the officer might be justified in arresting the body of the executor or administrator, as he did not mistake his precept, which issued from a court having jurisdiction.

But in this case, notwithstanding the precept, yet in fact the corporation, against which the excution issued, having no bodies liable to arrest, the officer could arrest none in obedience to his writ. It appears, that he under-

stood the name of the corporation expressed by the words "the president, directors and company," as descriptive of natural persons, whose bodies he ought to arrest; which appears to be a pardonable mistake, to which he was led by the improper manner, in which the execution was issued.

101.

WILLARD v. SHEAFE, AND TRUSTEE, 4 R. 235.

A contingent credit is not subject to a foreign attachment.

PARSONS, C. J. Smith, as agent for the owners of the cargo of the schooner Boston, in which Sheafe, French and himself, were equally interested, had left a part of the cargo in the hands of certain merchants in Martinique, to be sold on the joint account of the concerned. While these effects were in the hands of the merchants, Smith was not a debtor, or accountable to Sheafe for any part of the same, and consequently had no credits or effects of Sheafe in his hands. This was the state of that part of the cargo, when the writ was served on Smith; for he did not receive from those merchants any proceeds of the sales until October, 1807, which was a month after he had been sued as a trustee.

It had been several times determined, that a contingent credit is not attachable by virtue of the statute of 1794. c. 65. The debt must be absolute, although the time of payment may be future. This construction in some measure accords with the custom of London respecting foreign attachments. For the foreign attachment of a credit is by a suit against the garnishee, the holder of it, commenced by the creditor in the name of his debtor. The debt attached must, therefore, be absolute, and even payable at the time of the foreign attachment. But the form of our process, as well as the provisions of the statute, admit of the attachment of a debt absolutely due, but payable *in futuro*.

Smith must be discharged as trustee.

102.

KIDD v. SHEPHERD, 4 R. 238.

A debtor, against whom an action is pending for the recovery of the debt, cannot be held as the trustee of his creditor in a foreign attachment, in virtue of such debt, after issue joined in such action, and before verdict.

PARSONS, C. J. After a verdict in this cause for the plaintiff, the defendant moved to stay judgment, because, after the plea pleaded, and the issue joined, and during the term in which the cause was tried, but before the verdict, the goods, effects and credits of the plaintiff were attached in his hands, as trustee of the plaintiff, in several suits commenced against him by his creditors.

We are all of opinion, that the motion ought not to be granted. These attachments are made pursuant to the statute of 1794. c. 65, providing a remedy for creditors, whose debtors have intrusted and deposited their goods, effects and credits in the hands of others, so that they cannot be attached by the ordinary legal process. When a creditor has sued his debtor, and is endeavouring by compulsory process to recover from his hands his effects and credits, it is hardly to be conceived, that it was the intention of the statute to consider those effects and credits as a trust and deposit, to be attached by a

process, by which the creditor is to be delayed or defeated in his action. But we do not decide on this point; because the statute provides that the goods, effects and credits, when thus attached, shall stand bound to satisfy the judgment of the attaching creditor; and when appropriated for that purpose, the trustee may defend himself at law against the principal; it is, therefore manifest, that the effects must be attached under such circumstances, as will enable the trustee to plead the attachment in bar of the action of the principal, so that he may defend himself at law, and not rely on a relief to be granted by the judge at his discretion.

In this case, the attachment was made after plea pleaded and issue joined, and the motion is made after verdict. The trustee cannot, therefore, defend himself against a recovery by his principal, by the trial of any issue in fact or in law, on any plea which he has an opportunity to plead. The attachment is, therefore, void, and cannot be stayed. The principles of this decision were fully considered and settled in the case of Howell v. Frye, trustee of Freemen in Cumberland: 3 R. 121.

103.

JONES v. FALES, 4 R. 245.

A promissory note is not entitled to grace, by the laws of this state, unless made payable with grace.

If payment of a promissory note made payable with grace, is demanded of the maker before the last day of grace, the indorser is not holden.

A promissory note made payable in *foreign bills*, is not a cash note, and therefore not negotiable.

PARSONS, C. J. *Assumpsit* on four several promissory notes. Of two of the notes, Fales, the defendant, is the promisor; of the other two he is the indorser, William Clapp being the promisor. The objections to the verdict arise on the counts upon these last notes. One of them was payable "in sixty days and grace," and the other "in four months and grace." They were both lodged for collection in a public bank in Boston, where all the parties to these notes live. On the first day of grace, the bank gave the promisor notice, that the notes would be due on the third day of grace, and requested him then to make payment: but did not present the notes. On the third day of grace, the notes not being paid, notice was given to the defendant, the indorser.

The objection is that there was no demand of payment of the promisor, when the notes were due.

"A note of hand is not, by the laws of this state, entitled to grace, unless it be expressly made payable *with grace*. And the indorser is not holden, without his consent, to pay the note, unless it has been presented to the promisor when due, and payment demanded; or due diligence used for that purpose. When a note is made payable with grace, the terms must have the same construction as are given by the law merchant: and consequently the note is not due until the expiration of the time of grace, which is three days, unless the last day be not a day of business, and then it is two days. I must therefore infer that the indorser is not holden upon his indorsement of these notes without his assent, because the condition, arising from the construction of law, on which he engaged to pay, was not performed.

But as this condition is implied by law for the benefit of the indorser, like all other conditions it may be waived by him, for whose benefit it was made. And it is contended that in this case the defendant, when he indorsed these

notes, agreed that if the notes should be lodged in any bank in Boston, for collection, and if the bank should, according to its usage, notify the promisor on the first day of grace, that the notes would be due on the last day of grace, and should request him to make payment, and should afterwards, on the last day of grace, notify the defendant, the indorser, that the notes were not then paid, that he would be answerable on his indorsement. Now if the defendant made this agreement, he must, both in law and equity, be holden to it.

The evidence is the usage of the banks in Boston, of notifying in this manner the promisor and indorser of any note, made payable with grace, and lodged for collection, and the payment by the parties on such notice: and that the defendant was consusant of this usage, and had in other cases conformed to it. This usage, I am satisfied, is evidence of the defendant's agreement proper to be submitted to the jury, to infer from it the agreement of the defendant. Evidence of this kind, and for this purpose, is not to establish a new law, but to prove that the defendant has waived a condition implied by law for his benefit, and has consented to other terms, to which without question he might have expressly agreed. This objection to the verdict ought not in my opinion to prevail.

The last note is a promise to pay "six hundred and eighty dollars." These words nearly complete the line, at the end of which is a dash.—Below this line, at the left side of the page, and nearly on the same line with the promisor's name are written the words [*Foreign Bills*] included by brackets. The verdict, being general on all the counts, is objected to. because this last note is not a negotiable note, being made payable, not in cash, but in foreign bills.

It is not clear that we can, as judges, precisely determine the import of the words *foreign bills;* but I think we may do it with reasonable certainty. It is the common sense of the people, and must be our understanding, that when the word *bills* is used as a medium or subject of payment, the parties intend bank notes of some description. As judges we can take notice that several incorporated banks do their business in Boston, and that there are many incorporated banks who do their business in other towns, some at a greater, and some at a less distance from Boston. This notice we have from the public acts of incorporation. We must take notice, in common with the people, that bank notes derive their value, not only from the certainty, but the facility of payment; consequently that a man in trade in Boston, holding a bill issued by a bank at a distance from Boston, can less easily obtain payment, than he could, if the issuing bank was near to him; and that the different facility of procuring payment of different bills may create a difference in their valve. I must therefore conclude that the import of the words "foreign bills" is not cash, but something differing in value from cash. The inference is, if these words are a part of the promise, and that by the promise the maker of the note did not bind himself to pay cash, but something, the value of which was to be estimated in cash, that the note objected to is not a cash note.

The next question is whether these words, thus written and placed, are a part of the promisor's contract. There is no evidence by whom the body of the note was written, or whether these questionable words were inserted before or after the signature, or by the promisor or promisee. I can therefore reason only from the face of the note. And it is a reasonable conclusion, that they must all be taken to be the words of the maker of the note, written before it was delivered to the promisee, and not the words of the promisee assuring to the promisor any honorary or legal indulgence, either absolute or conditional. If they are the words of the promisor, they must be considered, either as idle words, or as a part of the promise, to which he

gave his signature; or as a subsequent memorandum explanatory of the manner in which the promise was to be performed. I am not authorized to consider them as words without meaning; and I do not think it material, whether they were part of the original contract, or added in explanation of it. For when the promisee took the note with these words on it, he was subject to the explanation in the memorandum, if it was one; as much as he would be bound by these words, if they were a part of the promise.

The words may secure a benefit to the promisor, and I consider him as stipulating that the money might be paid in foreign bills; and I consider the promisee, by taking the note thus written, as agreeing to the stipulation. And I can have no doubt, if on the day of payment the promisor had tendered to the promisee foreign bills in payment, and they had been refused, that this tender and refusal might have been well pleaded to a subsequent action upon the note.

It is therefore my opinion that the note was not, in its original creation, a note for the absolute payment of cash, and so was not negotiable. This opinion resulting from the face of the note would have been different, if there had been any evidence that by these words the parties had a different design.

But is the verdict to be set aside for this cause? The action is by the indorsee against the indorser; and it has been in this state the immemorial usage for indorsees of notes not negotiable, to declare against the indorsers as on a negotiable note. This usage may be in a few words explained.

The statute of 3. & 4. Ann. c. 9; was never enacted here, but in practice the provisions of the first section were early adopted, and the form of declaring on negotiable notes, resulting from that statute, was extended to notes not negotiable. It may therefore be considered as the common law of the Commonwealth, that all cash notes are negotiable; and that all notes for merchandize may be sued by the promisee against the promisor; and, when indorsed, by the indorsee against the indorser, who may declare in the same manner as he might, if the notes were negotiable.

Upon this principle the want of negotiability in the note comes to be no objection to the verdict. But it is insisted that this case is an exception to the general rule, because, although the note was admitted in evidence, yet the plaintiff having declared on it as a cash note, it did not support the count. As it is not a cash note, it did not support the count, and if the defendant had objected to it on that ground, the objection must have prevailed. But I am strongly inclined to the opinion, that the objections to the evidence, as not comporting with the declaration, ought not generally to be admitted, unless the objections were made at the trial, and the point reserved. A contrary practice would introduce much mischief. Had such objection been made at the trial, according to the ancient usage of the court, in granting amendments at any time before the cause is committed to the jury, the plaintiff might have amended his declaration, and cured the defect; and thereby saved much time and expense to the parties.

But I think there ought to be exceptions to this rule, which as a general rule is correct. If the objection goes to arrest the judgment, it ought to be heard; because the defendant may move in arrest of judgment, after he has failed in a motion for a new trial. But this is not the present case. If the declaration unamended had varied the defendant's defence, either as to the principles of it, or as to the rule of damages, the objection might be made. But it appears to me that this case is not within this exception. For on producing the note to the jury, it was competent to the defendant to have given any thing in evidence to defeat the plaintiff's demand, or to ascertain the damages, which he could have given, if the declaration had been amended.

Another exception may be, when judgment according to the verdict will not be a bar to another action on the same contract, on the same breach of it. And I think the defendant's case is within this exception.

When judgment in one personal action is a bar to another personal action, the cause in both actions must be the same; which must appear from the record, or from the averment of the party pleading. But he cannot aver any thing repugnant to a record, to which he is a party. Now a contract to pay money, and a contract to pay money's worth in bills, appear to me to be essentially different, and cannot be averred to be the same contract. And if we were to render judgment on this verdict, it could not be pleaded in bar to an action brought by the plaintiff against the defendant, on the same note, declaring on it as a contract to pay money in foreign bills.

Upon the whole it is my opinion that the verdict ought to be set aside, and a new trial granted. The plaintiff may then amend, or, if his case will admit of it, explain by evidence, that by the words "foreign bills," the parties intended an effect consistent with the negotiability of the note.

104

VAN STAPHORST AND ANOTHER v. PEARCE, 4 R. 258.

Upon an express promise to pay the factor of any one, for the use of the principal, the factor may maintain an action in his own name.

Where the debtor of A. has made an express promise to pay the debt to A's factor, the debtor cannot be held as the trustee of A. in a foreign attachment.

PARSONS, C. J. It appears from the case as stated, that on the 19th of June, 1803, Calder, a master of the defendant's ship, Martha Washington, was with the ship at St. Petersburgh, and there purchased of Blandow & Co. a cargo for his owner, agreeably to whose orders to pay the balance due to Blandow & Co., he drew a bill for 25,000 Rubles on the defendant, payable in six months at Amsterdam, at the plaintiffs', without mentioning the name of any payee. This bill was delivered to Blandow & Co., who, on the 23 of June, sent the bill to the plaintiffs, with an indorsement directing the defendant to pay the contents to the order of the plaintiffs, value in account. The plaintiffs, at the request of Blandow & Co., sent the bill to the defendant, who accepted it; and it not having been paid, the plaintiffs have brought this action, in which they have declared in several different ways, that these facts might support some one of the counts.

The third count states the contract as a bill drawn by Blandow & Co. on Pearce in favor of the plaintiffs, and accepted. And we are all satisfied that the plaintiffs may recover on this count, because every endorsement of a bill may be considered as a new bill drawn by the indorser on the acceptor in favor of the payee.

The defendant's counsel have not contested the truth of this position as generally true; but they argue that this case must be considered as an exception for two reasons.

1. Because from the letters of the plaintiffs it appears that they hold the bill on account of the indorsers, and, therefore, the action should have been sued in their names. This reason does not appear to have much force; for upon an express promise to pay to the factor of any one for the use of the principal, the factor may maintain an action in his own name; and as the indorsement expresses value in account, if the indorsee holds it for the use of the indorser, he is his factor as to this bill. If Pearce had, after his acceptance, paid the bill to the principal, he might be allowed to avail himself of such payment against the factor.

2. The second reason is, that the creditors of Blandow & Co. have sued Pearce as their trustee, and, therefore, the money due on the bill is attached in his hands. This reason cannot prevail, for in this action we cannot consider the rights of any persons who are not parties to the bill. And admitting that Blandow & Co. might have given notice to Pearce not to pay the bill to their factors, the plaintiffs; yet the creditors of Blandow & Co. have no authority to discharge Pearce from his express promise made to the factors of their debtors.

Let the defendant be defaulted, and let the plaintiffs enter their judgment on the third count for the sum agreed to be due on the bill.

105.

BEMIS v. FAXTON, 4 R. 263.

A declaration in assumpsit laying the promise on a day before the teste of the writ is well enough after verdict, though it would be bad on a special demurrer.

PARSONS, C. J. Had this objection been made on special demurrer, the declaration must have been quashed; but the plaintiff insists that the fault, which was a mere slip of the pen, is cured by the verdict.

If we take the whole declaration together, it seems impossible that the defendant could doubt as to the specific nature of the complaint against him, or that the jury could have been misled. It is true that the promise is alleged to be made at a day to come; but the breach is alleged to be committed afterwards on a day then past. We therefore feel a disposition to support this verdict, if it can be done without violating any correct principle.

It is not easy to reconcile all the cases on this subject; but the case of Sorrel v. Lewin reported in 1 Keb. 354 is in point. In that case *indebitatis assumpsit* was brought, and the *assumpsit* laid on a day not then come. Infancy was pleaded in bar, to which the plaintiff replied that it was for necessaries, and on issue being joined, the verdict was for the plaintiff. Upon motion to arrest the judgment for this fault in the declaration, the court observed that there should have been a special demurrer, that it was well enough after verdict, which could not have been found for the plaintiff, but on evidence of a promise made before the action, and a duty before the promise. And the plaintiff had judgment. The principle of this case is very reasonable, and as it is an authority in point, the plaintiff in the principal case must have judgment.

106.

CLAP v. DRAPER, 4 R. 266.

Trespass for breaking and entering the plaintiff's close, in Dorchester, in the county of Norfolk, and cutting and carrying away five hundred trees of the value of five hundred dollars.

A grant to one, his heirs and assigns of all the trees and timber standing and growing in a close forever, with free liberty to cut and carry them away at pleasure, conveys an estate of inheritance in the trees and timber:—and the grantee may maintain trespass *quare clausum fregit* against the owner of the soil for cutting down the trees.

PARSONS, C. J. The two deeds in this case, executed on the same day, the latter referring to the former and relating to the same transaction, must be considered as intended to effect the same contract, and must be construed

together. The result of this joint construction is, that the grantor conveyed the close to the grantee in fee, reserving to himself an inheritance in the trees and timber, not only then growing, but which might thereafter be growing in the close. This is the natural effect of the grantee's agreement that the grantor and his heirs should have all the trees and timber standing and growing on the close forever, and not merely those then standing, or which should be standing within a limited time; and of a perpetual license to cut and carry them away. The plaintiff having all the estate in the trees, timber and close, which the grantor had after the execution of these two deeds, he has an inheritance in the trees and timber, with an exclusive interest in the soil so far only as it may be necessary for the support and nourishment of the trees; 8 Co. 271; Cro. Jac. 487; 2 Roll. Abr. 455. l. 20; 11 Co. 46.

For cutting down and carrying away the trees trespass undoubtly lies; 2 Leon. 213, Hitchcock v. Harvey.

But the defendant insisted that the plaintiff could not maintain trespass for breaking the close. Upon looking into the cases, we are satisfied that the plaintiff having an inheritance in the trees, and an exclusive right in the soil of the close, as far as was necessary for their support and nourishment, may maintain trespass for breaking the close as well as for cutting. It appears to be a principle of law well settled, that where a man has a separate interest in the soil for a particular use, although the right of the soil is not in him, if he be injured in the enjoyment of his particular use of the soil, he may maintain trespass *quare clausum fregit;* but not if his interest is in common with others. Thus this action lies for him who has the herbage, although not a right to the soil; Moor. 355 Hoe v. Taylor; Co. Lit. 4 b.; Dalison. 47; Moor. 302; Cro. Eliz. 421. But if he is entitled to a portion of the herbage for a particular part of the year, he cannot maintain this action, but may maintain an action of trespass for spoiling his grass; 2 Leon. 213, *vid.* also Yelv. 187, Dewclas, *et al.* v. Kendall, *et al.*

The latest case on this subject is the case of Wilson v. Mackreth, 3 Burr. 1824. The plaintiff had an exclusive right to take the turf in a several parcel of ground, in which, and in other parcels adjoining, he and the other tenants of the manor had common pasture, the right of the soil being in the lord of the manor. The defendant dug and carried away peats in the place in question, and it was held that the plaintiff might maintain trespass *quare clausum fregit* against him. And the difference there taken is between exclusive rights and rights in common; that if the plaintiff had only a common of turbary, trespass would not lie.

Upon the authority of this case, as well as the reasonableness of the principle, the plaintiff, in consequence of his inheritance in the trees, had such an interest in, although not the right of soil, that he may maintain trespass *quare clausum fregit* in this case, and must have judgment on the special verdict.

107.

PENNIMAN v. VINTON, ET AL. ADMINISTRATORS OF JOHN VINTON, DECEASED, 4 R. 276.

In an action of assumpsit by a surety in a bond, who had paid a part of the debt against the principal, the statute of limitations is a good plea.

PARSONS, C. J. This action is *assumpsit* by the plaintiff against the administrators, declaring that the plaintiff being surety for their intestate in a

bond, the deceased promised to indemnify and save him harmless; and that the plaintiff, as surety, had been obliged to pay a part of the bond, and the deceased, the principal, had not indemnified him. There are also two other counts for the same cause of action.

The defendants pleaded several pleas, viz. *non assumpsit* generally, on which issue was joined; *non assumpsit infra sex annos;* and that the cause of action did not accrue within six years. These pleas were traversed, and on the traverse issues were joined. On these issues the jury found that the deceased did not make the promises alleged in the second and third counts; but they found that he made the promise alleged in the first count, for the breach of which they assessed damages. But they further found that neither did the cause of action accrue, nor was the promise made within six years.

This verdict, as to the last issues, was found by consent of the parties, subject to the opinion of the court on the following facts: that the bond mentioned in the declaration was executed on the 5th day of June, 1789, by the deceased as principal, and by the plaintiff as his surety: that the bond was discharged in September, 1791, the surety paying 225 dollars towards the discharge: that the principal died in November, 1803: and that the action was commenced in August, 1806.

On these facts it is evident that the jury were warranted in the conclusions which they draw in this verdict. But it was the intention of the parties, in making the case, to submit to the court a question, which does not appear to arise out of the case, viz. whether the statute of limitations is or is not a good plea in this action.

This question however arises from the record. For if that statute is not pleadable in this action, the issues joined upon the two pleas of the statute are immaterial: and a verdict being found for the plaintiff on the general issue, he is entitled to judgment. The plaintiff denies the validity of the special pleas on the authority of the case of Cole, ex'r. v. Saxby, (3 Esp. Rep. 159.) That was a *nisi prius* case before lord Kenyon, who expressed his doubts whether the statute of limitations can be pleaded to an action similar to the one now before the court. We have considered the point, and are all satisfied that such a plea is good.

The action is *assumpsit*, and is within the words of the statute, and we think within the intent of it. Payment by a surety in behalf of his principal may be a matter *in pais* without suit; and the evidence of it may be lost by the death of witnesses, the loss of vouchers or other accident. And we cannot distinguish this case, in principle, from a case where the action may be brought by a surety in a promissory note against the principal, for not indemnifying him against the payment of the note. In such a case it is not denied that the statute of limitations would be a good plea, because, as it is said, the action is not founded on a bond. In the present case the action is not founded on a bond, but on a promise or simple contract (although the executing of the bond as a surety is the consideration of the promise); and the breach of the promise is the not indemnifying the plaintiff against the payment of the bond, and is not the nonperformance of any contract to which the principal was bound by deed to the surety.

Upon the whole record the defendants are entitled to judgment.

108.

HAMILTON v. ANN CUTTS & OTHERS, EX'RS OF SAMUEL CUTTS, 4 R. 349.

PARSONS, C. J. This is an action of *covenant broken* on a deed of the

defendants' testator, conveying 100 acres of uncultivated land with general warranty. The plaintiff assigns as a breach of this covenant, that at the time of the conveyance one Moore was lawfully seized in fee of sixty acres, parcel of the said 100 acres; and that afterwards one M'Crealis, holding Moore's title, had entered into possession of, and evicted the plaintiff from the said sixty acres. The defendants traverse the eviction, and issue being joined thereon, a verdict is found for the plaintiff. The cause now comes before the court upon a motion for a new trial by the defendants, for a supposed misdirection of the judge at the trial.

The first objection is, that the judge admitted parole evidence to prove the eviction, which the counsel for the defendants contend can only be proved by the record of a judgment at law. And we are all of opinion, that, to prove an eviction according to its strict and technical meaning, a judgment of court is necessary. But we are inclined to give to the term a more extended signification, and to understand it in this case as synonimous with ouster.

But, secondly, it is contended that here was no legal evidence of an ouster; because the dispossession took place with the consent of the tenant in possession.

It is true that if the tenant consents to an unlawful ouster, he cannot afterwards be entitled to a remedy for such ouster. But an ouster may be lawful; and in that case the tenant may yield to a dispossession, without losing his remedy on the covenant of warranty, which, in this state, is a personal action of covenant broken. There is no necessity for him to involve himself in a law-suit, to defend himself against a title which he is satisfied must ultimately prevail.

But he consents at his own peril. If the title to which he has yielded be not good, he must abide the loss; and, in a suit against his warrantor, the burthen of proof will be on the plaintiff; although it would be otherwise in case of an eviction by force of a judgment at law, with notice of the suit to the warrantor. For, in such case, unless it be obtained by fraud, the judgment itself will be plenary evidence.

In the case at bar, it appears that M'Crealis has a good title to the sixty acres, paramount to the title of Cutts. And the plaintiff, by consenting to his taking possession, did not lose his remedy for this lawful ouster against his warrantor.

Judgment according to the verdict.

109.

DRINKWATER v. DRINKWATER, ADM'R OF PYAM PRINCE, 4 R. 354.

PARSONS, C. J. The plaintiff has sued a writ of entry against the defendant to foreclose a mortgage made to him by Prince, the intestate. On the trial he produced the mortgage deed, the execution of which is agreed. The defence is that the mortgage is not *bona fide*, nor for valuable consideration, but made to defraud the creditors of the mortgagor. And the question submitted is, whether in this case it is competent for the defendant to make this defence.

A conveyance to defraud creditors is good against the grantor and his heirs, and is void only as to creditors. For neither the grantor, nor his heirs claiming under him, can avail themselves of any fraud, to which the grantor was a party, to defeat any conveyance made by him. The intention of the law in establishing this principle, is effectually to prevent frauds, by refusing to relieve any man or his heirs from the consequences of his own fraud-

ulent act. If creditors have been injured by the fraud, they are entitled to relief; and, as to them, a fraudulent conveyance is void.

When the estate is not insolvent, a creditor may have the benefit of the estate fraudulently conveyed in two ways. He may recover judgment against the administrator, and may extend his execution on the estate; or the administrator, having obtained licence, may sell the estate at public auction, and out of the proceeds may satisfy the creditors. But the creditors of the intestate, Prince, are not affected by this mortgage, unless there is a deficiency of personal assets. The evidence to prove a deficiency of personal assets is to be derived from an administration account settled by the defendant July 8th, 1807, and from his claim to be allowed the costs of this suit. In looking into the account settled, it appears that, after all the debts are paid, there is a balance of personal assets in his hands amounting 159 dollars 97 cents. To this sum must be added seventeen dollars forty cents, the charges for dividing other real estate. The judge has also allowed him the very extraordinary claim of 172 dollars 31 cents for the expences of law suits. I say extraordinary, for the estate does not appear to have derived any benefit from them, as no judgments recovered are credited, while the estate is charged with eighty-nine dollars three cents, due on report of referees. In any view, therefore, that can be taken of this account, it is most manifest that the intestate left personal estate more than sufficient to defray the charges of administration, and to pay all his debts. And as nine dollars twenty-five cents are credited for the income of real estate, and there is also a charge for partition, it must be presumed that the intestate left real estate not incumbered by this mortgage.

From these facts we must necessarily infer that the mortgage cannot, in law, be deemed fraudulent against creditors, unless the defendant has a lien on the lands mortgaged for the costs of this suit. It may be proper, therefore, to consider the connexion an administrator has with the real estate of his intestate.

At law the lands descend to the heir, subject to the payment of debts, if there be a deficiency of personal assets. The administrator frequently enters on the lands, and accounts for the rents and profits in the probate court; and this practice may not be inconvenient to the heirs. For the profits become a part of the fund, if wanted, for the payment of the debts; and, if not wanted, they form a part of the distributive shares of the personal estate. But, in law, the administrator has no right to enter into the lands, or to take the profits. He has no interest in them, but a naked authority to sell them on licence to pay the debts, when the personal estate is insufficient. And lands not being liable for the payment of debts at common law, they are not liable by statute, which does not extend the liability to the defraying the charges of administration. The personal estate alone is a fund for the payment of those charges. It is true that when lands, recovered by an administrator by foreclosing a mortgage, or taken in execution to satisfy a judgment in a personal action, are sold on licence for the payment of debts, the proceeds of the sale are considered as personal assets, and liable for the charges of administration, because those lands were received in satisfaction of personal assets belonging to the intestate at his death. Also, when lands, of which the intestate died seized, are sold on licence for the payment of debts, the court authorize the sale of lands enough to defray the charges of the sale, and of accounting for the proceeds. Because the statute giving an administrator a power to sell lands on licence, the court granting the licence must, by a reasonable construction, have authority to indemnify him in executing his power. So, also, a judgment creditor may levy his execution for his costs as well as his damages on the land.

But the administrator having no interest in the lands of the intestate, unless they have been mortgaged to him, and having no right of entry, he cannot bring any real action to recover seizin or possession of them. He cannot count on the seizin of the intestate, for he derives no interest in the lands from the intestate by virtue of his administration. Nor can he count on his own seizin, for his entry on the tenant in possession will be tortious.

If the lands are liable to the payment of the intestate's debts, he may lawfully sell them on licence, whether they are in the possession of the heir, or of his alienee or disseizor. For no seizin of the heir, or of his alienee, or of his disseizor, can defeat the naked authority of the administrator to sell on licence. Thus, also, when an authority is given by the testator to his executor to sell his lands for the payment of his debts, the executor may sell notwithstanding the death or alienation of the devisee; and for the same reason, notwithstanding his disseizin. And the purchaser, by virtue of his deed, may lawfully enter into the lands sold; and may count on his entry as a lawful seizin, and try his title if it be disputed.

If the lands of the intestate are wanted for the payment of his debts, as the administrator has no cause to recover the possession by a suit at law, so to allow real actions to be maintained by him would be mischievous. If the deficiency of personal assets amount to fifty dollars, how much land may he demand of the alienee of the heir, if he is in possession? or by what description? shall he demand a large farm, worth 5000 dollars? And if he cannot recover the whole, what part shall he recover? If he recover the whole, after land sufficient to pay the debts and charges of sale are sold, how is the defendant, who has lost his land by a judgment at law, to regain his seizin of the remainder? But if the administrator proceed without action to sell, the owner of the land may, by becoming the purchaser, protect his own title; or if others will give more, enough may be sold, and his title to, and possession of, the remainder will continue undisturbed.

It may be objected, that if the purchaser at public auction conceives that he purchases not only the land, but a law suit, he will offer a much less sum, and cause more land to be sold. This is true; but it will be the folly of the owner of the land, by setting up his title as adverse to the sale, to lose more of his land; and if the administrator had no authority to sell the land, there is no reason that he should charge the estate with the expenses of a fruitless law suit.

After explaining the connexion of the administrator with the lands of his intestate, we must infer from it, that the administrator cannot defend in any real action brought against him as administrator, by any person claiming as a purchaser from the intestate; whether the purchase be *bona fide*, or fraudulent as to creditors. A recovery against him cannot prejudice the creditors; for their right to levy their executions on the land, and his right to sell on licence, remain the same after as before the recovery.

As the defendant has therefore no claim on the lands mortgaged, to reimburse him his expenses in defending this action, the creditors are not in any manner interested in the event of the suit; and, for the benefit of creditors only, can the conveyance of the mortgagor be shown to be fraudulent; for, as to all persons claiming as heirs to him, a conveyance cannot be impeached by a fraud, to which the grantor was a party. The expenses of this defence are unnecessary, and imprudently incurred; and so far are they from a charge on the intestate's land, that the administrator ought, in equity, to pay them out of his pocket, and not charge them against the estate.

Defendant defaulted.

110.

BAXTER v. TABER, 4 R. 361.

PARSONS, C. J. This cause is submitted to the decision of the court upon a case agreed by the parties. Thompson Baxter, the plaintiff, has sued Daniel Taber, as surety in a bond, in which Thomas Holbrook, jun. was principal, given to the plaintiff, to be forfeited, if Holbrook, who was committed to the gaol in Portland, on execution at the plaintiff's suit, did not continue a true prisoner within that prison, until lawfully discharged.

It is necessary to decide, what privileges Holbrook acquired by virtue of this bond; and whether from the facts agreed he had unlawfully exceeded those privileges.

By several provincial statutes, it was made the duty of the courts of sessions to erect a prison in their respective counties, containing apartments within it to lock up debtors separate from felons and other criminals; to provide apartments belonging to the prison, in which debtors, who had given bonds to indemnify their creditors against escapes, might have chambers at a small weekly rent; and a yard appurtenant to the prison, the liberty of which, debtors who had given this indemnity, might be allowed in the day time. All these appartments, whether in or belonging to the prison, and the yard appurtenant, were a part of the prison. The sheriff had the custody of the prison, by himself, or by a jailer his deputy, whose duty it was to lock up criminals in some safe apartment in the prison; and also debtors, who had not given the bond of indemnity; but apart from criminals. And to debtors, who had given the bond, he was obliged to allow chambers belonging to the prison; and he could not lawfully restrain them from the liberty of the yard in the day time, as this privilege was secured to them by statute. As the sessions were authorised to provide a yard appurtenant to the prison, for the ease of debts, to accommodate them with air and exercise, the sessions must necessarily have power to ascertain its boundaries, without any express directions given for that purpose.

These several provisions were re-enacted by the statutes of 1783, c. 44, and 1784, c. 41. There cannot be any doubt that the yard is a part of the prison; for the 9th section of this last act, allows to debtors the liberty of the yard, but not to pass without the limits of the prison; and a part of the condition of the bond, given by a debtor to obtain the liberty of the yard in the day time, is that the debtor shall continue a true prisoner, in the custody of the gaoler, within the limits of the prison.

Previous to the passing of this last act, no doubts had been entertained as to the liberty of the gaol yard. The sessions had never attempted to make any land a part of the yard, but their own land, or land over which they had some control; but a power in the sessions to make the closes or houses of others a part of the yard appurtenant to the county gaol, which the sessions were to provide, was, I believe, never conceived to belong to that court. At the close of the ninth section, it is made the duty of that court, to fix and determine the boundaries of the several gaol yards to the several gaols appertaining, as soon as might be after the publication of that act. By this clause no new power is given to the court of sessions. Before this time, it might fix the boundaries of the gaol yard; and as the county might own more land, adjoining on the prison, than might be thought necessary for a yard and which it might be convenient to appropriate to some other use, doubts as to the limits of the yard might exist, which the sessions were enjoined seasonably to remove by ascertaining those limits.

But it is urged, that by virtue of this clause, the sessions may extend the

limits of the gaol yard, at its pleasure, including within its limits a whole town, and making every man's house and land a part of the prison, of which the sheriff has the custody. And the boundaries of the Portland gaol, as fixed by the order of the sessions, which is a part of the case, affords some presumption that the court of sessions for Cumberland, in the year 1798, were of this opinion.

We are, however, satisfied, that no opinion could have less foundation. This last act gives, in this respect, no new powers; and the practice, for half a century, under the former laws, is irresistible evidence of the construction of the power in the sessions to fix the limits of the prison. Now in virtue of this power, it is said that every man's house, and garden, and close, in Portland, is made a part of the county gaol, of which by law the sheriff has the custody, by being made a part of the yard appurtenant to the prison. To give a power of this extent to the sessions, could not have been within the intent of the statute; and if the legislature had intended it, it is manifest that the execution of the power would have been unconstitutional, as it would have been an appropriation of private property to public uses without compensation to the proprietors.

Neither can this power be considered as analogous to the jurisdiction of the king's bench, in fixing the boundaries of the rules of their prison. That the court may order their prison to be located at its pleasure; and because the prison is not large enough to contain all the prisoners, the court have authorised the marshall to keep his debtors within certain limits, without the walls of the prison, ascertained by a rule of the court, and hence called the rules of the prison. It remains at the discretion of the marshall, how far he will grant this permission to debtors; for he is still answerable to the creditor for an escape from the rules. And having granted this permission, he may revoke it, and lock up his prisoner, if there should be danger of an escape; or if he escape against the will of the marshal, he may retake him on fresh pursuit. And on granting permission, he may take bonds from the debtor, conditioned that he shall be a true prisoner, which are held good, and not as given for ease and favor. But the rules of the prison are not stated or considered as a gaol yard, appurtenant to the prison, which debtors are allowed on any terms to have, against the will of the marshal.

The law in this state is very different. The prison, including all the apartments and appurtenances, is provided at the expense of the county, which is answerable for all escapes of debtors through the insufficiency of the gaol, the justices in sessions being for this purpose the agents for the county, as well in raising as in appropriating the money. And the sessions only have authority to locate and erect the prison, and limit its boundaries, without the control of any other court. And as the gaol yard, to be provided for the accommodation of debtors, must be not only a part of, but appurtenant to the prison, it is unreasonable to consider the inclosure or the dwelling house of any man, as a part of a yard appurtenant to a goal; which must be considered to be some open area, which the debtor may lawfully enter in the day time.

But this extravagant construction of the powers of the sessions may perhaps be contended for, as beneficial and humane to debtors. The genius of our laws is certainly humane to debtors; perhaps without sufficiently distinguishing between debtors in execution for breach of contracts, and those who have been convicted of personal torts. The design of the statute, in this case, is to grant them relief from close confinement, that they may preserve their health by using exercise and fresh air, without giving indulgences which should induce an able but fraudulent debtor to withhold from his cred-

itor a just debt. If the debtor alleges that he is unable to pay, and will satisfy two justices of the peace, by his examination on oath, of the truth of his allegations, he will be discharged; and this discharge may generally be effected in thirty days. But if able to pay his debts, it is not an unreasonable hardship, that he should be coerced by confinement to apartments belonging to the prison, with the liberty of the yard appurtenant, for air and exercise.

There is another consideration, which has great weight in our minds. Imprisonment for debt, ought to be exercised impartially; but on the construction contended for, many great advantages are secured to a debtor, who lives in the town, where a county gaol is erected. If this construction should prevail, a debtor in Portland, when in execution, after he has given bonds, is subject to no other restraint than keeping in some hired apartment belonging to the prison during the night; but in the day he may live with his family and pursue his business, or amusements, at his pleasure, either on land or water, so that he does not leave the town, or go on the islands; for it should seem that the waters of the harbor within the town, are by the magic of this power, transferred to a part of the gaol yard.

But it has been argued, that admitting the court of sessions has exceeded its power, yet the order must be effectual according to the terms of it, until it is rescinded on *certiorari*. We greatly doubt, whether in this case a *certiorari* could lawfully be issued. This order of the sessions does not appear to be a judicial act; but done in execution of the powers vested in the justices by law, as ministerial agents for the county, like the powers they have to purchase lands, and to erect court houses, gaols and houses of correction, for the use of the county; or to make contracts in behalf of the county, allow accounts, and issue orders for payment. But if a *certiorari* lies, yet it is very clear, that when it appears on the face of an order of sessions, made in execution of powers like these, that no powers exist for passing the order, it must be deemed *ipso facto* void, as far so it is founded on an excess of legal powers. But it may be good so far as the powers of the sessions extend, whether they have been used discreetly or otherwise.

We fear that the powers on this subject, which the sessions supposed they possessed, and the manner in which they may have been exercised, may have ensnared some persons, confiding that the legal powers had not been exceeded. We shall greatly regret this effect; but we cannot prevent it. Inconveniences to individuals cannot alter the law, nor bend it to particular cases. We must execute it impartially, and dispense the same measure of justice to all the citizens, uninfluenced by their rank, station or circumstances. Few, if any, creditors will probably avail themselves of any mistake to charge an humane surety; and certainly not he who lives

> "Beyond the fixed and settled rules
> Of vice and virtue in the schools,
> Beyond the letter of the law."

As we cannot construe the powers of the sessions, as co-extensive with the terms of the order, we shall consider what liberty may be lawfully allowed under it, to a debtor in execution. And we are of opinion, that the debtor's liberty extends to all the grounds, the property of the county, appurtenant to the prison; and further, as the public streets and highways are open to all the citizens; as any man without being a trespasser, may use them as well for air and exercise as for other purposes, we do not feel ourselves obliged to restrain the sessions from considering them, when adjoining on, or leading to the prison, as part of the gaol yard; for in fact, when the public necessity or convenience require it, a highway may be located by the sessions over the yard. But further than this we cannot go. We cannot admit that

the sessions can, by any order of theirs, make the private property of others, of which by law they have the exclusive use, a part of the county prison.

Having thus given, as we conceive, the most liberal limits of the yard, within which a debtor must be restrained, which the law allows, we shall now examine the facts in the case, to determine whether Holbrook, the debtor, did or did not escape without those limits. The case seems to have been hastily drawn up, and without much precision; and we must form as correct a statement of the facts as we are able. It is stated that after the execution of the bond, Holbrook was accustomed to go to and frequent any part of Portland, in the day time, within the limits ascertained by the order. From this statement we cannot conclude that he in fact went to any part of the town, to which he might not lawfully go. He might not leave the public streets, or invade the private property of any man; and we cannot necessarily infer that he has broken the condition of the bond. It is further stated that, being at a place called King-street, which we may presume is a public street in Portland, he was suddenly taken sick, and was necessarily conveyed to a private house, where he languished until he died, as he could not be removed to the prison, without manifest danger of his life. From the liberty we have supposed debtors in execution entitled to under the order of the sessions, we cannot consider Holbrook's being in King-street as an escape. Had he voluntarily left the street, and entered the private house, it is our opinion that it would have been an escape.

But was the conveying of him to this house by others, in consequence of his sudden sickness, a breach of the condition? After the fullest consideration, we have been able to give this question, we are satisfied, that to constitute an escape, within the intent of this bond, there must be some agency of the debtor employed; and a conveying of him without the limits of the prison, he not consenting, is no escape, if he return as soon as he has the ability.

If any force, not of an enemy, should break open a gaol, and a prisoner, availing himself of the breach, should leave the prison, or suffer himself to be rescued, it would be an escape. But if he was carried away by violence, and voluntarily returned as soon as the force ceased, it is not clear that at law it would be considered as an escape. And if a debtor, who had entitled himself to the liberty of the yard by giving bond, should be forcibly carried without the limits, and should return as soon as the force ceased, perhaps it might not be a breach within the true intent of the bond. If he is visited by sudden sickness, so extreme, that he is carried to an adjoining house, without any agency or direction of his own, but by the humanity of others, we are satisfied that this would be no escape, if he returned as soon as he had reason and strength; and if he died before, the bond would be saved. For it happened by the providence of God, which shall hurt no man. This is the case before us. Holbrook, while lawfully in the street, was suddenly visited with extreme sickness, which made it necessary to carry him to a private house. There he languished until he died, as a return to the prison would manifestly have endangered his life.

It is our opinion, that this was not an escape within the true intent of the condition of the bond. According to the agreement of the parties the plaintiff must be called.

Plaintiff nonsuit.

111.

AYER v. HUTCHINS, ET AL. 4 R. 370.

PARSONS, C. J. The plaintiff declares on a promissory note given by the

defendants to one Philip Page, payable to him or his order on demand, and indorsed to the plaintiff. On the general issue, the defendants offered evidence to prove that the note was indorsed to the plaintiff about eight months after it was given, by a special indorsement, purporting that the indorser was not to be liable in any way for the payment; that the indorsement was made without the knowledge of the plaintiff, and for the benefit of Page, the original promisee; and that the note was fraudulently obtained by Page. And this evidence was rejected by the judge.

The first question for our consideration is, whether, as between the parties to this action, fraud could legally be given in evidence, to defeat the recovery by the indorsee.

By virtue of the statutes against gaming and usury, negotiable notes, given for gaming or usurious consideration, are absolutely void in the hands of innocent indorsees. But at common law the promisor cannot give in evidence against an innocent indorsee, who came honestly by the note, without any reason to suspect that it was not good, any illegality in the consideration, or fraud in obtaining it, or a subsequent payment; (Brown v. Davies, 3 Term R. 80.) If the indorsee receives the note under circumstances, which might reasonably create suspicions that it was not good, he ought, before he takes it, to inquire into the validity of the note; and if he does not, he must take it subject to any legal defence, which might be made against the recovery by the promisee. And it has been determined, that the indorsement of a note, after payment has been refused, is a circumstance, which ought to awaken the suspicion of the indorsee, and to lead him to further inquiries before he takes it: and that a note indorsed sometime after it is due, furnishes a presumption that it has been dishonored; because it may reasonably be inferred that the holder of the note would prefer receiving the money due, if payment could be had, to a negotiation of the note.

A note payable on demand is due presently. In this case the note had been due eight months before it was indorsed, a length of time sufficient to induce suspicions that the promisors would not pay it, and to cause some inquiry to be made, whether it had in fact been dishonored, or why payment had not been made. If there was no other circumstance, this would be a good reason to let the defendants into any defence which could legally be made by them, if Page were the plaintiff.

There is however another fact of importance. It was alleged that Page was not to be liable on his indorsement, if the defendants refused payment. A caution of this kind must certainly induce an indorsee to believe that payment had been demanded, or that the demand had been neglected from a certainty of refusal, unless the indorser assigned some other reason. An indorsement of this nature, made eight months after a note is due, is enough to charge the indorsee with such negligence in making further inquiries, as will subject him to the same defence, that might be made against the indorser.

But evidence was also offered, that the indorsement was in trust for the indorser himself. If this was the case, whether the note was indorsed before or after it became due, we are satisfied that any evidence may be admitted against the trustee, which might have been admitted against the *cestui que trust*, if he had sued the note as promisee.

The next question is, whether the defence offered and rejected would have supported a legal defence against Page.

Page was a deputy sheriff, having a prisoner in custody on execution, whom he was carrying to gaol, and having proposed to the defendants to procure for the prisoner sureties to entitle him to the liberty of the prison yard, the defendants agreed to give him bond to indemnify him against the escape of the prisoner, either before he was committed, or after he had the liberty

of the yard: and no scrivener being present to write a bond, the note was made and given, upon the express agreement of the defendants and Page, that the note was to be void, if no escape was committed, otherwise he was to retain it as an indemnity. But Page, without proceeding to the gaol with his prisoner, voluntarily discharged him.

If these allegations had been proved against Page, it is very clear that he could not have recovered. The only ground, on which he could claim payment of the note, is as an indemnity. The escape, contemplated by the parties before the prisoner was committed, must have been an escape against the will of the officer: but there was no escape against his will, for he voluntarily dischaged his prisoner, and is entitled to no indemnity against his own wrong. And if the parties had contemplated a voluntary escape, then the consideration of the note would be illegal; for an agreement to indemnify an officer for a voluntary escape is void, as against the policy of the law.

As we are of opinion that the evidence ought to have been admitted, the verdict must be set aside, and a new trial granted.

112.

MAYO v. MAINE FIRE AND MARINE INSURANCE COMPANY, 4 R. 374.

Underwriters upon freight are not liable for a detention of the ship on the voyage, if she finally earns her freight.

PARSONS, C. J. It appears from the judge's report, that the plaintiff was the owner of the brigantine Harriot; that she sailed on the voyage insured with a cargo on freight for a port in France, the vessel and freight being both insured; that during the voyage the vessel was captured, and carried into Plymouth in England, where she was detained two months, after which she was liberated, proceeded on her voyage, and the cargo was delivered to the consignees at the port of original destination in France, by whom the whole stipulated freight money was duly paid; and that all extraordinary wages, expenses, damages and losses of every kind incurred by the detention have been adjusted and paid, as a general average on vessel, cargo and freight. But the assurers refuse to pay a partial loss on the freight arising from the protraction of the voyage by the capture and detention, which in this action is claimed by the plaintiff.

After fully considering the subject we are satisfied that the plaintiff's claim is not well founded. He insured his freight, and he has received it; and all the general average the vessel and freight were liable to pay. But he says that if there had been no detention, his vessel might have earned her freight in less time. But the underwriters did not insure any particular time, in which the voyage should be performed; but only that the freight should be earned. They are not therefore answerable for a partial loss arising from the increased length of the voyage by the detention, any more than they would have been, if the arrival of the vessel had been delayed by violent storms, which had driven her out of her course. If the plaintiff can claim on his policy on the freight, it must be either for a partial loss, or for a general average. There has been no partial loss, and the general average has been paid him.

Verdict set aside.

113.

WINSLOW, AN INFANT WHO SUES BY HIS GUARDIAN, &C. PLAINTIFF IN ERROR, v. ANDERSON, 4 R. 376.

PARSONS, C. J. This case comes before us by a writ of error sued by

the guardian of Robert Winslow against Robert Anderson, clerk of a military company, to correct the errors of certain proceedings had before a justice of the peace, in which the plaintiff in error was convicted of an offence, in neglecting to appear, armed and equipped according to law, at a company muster after due notice. And error in fact is assigned, that the plaintiff in error was an infant, and did not appear by guardian, but was convicted on default, to which assignment there is a demurrer.

On inspecting the record, it appears that a writ of error does not lie in this case; but the record ought to have been certified on *certiorari* granted on motion to the court. As this mistake has been frequent, the court have sometimes proceeded to correct the errors as on *certiorari*, where it appeared that a *certiorari* would have been granted on motion. But, if the mistake be continued, we shall be obliged to quash the writ of error, as having improperly issued, in order to introduce a necessary regularity into practice.

In the present case we shall consider the record, as if it was certified to us on a writ of *certiorari*; and, therefore, we cannot take any notice of the error in fact, assigned and appearing on the record, as having any influence on our opinion.

It appears that the justice imposed a fine of five dollars and thirty-three cents for the neglect of appearance at a company muster or review. By the sixth section of the statute of 1805, c. 114, a penalty is imposed of four dollars for every default of appearance, armed and equipped, at a battalion or regimental muster; and of two dollars for the like default at a company muster. These penalties are imposed in lieu of the fines provided in the 19th, 20th and 24th sections of the statutes of 1793, c. 14. No other forfeiture can now be incurred. And these penalties are forfeited, notwithstanding the arms and equipments of the soldier are on the parade, if he be absent; or if he is present without his arms and equipments. The justice has, therefore, mistaken the penalty, and on this account the proceedings must be quashed. We have had this question before us in the cases of Savage v. Gulliver, and Pratt v. Hall, (*Vide* 4 R. pages 239, 171,) in Suffolk, and the whole court, after full consideration, were of the opinion which we now declare.

Although we have taken no notice of the alleged infancy of the plaintiff in error in forming our opinion, yet, as a part of the militia are minors, and the settlement of the question may prevent frequent disputes, we have considered the validity of that error as before us. And we are all of opinion that the proceedings are not erroneous for that cause.

The proceedings against the infant are not *civiliter*, as upon a contract, or *quasi ex contractu*, but *criminaliter* for an offence against law; and in these proceedings he may appear and answer in person, for the same reason that to an indictment for an offence against an infant, he may personally answer. If the law were otherwise, no proceedings could be had against infants having no guardian appointed by the probate court, to recover penalties for offences committed by them; for in those cases a justice is not authorized by law to assign guardians to them.

Let the proceedings be quashed.

114.

M'MILLIN v. EASTMAN, 4 R. 378.

PARSONS, C. J. An act of the United States was passed July 14. 1798, to lay and collect a direct tax, to be assessed on dwelling houses, lands and slaves, agreeably to an act before passed, providing for a valuation of dwel-

ling houses and lands, and for the enumeration of slaves. By the 4th section, the supervisors were to subdivide their districts into collection districts, and within each of them to appoint a collector. By the 6th section, each collector was to be furnished with a list of the assessments within his collection district, and by the 9th section he was authorized to demand and collect the taxes committed to him, by giving the public notice, and by proceeding as therein directed. By the 11th and 12th sections, when the person, under whose care and superintendance the estate assessed was situated or found, was not in his collection district, he was required to certify the same to the surveyor of the assessment district within which such person resided, if known, and the surveyor was to cause notifications to be made, and such person might pay his tax within the collection district in which he resided. By the 13th section, which is principally relied upon by the plaintiff, the collector is authorized, after giving the notice there required, and the taxes remaining unpaid for a year, to sell at public auction so much of the land as might be necessary to pay the taxes, with the costs and charges of sale. And there is a proviso, that the owner may redeem, by paying to the collector, for the use of the purchaser, within two years, the amount of the taxes, costs and charges, with twelve per cent. interest, on which payment, or the tender thereof, the sale shall be void. And no deed shall be given, in pursuance of such sale, until the time of redemption shall have expired. By the 14th section, the collector is obliged to account, and pay over monthly the monies he shall have collected.

In this action the *gravamen* complained of by the plaintiff is substantially thus stated: That the defendant was the collector of the fifteenth collection district in the second division of Massachusetts; that the lands described in his writ were situate, and legally assessed in his district; that for default of payment of the taxes, the defendant duly advertised the lands for sale at public auction; that they were sold to the plaintiff, the highest bidder, for twenty-three dollars and sixty-eight cents, being the amount of the taxes, with the costs and charges of sale; that the owner did not redeem them within two years; that after the expiration of the two years the plaintiff demanded a deed of conveyance of the defendant, who refused to execute any deed, and for this refusal he brings his action.

The declaration contains four counts, of which we lay aside the first, as the plaintiff does not rely upon it. Of the three last, two, the second and fourth, allege a promise of the defendant, in consideration of the sale at auction to the plaintiff, and of his payment of the money, to execute to him a deed of conveyance of the lands sold. To prove the promise the plaintiff produces the conditions of the sale under the hand of the defendant; but in these conditions there is no intimation that the defendant would execute any deed to the purchaser after the expiration of two years, if not before that time redeemed. He also produced the defendant's receipt for the money paid by the plaintiff for the taxes on the land struck off to him, with the charges, for which the defendant is to account as the law directs. Neither is there in this receipt any promise of the defendant to execute any deed conveying the land. And by the 14th section of statute he was obliged, within one month, to account for, and to pay over the money. The papers offered had, therefore, no legal tendency to prove an express promise of the defendant to execute any deed of conveyance of the land struck off to the plaintiff.

But his counsel insist that those papers would have proved facts, whence the law would imply a promise of the defendant to execute such a conveyance. This appears to us to be a mistake. We know of no decision that, in any case, the law will imply a promise to convey land, on which an as-

sumpsit can be maintained at law. And it is very certain that no such action can be maintained, since the statute of frauds has required a memorandum in writing of the party charged with the contract or agreement to convey land, for the breach of which he is sued. The argument to support the inference of an implied contract is founded on the position, that it was the collector's duty to have made the conveyance, and that the law implies a promise of every man, that he will do his duty. If the position was right, that it was the collector's duty to have made the conveyance, the inference would not be in this case just. For the remedy against a public officer for neglect or misbehavior in executing his office, is generally by an action of the case, alleging his misdemeanor, or sometimes by an action of debt, according to the nature of the misfeasance, but not by an *assumpsit*, as implied by law.

The plaintiff's third count is for money had and received. And we do not see how the evidence rejected, could in any manner have tended to support this count. The money was not paid by mistake, or on a consideration which had failed, or obtained by deceit or imposition, or detained by the defendant against good conscience. He received the money in trust for the United States in the due course of his official duty, and to them he either has accounted or must account.

If the plaintiff had sued a special action of the case against the defendant for a misfeasance in his office, in not executing the conveyance when requested, we must then have determined whether his neglect was a breach of his duty. At common law a title to land by purchase must be conveyed by deed; but by statute a title may be acquired without deed. In the present case, whether the title of the plaintiff was complete by his purchase at auction without deed, or whether a subsequent deed was necessary, or whether, if it was, the defendant ought to have executed it, are questions which must depend on the construction of the several statutes of the United States on this subject. On these questions we give no opinion; as we are satisfied that the evidence offered upon the trial was properly rejected, and that the direction of the judge was right.

Judgment must be entered according to the verdict.

115.

COMMONWEALTH v. DREW AND QUINBY, 4 R. 391.

Of murder and manslaughter.

The defendants were indicted at this term for the wilful murder of Ebenezer Parker. The indictment contained two counts.* The first count charged Drew and Quinby with assaulting Parker, at Falmouth, on the eleventh day of January last, then a deputy sheriff, and in the due execution of his office; and that Drew then and there gave the deceased the mortal wound, of which he thereafterwards, on the eighteenth of the same January, died. And that Quinby was present, aiding and abetting Drew in giving the mortal wound.—The second count was like the first, with this difference only, that it was not alleged therein that Parker was a deputy sheriff, in the due execution of his office.

The Chief Justice charged the jury. After stating to them the evidence, he observed, that, if they believed the witnesses, the deceased, when he received the mortal wound, was not in the execution of his office, as deputy

* It was remarked by the Chief Justice that there seemed no occasion for two counts in this case, as murder was charged in both, and with a similar instrument; and that on the last count the Solicitor General might have given evidence that the deceased was a deputy sheriff in the due execution of his office, to prove that the killing was malicious.

sheriff; that having arrested Quinby fourteen days before, and committed him to the custody of King, who had voluntarily permitted his prisoner to go at large, this permission must also be considered as the act of the deceased, whose servant King was. And that a voluntary escape of Quinby having been suffered, the deceased could not lawfully arrest him again on the same execution; and, therefore, that the prisoner ought to be acquitted of the felony and murder charged in the first count of the indictment.

In the second count, the prisoner was charged with murdering the deceased, then in the peace of God, and of the Commonwealth, without any allegation, that he was in the execution of his office as a deputy sheriff; and the jury were instructed that it was their duty to consider the evidence, as it applied to the second count. If they believed the witnesses, there was no question, but that the deceased was killed by the prisoner at the bar. If they were satisfied of this fact, the implication of malice would arise, unless the circumstances of the killing were such, as would reduce the crime below murder. If the act of killing was in itself attended with probable dangerous consequences to the deceased, and was committed deliberately, the malice will be presumed, unless some sufficient excuse or provocation should be shown; for the law infers that the natural or probable effects of any act deliberately done, were intended by the agent.

It had been argued that there were two causes of provocation, which would reduce the killing below the crime of murder. One was, that the prisoner was in the peaceable possession of his shop, engaged in his lawful business, when the deceased unlawfully forced open the door, with an intent to enter against the prisoner's consent. The other provocation was, that the deceased forced the door, with the intent unlawfully to enter, and to arrest Quinby, who was the prisoner's fellow servant, and at work with him, the deceased having no legal warrant therefor.

The Chief Justice then observed, that it was necessary for the jury, before they considered the nature and sufficiency of these provocations to determine whether the bludgeon used by the prisoner, in killing the deceased, was, or was not, a deadly weapon, which would necessarily kill, or do great bodily harm; that this was a question of fact, for the jury exclusively to decide. If the jury were satisfied that the weapon used was not likely to kill, or to do great bodily harm, he was of opinion, that either of the provocations was sufficient to free the prisoner from the guilt of murder. For by using a weapon, which would not probably do great injury to the deceased, it was a reasonable inference that the prisoner did not intend to kill the deceased, but accidentally killed him against his intention, and the presumption of malice would be sufficiently rebutted; and without malice, the killing could not be murder. But if the jury were satisfied that the instrument of death was a deadly weapon, which would probably kill the deceased, or do him great bodily injury, these grounds of excuse or provocation would deserve a different consideration. That the provocation arising from the trespass committed by the deceased, in breaking open the shop door, for the purpose of unlawfully entering, was not a provocation sufficient to reduce the killing below the crime of murder, if the prisoner killed the deceased with a deadly weapon; because the trespass was not a sufficient excuse for such a barbarous act, admitting the prisoner, and not Conant, his master, to have had possession of his shop. For it is a rule of law that where the trespass is barely against the property of another, not his dwelling house, it is not a provocation sufficient to warrant the owner in using a deadly weapon; and if he do, and with it kill the trespasser, this will be murder, because it is an act of violence beyond the degree of the provocation; but if the beating be with an instrument, and in a manner not likely to kill, and the trespasser

should notwithstanding happen to be killed, it will be no more than manslaughter.

The other provocation, which, it was argued, would reduce the killing below murder, was the forcibly breaking of the shop door by the deceased, with the intent unlawfully to enter and to arrest Quinby. It was a principle of the law, that if any man, under color or claim of legal authority, unlawfully arrest, or actually attempt or offer to arrest another, and if he resist, and in the resistance kill the aggressor, it will be manslaughter; and that any person aiding the injured party, by endeavoring to rescue him, or to prevent an unlawful arrest, when actually attempted, is guilty only of manslaughter, if he kill the aggressor in opposing him, unless, perhaps, the party aiding be a stranger to him, whom he shall endeavor to assist. That whether the principle will or will not comprehend a stranger, it was not necessary then to decide, for it was the opinion of the judges then present, that in this case the prisoner was not to be considered as a stranger to Quinby, as they were fellow servants, hired by the same master, and were at that time laboring together in his service.

Although from the testimony of the witness (if the jury credited him) it appeared, that on the door being broken open, the prisoner rushed out with his sledge, saying, "what are you breaking open my shop for—stand by, or I will throw the sledge through you," whence it may be inferred, that the fatal blow was given to chastise the deseased for the violence done to his shop; yet the jury would decide, whether it must not be reasonably presumed, that the intent of the prisoner was also to prevent the deceased from entering the shop to arrest Quinby, as the door had been fastened for his protection, and as the deceased had just before declared that he was his prisoner and that he would have him. That in this view of the evidence the jury would apply the facts to the law.

In three of the cases relied on for the prisoner, the unlawful arrest had been made before there was any resistance or quarrel. And in the last case, the officer and his assistant, before the latter was assaulted, were in the room with the party to be arrested, had him in their power, and had ordered him to go with them. In the case of the prisoner, Quinby had remained all the time in the shop, and the deceased had not entered it, but when the prisoner went out, had retreated behind the door, to avoid a blow from the sledge.—That before the mortal blow was given, a stroke with the bludgeon had forcibly shut the door; and that the deceased and the prisoner were out of the shop, with the door closed, when the mortal wound was inflicted. If the jury were satisfied that the evidence established these facts, they would conclude that, although the deceased had forced open the door, with the intent to enter the shop, to arrest, or to attempt the arrest of Quinby; yet when he received his death wound, he had not arrested Quinby, nor had he, in fact, attempted or offered to arrest him.

The Chief Justice concluded, by observing that he had considered the evidence in a light as favorable to the prisoner, as was consistent with the testimony of the witnesses; and it was with regret, that he was obliged to declare, that if the facts were as he had stated them, of which the jury were the judges, the killing of the deceased by the prisoner, if the instrument was a deadly weapon, amounted to the crime of murder.

The jury acquitted the prisoner on the first count, and found him guilty of the felony and murder charged in the second count.

Quinby was afterwards put upon his trial, and the same evidence was given against him, which had been produced against Drew. It was further proved in behalf of the Commonwealth, that Quinby, before Parker had arrested him on the execution, had armed himself with a club, and had de-

clared to one witness, that if Parker attempted to take him, he would break his head; and to another witness, that if Parker came to take him, and he bid him stand off, if Parker persisted, he would split him down. That after the mortal wound had been given, and Drew had again fastened himself in the shop, and let down the window, Quinby came to the window with a club, brandishing it in defiance. That he called one of the people a rascal, for pretending to be his friend, when he came to assist in taking him. And that Quinby or Drew said, "carry off your dead officer." And the same William Babb, jun. who was in the shop, when the deceased forced open the door, testified, that when the door was opened for himself, Quinby was standing within two feet of the door, with the bludgeon in his hand; that after he entered the door was hasped, and Quinby went to the bellows, and shifting the bludgeon to his other hand, began blowing the bellows. But he further swore, that when Drew went out of the shop with the sledge, Quinby did not remove from his place; that while standing by the bellows, he threw down the bludgeon, which fell between the anvil and the door, and about two feet from the door; that when he threw it down, he said nothing: and that after Drew went out of the shop, Quinby could not see him, neither when he threw the sledge, nor when Quinby threw down the bludgeon.

Upon this evidence, the Chief Justice left it to the jury, whether they would presume that Quinby threw the bludgeon towards the door, with the intent to furnish Drew with a deadly weapon, to assault the deceased outside of the shop. If they were satisfied that he threw the bludgeon with that intent, he was equally guilty with Drew, who used it. But if they were not satisfied that the bludgeon was thrown with that intent, Quinby ought to be acquitted. And the jury found him not guilty.

On the last day of the term, Drew was brought up to receive his sentence, when his counsel moved the court to delay giving judgment, because they had evidence, that Richard King, who was a material witness for the government, had declared before the trial, that he would hang the prisoner by his testimony, if he could, of which declaration he had no knowledge until after the trial; and because a Mr. Ingalls, one of the jury, did not agree to find the prisoner guilty of murder, but only of manslaughter; and through mistake of his duty, he believed that he must assent to the verdict of the major part of the jury.

The court did not enquire into the truth of these allegations; observing that if they were proved they could not avail the prisoner on any legal principles, by which alone the court must be bound; and if they supported any equitable claims to favor for the prisoner, he might apply to the supreme executive, who had power to cause the sentence to be executed, or who could pardon it absolutely, or on condition, at its discretion.

Judgment of DEATH was then pronounced against the prisoner.

116.

DILLINGHAM v. RUNNELLS, 4 R. 400.

A special promise to pay a pre-existing debt is not within the statute of frauds, and may be proved by parole evidence, although the origin of such debt was the sale of lands by the promisee to the promisor.

By the court. We are satisfied that in this case the admission by the judge of the parole evidence was right. Runnels, being justly indebted to Dillingham, made the contract declared on, to induce the plaintiff to take J. P's note towards the payment of the debt. It is very immaterial what

was the origin of the debt due to the plaintiff, if it was a just debt, whether it accrued from the plaintiff's having theretofore sold land to the defendant, or from any other lawful consideration. The defendant's promise cannot be considered within the statute of frauds, because the contract, on which he is charged, is not on the consideration of the sale of lands, or of any interest therein, but to pay a precedent existing debt.

As the court were about entering judgment according to the verdict, the defendant's counsel took an exception to the declaration, that it did not allege the discount to have been made by the plaintiff, which formed the consideration of the defendant's promise and undertaking. The verdict was then set aside by consent, and the defendant was afterwards defaulted on terms as to the costs.

117.

LADD v. BLUNT, 1 R. 402.

PARSONS, C. J. The action is debt on a judgment. The defendant has pleaded two pleas.

His first plea is *nul tiel record* of the judgment, on which issue is joined to the court. On inspecting an attested copy of the record, we are satisfied that there is such a record. We never direct the record of the court of common pleas to be sent us on the trial of an issue of *nul tiel record;* but receive copies of their records attested by the clerk in evidence, which by immemorial usage is held to be evidence of the record. Indeed, upon a writ of error or *certiorari* nothing but the tenor of the record is sent up ; which is only a copy attested by the clerk.

The second plea is, that the judgment has been satisfied by the extent of an execution issued upon it upon the lands of the defendant. The plaintiff replies that there is no record of the return of any such extent. To this replication there is a demurrer and joinder ; and we are to decide on the sufficiency of the replication.

When goods sufficient to satisfy the judgment are seized on a *fieri facias,* the debtor is discharged, even if the sheriff waste the goods, or misapply the money arising from the sale, or does not return his execution. For by a lawful seizure the debtor has lost his property in the goods. But the law is different in the case of an extent on lands.

By our statute we have but one form of an execution, which includes a *capias ad satisfaciendum* a *levari facias* as to the money of the debtor, and an *extendi facias* as to his lands. But the lands of the debtor cannot be taken unless by the acceptance of the creditor, to whom seizin must be delivered by the sheriff; and until this delivery of seizin the title of the debtor is not affected. The creditor's title is by matter of record ; and unless he can show it by record, the debtor will hold the land. The sheriff must, therefore, return the extent and the delivery of seizin; which return, when made, is a record of the court, and as such can be pleaded. If there be no record of any such return, the creditor has no legal title to the land ; which remains the property of the debtor, and the judgment is unsatisfied.

To prevent frauds against others, the statute of 1783, c. 57, directs the execution and return to be entered on the records of the county in three months after the extent. When, therefore, a debtor pleads satisfaction of a judgment by the extent of the execution on his lands, he must plead that the extent was legally made, seizin delivered, and a return of the execution and extent, which is a matter of record. For the lands remain the debtor's unless the creditor has a good title to them by matter of record.

For these reasons the replication is good, which alleges that the plaintiff has no title to the lands by any record of the return, which is confessed by the demurrer.

118.

HUSSEY, ET AL. V. THORNTON, ET AL. 4 R. 405.

If A. contracts to sell certain goods to B. on a credit, with condition that B. shall furnish a surety for the price, and delivers the goods without such surety furnished, but declaring that he should not consider them as sold until the security should be given, the property remains in A. notwithstanding the delivery.

PARSONS, C. J. The question to be decided in this case is, in whom the property of the boxes of candles was at the time the writ of replevin was executed. The case shows that they were once the undisputed property of the plaintiffs; and unless they have divested themselves of the title to them, they must recover in this action. They at first refused to sell them to Todd and Worthley, without some further security than their single *assumpsit*. They had probably forgotten, at the moment of actual delivery, the condition for which they had stipulated; and a question arises, on the facts in the case, whether this was an absolute delivery not revocable, or if revocable, yet not revoked. We think they were bound to recollect the condition they had themselves made, and not to have delivered the candles until it had been complied with.

But we do not decide the cause on that point. Howard, being the agent of the vendees, had authority to receive the goods, and to consent to any conditions attached to the delivery of them. He received them on board his vessel, under the declaration of one of the vendors, that they should not consider them as sold until they should receive further security. His so receiving them was an assent to that declaration, and his principals were bound by it. The property then continued in the vendors. Had the demands of these creditors originated while the goods were in the possession of Todd and Worthley, so that it might be fairly prerumed that a false credit was given them; or had Todd and Worthley sold them *bona fide* and for a valuable consideration, our opinion would have been otherwise. But upon the facts in the case there must be judgment according to the verdict.

119.

BEARCE V. JACKSON, administrator of SHEPARD, 4 R. 408.

A plan of land taken *ex parte* cannot be used on a trial but as chalk.

One in possession of land, claiming to hold it in fee simple, is sufficiently seized to enable him to convey; and if he warrant the land, no action lies against him on his covenant of warranty, until an eviction of the grantee or his assigns by a paramount title.

Covenant broken on a deed of the defendant's intestate coveying certain lands described therein to the plaintiff in fee, and covenanting that the grantor was lawfully seized in fee, and that he would warrant and defend the granted premises to the grantee, &c.

PARSONS, C. J. We are satisfied that the judge was correct in rejecting the plan. Anciently the land was not described in the declaration; but the plaintiff was bound to give the defendant a view. The practice here has been to describe the land in the declaration, and, if necessary, to send the jury to view it. But to supersede the necessity of either of those views, a

very convenient practice has arisen, to have a plan taken under a rule of the court by a surveyor appointed by the court, or agreed upon by the parties, who is sworn to the faithful execution of the trust, as are also the chainbearers. And his duty is to give notice to the parties, and to mark on the plan any monuments or lines, which either of the parties shall request. A plan taken *ex parte* can never be used but as chalk, unless by consent.

As to the other exception, it is very clear that the defendant's intestate, being in possession claiming a fee simple in the land, was able to convey. So the covenant of seizin was not broken. And to entitle the plaintiff to recover on the covenant of warranty, he must show an actual eviction or ouster by a paramount title.

Judgment according to verdict.

120.

BOSWELL v. DINGLEY, 4 R. 411.

When a sheriff has arrested a debtor in execution, and committed him to prison, and the debtor afterwards takes the benefit of the poor prisoner's act, the sheriff is entitled to demand and receive his fees of poundage and travel of the judgment creditor.

PARSONS, C. J. This is an action of *assumpsit* brought by the plaintiff, a deputy sheriff, for his fees in serving two executions issued at the suits of the defendant; and the cause comes before us on a case made by the parties.

It is agreed that the defendant having sued out two executions, one against Stackpole, and the other against Doe, delivered them to the plaintiff to be executed; who, for want of goods, chattels or lands of the debtors, arrested their bodies, and committed them in execution, where they remained until discharged under the provisions of the poor debtor's act.

It is said by the defendant that the plaintiff is not entitled to any fees; if he is, he cannot maintain an action against the defendant for them: and if he can, he has demanded more or greater fees than by law he can claim.

Upon the first point we are of opinion that the sheriff is entitled to his fees for poundage and travel in these cases. He took the bodies of the debtors as pledges for the payment of the executions; and he detained those pledges at his own risk against any escape.

On the second point we are of opinion that he can maintain this action against the defendant for these fees. He could not demand payment before he performed the service; and the service was performed for the defendant. Could the officer have found estate of the debtor, he ought to have levied his fees, and thus have indemnified the defendant; and not finding estate he took and held their bodies for the defendant's use. As they were discharged by order of law, the officer may maintain an action for his fees, the authority to levy the fees being for the defendant's benefit, and not to discharge him from satisfying the officer. *Vide* Moor, 468; Cro. Eliz. 654; 1 Salk. 209. 231; 1 Roll. 598. pl. 35.

On the construction of the English statutes, in actions on simple contracts, and judgments for a debt certain, the plaintiff, and not the defendant pays the expence of levying; but if the judgment be for a penalty, the plaintiff may levy his whole debt independent of the charges of execution. In this state there is no distinction of actions; for in all executions the expence of of levying is a charge on the debtor, in favor of the creditor.

As to the third point, the plaintiff must recover only the fees provided by law, the court having no discretion to make him any allowance.

Judgment for the plaintiff.

121.

DOW v. TUTTLE, 4 R. 414.

Where the promisee of a note, payable at a day certain, contracts, at the time the note is given, not to demand payment of it, until a certain time after its maturity, such contract is a collateral promise, for the breach of which, if there be a legal consideration, an action may lie, but it will be no bar to an action on the note, when due by the terms of it.

PARSONS, C. J. We are satisfied that the agreement, proposed by the defendant to be given in evidence at the trial, is not to be considered as a part of the contract with the note. That is a promise to pay to the promisee or his order a sum of money in one year. If the agreement was a part of this contract, it would be repugnant to the note, and destroy its effect. The agreement, although made at the same time, must be considered as a collateral promise of the promisee's, for the breach of which, if there be a legal consideration, an action would lie. In chancery it would be a sufficient ground for an injunction against the plaintiff, proving his knowledge of it before he purchased the note. And at law perhaps, it may support a motion to stay proceedings, by granting imparlances, until the plaintiff could put it in suit consistent with the agreement. But on this last point it is not now necessary to decide.

As we consider the agreement as collateral to the note, the evidence was properly rejected, and a new trial cannot be granted.

Judgment according to verdict.

122.

THE PROPRIETORS OF THE KENNEBECK PURCHASE v. SPRINGER, 4 R. 416.

When one enters on land, claiming a right to it, ond gains a seizin by his entry, his seizin shall extend to the whole parcel, to which he claims a right; but when one enters without claiming a right, his seizin cannot extend farther than his actual occupation.

To constitute a disseizin of the owner of uncultivated lands the entry and occupation of the disseizor must be such that the owner may be presumed to know that there is a possession adverse to his title.

PARSONS, C. J. The demandants sued the tenant in a writ of entry, counting on their own seizin within thirty years, and demanding the northerly half of lot numbered thirty two, in the second range of lots, of which they had been disseized by the tenant. On the trial upon the general issue, the jury found a verdict for the demandants; and the tenant moves for a new trial, because, as he supposes, the verdict was against evidence, which is reported by the judge.

The tenant's title was under a release from James Springer, who, as the tenant alleges, entered more than thirty years before, and disseized the demandants; for no evidence was given that James entered claiming any title or right to the land.

The statute of 1786. c. 13. limits the time of suing any real action by any corporation, declaring on its own seizin, to thirty years next after such seizin. And the tenant insists that by virtue of this statute the demandants are barred by the disseizin done to them by his releasor in 1775, which is more than thirty years before the teste of their writ.

The law upon this subject seems to be very well settled. When a man is

once seized of land, his seizin is presumed to continue, until a disseizin is proved. When a man enters on land, claiming a right or title to the same, and acquires a seizin by his entry, his seizin shall extend to the whole parcel to which he has right; for in this case an entry on part is an entry on the whole. When a man not claiming any right or title to the land shall enter on it, he acquires no seizin, but by the ouster of him who was seized, and he is himself a disseizor. To constitute an ouster of him who was seized, the disseizor must have the actual exclusive occupation of the land, claiming to hold it against him who was seized, or he must actually turn him out of possession. When a disseizor claims to be seized by his entry and occupation, his seizin cannot extend farther than his actual exclusive occupation; for no farther can the party seized be considered as ousted: for the acts of a wrongdoer must be construed strictly, when he claims a benefit from his own wrong.

Let us now consider the evidence, as applicable to these principles. The demandants proved a title to the tenements demanded, and a seizin in 1769. This seizin must be presumed to be continued until they were disseized, as they continued to claim title to the land. James Springer entered on the front lot numbered thirty two in 1775. He continued in the occupation of that lot, improving and fencing a part and living on it until he died, having in the year he entered, caused it to be run round by a surveyor, and trees marked on the lines. This land is not demanded. But the northerly half of lot numbered thirty two on the second range is demanded. And it appears that when he surveyed the front lot in 1775, he at the same time caused the demanded premises to be run round by the surveyor and the lines marked. There is no evidence that he ever fenced any part of the land demanded until 1792, which is within the thirty years, or exercised any act of ownership on it, except that he sometimes cut the grass on a small meadow which was part of it. Having fenced a part in 1792, he conveyed the premises to the tenant, who entered and has occupied the same under his deed ever since.

On considering the evidence we are all satisfied that the demandants were not disseized until 1792, by the entry of the tenant; that the running round the land by a surveyor, and marking the lines, by the direction of one who claims no title to the land, is not such an exclusive occupation of the land, as can amount to an ouster or disseizin of the demandants. Neither can the occasional cutting of the grass on the meadow by Springer, who does not appear to have claimed the land, amount to a disseizin.

To constitute a disseizin of the owner of uncultivated lands by the entry and occupation of a party not claiming title to the land, the occupation must be of that nature and notoriety, that the owner may be presumed to know, that there is a possession of the land adverse to his title; otherwise a man may be disseized without his knowledge, and the statute of limitations may run against him, while he has no ground to believe that his seizin has been interrupted.

As the tenant set up no title prior to 1792, but relied entirely on the statute as a bar, and as it appears to us, from the facts reported, that the demandants were seized within thirty years next before the teste of their writ, we are of opinion that the conclusion made by the jury from the evidence in the cause was legal, and that their verdict must stand.

Let judgment be entered according to the verdict.

123.

THE PROPRIETORS OF THE KENNEBEC PURCHASE v. ABNER BOULTON, JAMES BOULTON, JAMES SAVAGE, SAVAGE BOULTON, JAMES CATING, JOHN WARD, jun. SAMUEL WARD, WILLIAM WARD, JEREMIAH ROBINSON AND JOHN HAMMOND, 4 R. 419.

In trespass *quare clausum fregit* against several, where the evidence was of three distinct trespasses, each of which was committed jointly by some of the defendants only, (all of them being on the close at the same time,) part of them were defaulted, and part pleaded not guilty; the damages for each trespass were rightly assessed jointly against those who jointly committed it; and the damages against the several trespassers were rightly assessed severally.

In such case, costs are to be taxed jointly against all the defendants.

The three Boultons, with Savage and Cating, were defaulted; the other five defendants pleaded severally the general issue, which was joined by the plaintiffs.

A jury was impannelled before the Chief Justice at the sittings after the last May term in this county, as well to assess the damages against the five defendants who had been defaulted, as to try the several issues.

Upon the trial there was evidence that all the defendants were at the same time on the plaintiff's close, cutting down their trees, and making them into shingles, which they carried away. But it appeared, that the five defendants who were defaulted, formed a company by themselves, and cut down the trees, and made and carried away the shingles, for their own use, unconnected with any of the other defendants. It also appeared that the three Wards and Robinson, formed another company by themselves, and the trees they cut down. and the shingles they made and carried away, were for their own use, unconnected with any of the other defendants. And it also appeared that Hammond was associated with a third party, he only of that party being sued, which third party cut down trees, and made and carried away their shingles for their own use, unconnected with any other of the defendants.

On this evidence a question was made at the trial, in what manner the damages ought to be assessed. The Chief Justice directed the jury, that if they were satisfied that all the defendants, who had pleaded were guilty, they might assess joint damages against the five defendants, who were defaulted, according to the injury they had done the plaintiffs; that they might assess joint damages also against the three Wards and Robinson, estimating the damages according to the injury the plaintiff's had received from them; and that they might assess several damages against Hammond, measuring them by the same rule. The jury found the defendants guilty, who had pleaded not guilty, and assessed the damages against all the defendants, according to the direction given them by the judge.

The defendants, who had pleaded, moved for a new trial on account of this direction, to obtain the opinion of the whole court as to the rule of assessing damages in this case.

The plaintiffs also, if the verdict should not be set aside, moved the court to direct the clerk in what manner he should tax the costs.

The action stood continued for advisement until this term, when

PARSONS, C. J. observed, that the five judges had conferred together upon his report, and upon consideration were all of opinion, that the damages were rightly assessed by the jury.

The law upon this subject seems to be well settled. When the trespass is found by the jury to be committed severally by the defendants, who plead severally, the damages ought to be severed; but if the trespass be joint, the damages

must be jointly assessed, although the defendants plead severally; 11 Co. 5 b. Heydon's case. In the case at bar, it appears from the report of the judge, and from the verdict, that there were three distinct trespasses charged in the declaration, but that each trespass was jointly committed by some of the defendants only. The damages for each trespass were rightly assessed jointly against those of the defendants, who jointly committed it; and also the damages for the several trespasses were very properly severally assessed.

Judgment must be rendered according to the verdict.

As to the costs in this case, the plaintiff is entitled to full costs, to be taxed jointly against all the defendants; for those, who are defaulted, have by their default confessed the trespass, and the others have been found guilty by the jury. The forms of entry in 2 Towns. Judgm. 234. pl. 19, 235, pl. 22, and 2 Litt. Ent. 513, Fovargne v. Hampson & Elam, are in point. The reason is, that the costs of suit are an entire thing, for the payment of which, each of the defendants, who is guilty, is responsible.

124.

WOOD v. THE INHABITANTS OF WATERVILLE, 4 R. 422.

A surveyor of highways may recover against his town damages happening to him through a defect in the highways within his own district, unless the defect arises from the surveyor's own neglect.

PARSONS, C. J. The plaintiff's action is grounded on the statute of 1786. c. 81. s. 7. which provides that any person injured in his person or property through any defect in any highway, causeway or bridge, may recover of those who are obliged to repair them, in case they had reasonable notice of the defect, double the damages sustained by the injury. On the trial, the defendants offered to give in evidence, that the plaintiff was the surveyor of the defective way in Waterville. This evidence was rejected, and for this cause the defendants move for a new trial.

From an examination of the act, it is manifest that the principle, on which damages are given, is that the town have neglected to cause repairs to be made agreeable to the duty enjoined upon them by law, for the accommodation of all persons having occasion to use the highways; and that the party injured is in no fault. For it cannot be presumed that the act intended to provide a remedy for damages sustained by any man through his own wrong.

The first section provides that all highways shall be repaired at the expence of the town, in which they are located, by surveyors of highways to be chosen by the town; who are, by the second section, to have their respective limits assigned by the selectmen. As this duty is enjoined on the surveyors, so the means of performing it are provided. For by the third section the town is directed to raise as much money, as it shall judge necessary, to be expended in labour and materials under the direction of the surveyors. And by the eighth section, if the town neglect to raise any money for this purpose, each surveyor may assess a sufficient sum on the inhabitants within his district, to be expended in repairs under his direction. And to compel the surveyor to the faithful performance of his duty, the eleventh section provides that he shall refund to the town any fine imposed on it for the defect of the highways within his district, which he ought to have repaired.

From this view of the act, it is clear that the surveyors are bound to repair the highways, but at the expense of the town. And if the town had raised sufficient money, or if it was in the power of the surveyor to assess sufficient, and the ways have not been repaired through his neglect of duty,

and by that neglect a defect has existed from which he has sustained damage, it would be a very unreasonable construction of the act, to enable him to recover double damages of the town; as it would reward him for his own faulty misconduct.

We are therefore satisfied that the evidence offered ought to have been admitted; but it is our opinion that it would not have been conclusive. If the plaintiff had neglected to spend the money raised by the town, or if the town had refused to raise any money, and the plaintiff had neglected to assess and expend a sufficient sum, he ought to be barred of his action.

But if the town had raised a sum that was insufficient, whether the surveyor could or not in that case assess any further sum, or could employ the inhabitants within his district to labor further in completing the repairs at the expense of the town. without the assent of the major part of the selectmen, it is not now necessary to decide. And if it should appear that in this case an insufficient sum was raised by the town, which had been all expended in labor and materials, and that the major part of the selectmen had refused their assent to the plaintiff's further employing the inhabitants within his district to complete the repairs at the expence of the town, whether the plaintiff, he being a surveyor, shall be considered as in no fault, may be hereafter determined.

Let the verdict be set aside, and a new trial be granted, that the jury may have all the testimony necessary to find a verdict on the true merits of the cause.

125.

PITTS v. WAUGH & GREELEY, 4 R. 424.

The law merchant respecting dormant partners does not extend to speculations in land.

PARSONS, C. J. The plaintiff's action is against the defendants on a note made and signed by Waugh, one of the defendants. As the note does not purport to be signed by Waugh and Greeley, nor by Waugh for himself and Greeley, the plaintiff must contend that Greeley is answerable as a dormant partner with Waugh; and the plaintiff offered to give evidence that they were partners in trade, negotiating together particularly in the purchase and sale of lands for their mutual profit; and that Waugh signed this note on the partnership account, and for lands purchased for their joint benefit. This evidence being rejected, the plaintiff moves for a new trial.

By the law merchant, a man may be answerable as a dormant partner, on a contract made by the partnership, of which he is in fact a member. But this law is confined to trade and commerce, and does not extend to speculations in the purchase and sale of lands. When lands are sold, no man, as a dormant partner, can claim any part of the lands by virtue of any conveyance, to which he is not, on the face of it, a party. If the nominal purchaser choose to hold the lands, the party who advanced the money, if not named as a grantee, can have no title to the land, whatsoever remedy he may have against him to whom the land was conveyed. He cannot therefore be holden to the vendor for the payment of any part of the consideration, unless he has agreed to be liable.

In this there was no evidence offered, that the land was conveyed by the plaintiff to Waugh and Greeley, or that Greeley in any manner authorised Waugh to bind him to the payment of of this note; or that the plaintiff sold the land on Greeley's credit, or knew that he had any interest in the purchase; nor was there any evidence offered, that Greeley knew of the pur-

chase,or did or could derive any benefit from it. This is decisive; for by the law merchant a man is holden a dormant partner, who is not known in the partnership, because he is interested in the profits of the trade; and as the conveyance was made to Waugh, Greeley can derive no benefit from it.

However, to prevent mistakes, we repeat that the law merchant does not extend to speculations in land. And by the statute of frauds no man is chargeable on any contract concerning the sale of lands, but on some memorandum in writing, signed by himself, or by his agent, lawfully authorised. In this case, there is no color for considering Waugh as an authorised agent of Greeley within the statute.

Upon every view of the case, the evidence was properly rejected; and a new trial cannot be granted.

Let judgment be entered according to the verdict.

126.

BOUTELLE, QUI TAM, &c. v. NOURSE, 4 Rep. 431.

Where a statute imposes a penalty for taking fish, and gives an action of debt *qui tam* for its recovery, if several join in taking the same fish, a recovery and satisfaction against one of the offenders is a good bar to an action brought against the others.

PARSONS, C. J. This action is debt *qui tam* on the fourth section of the statute of 1797. c. 70, against the defendant for taking in Sebasticook river seven thousand two hundred alewives. The defendant pleads that he is not guilty, but with one Jedediah Morrill; and that the plaintiff had formerly impleaded the said Morrill for the same offence, had recovered judgment, and that judgment has been satisfied. To this bar there is no demurrer and joinder.

As the statute imposes a penalty for every alewive taken, to be paid by the offender, we are satisfied that but one penalty can be recovered for taking the same fish.

Although debt *qui tam* lies to recover the penalty, yet the debt arises from a trespass, which in its nature is several, as well as joint. The action may, therefore, be sued against one or more of the joint offenders. But the plaintiff can have but one satisfaction. It appears from the bar, which is confessed by the demurrer, that the plaintiff has already received from Morrill a satisfaction for the penalty incurred by taking the same fish mentioned in his declaration. He cannot, therefore, recover a double satisfaction by maintaining the present action against Nourse.

If several persons were fishing at the same time, each with his own net, and on his own separate account, they would be separately liable to the penalty,each one for the fish he caught, although they might afterwards agree to throw all the fish into one stock. But that is not the present case.

The plea in bar, appears to us to be good, and the defendant must have judgment.

127.

WHITE v. DINGLEY, 4 R. 433.

A creditor gives his debtor a licence for two years, and in the letter of licence covenants, that he will not sue, &c. and that if he shall sue, the debtor shall be discharged of his debt; notwithstanding which, he sues within the two years, and the debtor pleads the letter of licence in bar and has judgment; he cannot afterwards maintain an action against the creditor on the covenant.

No action lies for damages sustained by being sued in a civil action, unless such an action was malicious and without probable cause.

The opion of the court was delivered by

PARSONS, C. J. We are satisfied that the action cannot be maintained. The forfeiture of the debt is not in the nature of a penalty, but a liquidation of the damages, to be paid in case of a breach of the covenant, on the part of the creditor. The parties have made their contract, and we have no authority to alter it, or to make another for them in its stead.

No action, by the common law, lies for damages sustained by suing a civil action, when the plaintiff fails; unless it be alleged and shown to be malicious, and without probable cause.

Defendant's plea good.

128.

LIVERMORE v. BOSWELL, 4 R. 437.

The defendant moved in arrest of judgment,

1. Because it does not appear by the plaintiff's declaration, from what court the execution therein set forth issued, nor to what court the same was returnable.
2. Because it does not appear from said declaration, how much was levied and collected by force of said execution.
3. Because it appears by the plaintiff's writ, that the same was never legally served on the said Boswell, the coroner's return bearing date the 26th of November, 1806, and the writ bearing date the 25th of December, 1806.

PARSONS, C. J. If the first objection had been taken upon demurrer it might have prevailed, but it is cured by a verdict; for the jury could not have convicted the defendant, under a less regular execution, in due form, and issued by a court having jurisdiction, and not then returnable, had been given to them in evidence. The declaration states the parties to, and the date of the execution, so that a judgment in this action, may be pleaded in bar to another action, for the same extortion, averring the identity of the judgment and execution.

The second objection is, that there is no allegation of the sum levied and collected by force of the execution. It is alleged, that for levying and collecting fifteen dollars, the defendant received four dollars: and that the fees received were greater than are allowed by law for poundage and travel, which is certain enough. For it is not necessary to set forth the whole transaction in this case, as in usury, where the illegal contract must be precisely set forth and proved.

The third objection goes to the service of the original writ in this action. But this is matter in abatement, which is waived by the defendant's appearing and pleading the general issue.

Let judgment be entered according to the verdict.

129.

TWAMBLY v. HENLY, 4 R. 441.

PARSONS, C. J. This action comes before the court upon exceptions filed by the demandant, because the judge rejected one John Borland as a witness.

Borland, claiming to be seized of the land demanded, on the first day of January 1776, by his deed of that date, conveyed it to the demandant, with

a covenant that he had full power, good right, and lawful authority to sell the land, and a further covenant of warranty against all persons claiming under him.

Twambly brings this suit, counting on his own seizin against Henly, who did not claim under Borland; and to prove his title, offers Borland as a witness, who is excepted to, as being interested by reason of his covenants. The demandant insisted, that he was not interested, because he could not be answerable on warranty, the tenant not claiming under him; and that his covenant, that he had good right to sell the land to the demandant, was controlled by the covenant of special warranty. But the judge did not admit Borland.

The two covenants in the deed are perfectly consistent; the first amounting to a covenant that the lands should pass by the conveyance. And this covenant is not broken, if Borland was in fact seized, either by wrong, or by defeasible title. The covenant of warranty cannot be broken, but by an eviction or ouster, by some title paramount to the grantor's and this latter covenant does not control the former one.

The witness was offered "to prove the title" of his grantee. From this general expression we must conclude that he was offered to prove the seizin of his grantee, claiming under his deed. Now what interest had Borland in the event of this suit? If his covenant was broken, it must have been broken presently after it was made. And whether it was or was not broken, cannot depend on the event of this suit; neither is the verdict in this cause, evidence in an action brought against him by his grantee for the breach of this covenant. If the demandant recover, still if Borland had no right to convey, he is answerable to the demandant in action of covenant broken, and cannot defend himself by this verdict. If the demandant fail, and he sue the witness for the breach of this covenant, the plaintiff cannot give this verdict in evidence to maintain his action.

That the witness will testify under a strong bias, may be admitted, and of this the jury will consider; but not under a stronger bias, than he would, if he had conveyed without covenants. And in the case of Bushby v. Greenslate, the person, who had sold the inheritance, without any covenant for good title or warranty was allowed to be a witness to prove the title of the vendee. In the case at bar, there is no covenant that the grantee shall have a good title, nor any warranty against the tenant. The witness ought to have been admitted, and his credit left with the jury. New trial granted.

130.

KELLERAN v. BROWN, 4 R. 443.

The tenant in defence of the action, having prayed in aid the title of Timothy Manly, under whom he claims the premises, as his tenant, the counsel for the tenant, to show the demandant ought not to have judgment, except as in an action upon a mortgage, offered to read in evidence an agreement in writing, signed by the demandant, and bearing even date with the deed aforesaid, in the following terms, viz: "Thomaston, May 26, 1800, I, Edward Kelleran, the subscriber, having purchased of Timothy Manly, a lot of land lying in said Thomaston, containing 50 acres, (being the lot, which the said Manly purchased of Ebenezer Bly,) for which I have received a warranty deed; but if the said Manly shall repay me the sum of $400, with the lawful interest on the same, in one year from the date thereof, I will then reconvey the said lot of land to him. EDWARD KELLERAN;" and also offered to prove to the jury that the tenant Brown, at the time of the commencement of this action, and for a long time before was, and ever since has been, tenant at will of the premises demanded, under the said Timothy Manly, the aid of whose title is prayed in this action.

PARSONS C. J. The demandant has sued a writ of entry, to recover his seizin of the lands demanded in his writ and count. The tenant pleads the general issue, and to maintain the issue on his part, offers to give in evidence that he is tenant at will to one Timothy Manly; and that Manly conveyed the lands demanded to Kelleran, in mortgage. To prove that the conveyance was a mortgage, he offered to read in evidence, a contract in writing, under the demandant's hand, of the following tenor: (Here his honor read the agreement before recited.) But the judge rejected the evidence that he was tenant at will, and refused to let this contract be read to the jury.

As the demandant, in his writ, had demanded a freehold of the tenant, he by pleading the general issue, had admitted on record, that he was the tenant of the freehold. He was, therefore, estopped from proving, that he had not the freehold, but was a tenant at will.

As to the effect of the written contract, if it be an instrument of defeasance, at common law, of the conveyance made by Manly to the demandant, the tenant might have read it in evidence, to show that the demandant was entitled only to the conditional judgment, as in a suit to foreclose a mortgage.

In chancery, whenever it appears, from written evidence, that land is conveyed as a pledge to secure the payment of money, the conveyance will be treated as a mortgage, in whatever form the land was pledged. And if we had all the equity powers of a court of chancery, I should be satisfied that the conveyance, in this case, with the written contract of reconveyance, would be deemed in equity a mortgage, and the grantee would be allowed to redeem.

But the equity powers of this court are derived from statute, and are extremely limited. We can relieve mortgagors only in cases, where the lands are granted on condition, by force of any deed of mortgage, or bargain and sale with defeasance. (*Vide* statutes 1785, c. 22—1798, c. 77.) Now a defeasance of any instrument of conveyance must be of as high a nature as the conveyance, must be executed at the same time, and it is to be considered as a part of it; so that the conveyance and defeasance must be taken together, and considered as parts of one contract. If, therefore, the conveyance is by deed, the defeasance must be by deed. In this case, the conveyance by Manly to Kelleran, was by deed, and the agreement by Kelleran was merely by a simple contract; and however it might in equity have the effect of a defeasance, at law it is not a defeasance of the deed to Kelleran.

The counsel for the tenant referred to the statute of 1802, c. 33, which provides that no conveyance of any land, unless for a term less than seven years, shall be defeated or incumbered by any bond or other deed, or instrument of defeasance, unless they are registered. This provision cannot avail to enlarge our jurisdiction, which was not within the purview of the act. What shall be deemed an instrument of defeasance must still be determined upon the principles of the common law. The written contract of Kelleran, not under his seal, was in our opinion, properly rejected as evidence.

Judgment according to verdict.

131.

WORTHEN, ET AL. v. STEVENS, 1 R. 448.

Where demands made by one party only, are submitted to arbitrators, if they award a sum in favor of the party, on whom the demand is made, no remedy lies on such award.

PARSONS, C. J. The plaintiffs have declared in case on a submission to arbitrators of divers lawsuits, actions, controversies, quarrels and disputes, then pending between them and the defendant in the court of common pleas, and on mutual promises, that the award should be delivered to one Jonathan Greeley, esq.; that judgment thereon should be final, and that the parties would abide by and perform the award. The plaintiffs further allege that the arbitrators, pursuant to the submission, awarded that the defendant pay the plaintiffs $58 73, and deliver a cow to one of the plaintiffs, and pay costs of reference in full of the two actions submitted; that the award was left with Greeley, but that the defendant had refused to pay the plaintiffs the money awarded.

To prove this declaration, a paper was offered in evidence, in which is recited, that the defendant had commenced an action of trespass against the plaintiffs, and also another action against one of the plaintiffs, which had been entered in the court of common pleas; but this recital is not signed by the defendant. Then follows an agreement of all the parties to submit those two actions, that the report shall be made to Greeley, and judgment thereon be final. This paper the judge rejected as irrelevant.

It is not very easy to determine, what the parties intended by their agreement. It resembles in most respects a reference acknowledged before a justice of the peace, pursuant to the statute of 1786. c. 21. But the demand made by Stevens is not signed by him; and the report is not to be made to the court of common pleas, but to a justice. Probably the parties intended a new kind of submission, and on the award the justice was to enter judgment and issue execution. This being found against law, the plaintiffs are now attempting to enforce the award by an action at law, upon an implied contract to perform it.

It is a general rule, that when the parties have made an express contract, the law will not imply a contract. How far this rule will apply, when the express contract is of such a nature, that no remedy will lie for a breach of it, when at the same time there is a sufficient consideration to support an implied contract, may be a question. But in this case it is not necessary to determine it.

It is manifest that nothing was intended to be submitted, but two actions commenced by the defendant. No demands of the plaintiff against him, were submitted, unless perhaps a claim for costs in those actions. Yet the referees awarded, that the plaintiffs should recover of the defendant a sum of money, and that one of the plaintiffs should recover of him a cow. The arbitrators have exceeded their powers, and the award is not warranted by the submission. The evidence offered of the submission was properly rejected, as having no tendency in law to support the plaintiff's action.

Judgment according to verdict.

132.

[illegible]LE v. WEEKS, 4 R. 451.

The declaration was, "in a plea of the case, for that at, &c. on, &c. the said Weeks, by his note in writing, of that date, by him subscribed, for value received, promised one J. K. K. to pay to him or bearer, $75, payable on, &c. And the plaintiff is the bearer of said note: Yet, though often requested, the said Weeks has not paid said sum, but refuses to do it. To the damage, &c.

To this declaration the defendant demurred generally, and the plaintiff joined in demurrer.

PER CURIAM. The declaration is certainly not in the usual form, it be

ing common to allege notice, whereby the defendant became liable, and in consideration thereof, promised, &c.

On a general demurrer we must presume the plaintiff to be the lawful bearer of the note. Where there is sufficient matter, substantially alleged, to entitle the plaintiff to his action, the declaration will be good, on a general demurrer. On this ground, we shall support this declaration; but we wish practitioners would make it a rule to adhere to established forms in in their declarations and pleadings. They would save much trouble to themselves and the court.

Declaration adjudged good.

133.

COMMONWEALTH v. MESSENGER, 4 R. 462.

PARSONS, C. J. This prosecution was commenced before a justice of the peace against the defendant, upon the statute of 1791, c. 58, and on the additional statute of 1796, c. 88, to recover a penalty therein provided.

By the first statute, it is enacted that no person shall travel,——or shall upon land or water, do any manner of labor, business or work, on the Lord's day. (works of necessity and charity excepted,) on a penalty not exceeding twenty shillings, nor less than ten shillings, for every offence; and that the Lord's day shall extend from the midnight preceding to the sunsetting of that day.

By the additional statute, these panalties are raised so as not to be more than six dollars sixty six cents, nor less than four dollars; and one moiety is given to the town in which the offences is committed, and the other to the informer, who may recover the same with costs before a jusiice; or the penalties may be recovered for the use of the town, by presentment at the sessions, whose jurisdiction has been since transferred to the common pleas.

The defendant, to support his motion, contends that the complaint is insufficient for the Commonwealth to have judgment.

If the statutes had authorised a proceeding by information in any court of record for the recovery of the penalty, and the information had been drawn like this complaint, it is very clear that such information would have been bad. Because there is no allegation of the sum of money forfeited, nor of the share which the informer claims. For an information resembles, not only an indictment in the correct and technical description of the offence, but also an action *qui tam*, in which the informer must show the forfeiture and its appropriation, or at least the proportion given him by the statute. (Pie v. Westly, Hob. 245.)

But the remedy pursued in this case is a summary proceeding before a justice, in which the court will see that the fact charged is strictly within the statute, and that the proceedings are conformable to it. But a rigid adherence to forms will not be required. (Rex v. Chandler, Salk. 378.)

The substantial part of the complaint is the description of the offence. And the complaint charges that the defendant did, &c. This we consider as a sufficient description of an offence against the first section of the first statute, although there are words of surplussage, which had better been omitted; but they do not render the charge uncertain or incomplete.

There are several objections made to the form of the complaint.

There is no conclusion against the form of the statutes in such case provided. The conclusion is "against the statutes enacted for the due observation of the Lord's day." Upon examining the titles of the several statutes, we are satisfied that the conclusion in the complaint, though not technically

formal, is sufficiently certain, as the defendant must as certainly know the offence, with which he is charged, and the statutes he is alleged to have broken, as if the conclusion had been in the usual form.

Another exception is, that the complaint does not set forth on what part of the Lord's day the work or labor was done. It appears that the statute has defined the time which is intended to be considered as the Lord's day. It is, therefore, regular to allege the fact on the Lord's day generally, and if by the testimony, it was proved to have been done at any time not therein considered as the Lord's day, the defendant must have been acquitted.

The exception which has he most weight is, that the complainant neither shows on whose behalf he complains, nor what the defendant has forfeited by the offence, nor consequently how the statute has appropriated the forfeiture.

To an information *qui tam* at common law, this exception would be fatal. But some indulgence is due to these summary proceedings. In looking into the entries, the precedents of convictions are found liable to the same exceptions. There are four in Tremayne's Pleas of the Crown, p. 326—329, and some in Wentworth's System of Pleadings, vol. 6, p. 14—19. There is a form equally exceptionable in 1 Burr. 148, Rex v. Jarvis, and another in the same book, p. 609, Rex v. Little. The former was on the game laws, and the latter on the statutes against hawkers and pedlars. Both were removed by the defendants, and in neither was this exception taken. For if the offence be correctly described by an informer, the justice, or on appeal, the sessions, and now the common pleas, is competent to decide an inference purely legal, as what is the forfeiture incurred, and what is its appropriation. Upon the authority of these precedents, it is our opinion that the judgment ought not to be arrested for this exception.

But the defendant, as a further ground for his motion, has argued that this court has no appellate jurisdiction of this cause. And if it has not, certainly, we ought not to render judgment on this verdict, but should order the appeal to be dismissed.

The determination of this question must depend on the several statutes relating to this subject. The jurisdiction, which the common pleas has of this cause, was vested in that court by the statute of 1803, c. 154. By the third section of this act, the common pleas are to exercise and perform all the powers, authorities and duties of the court of sessions, with certain exceptions which do not include its criminal jurisdiction. And, although in this statute no appeal is given from the sentence of the common pleas in criminal suits, yet by a fair construction, that court must hold the original and appellate criminal jurisdiction of the sessions under the same modifications and limitations, with which it was exercised by the sessions; and if, in this case, had the sentence been given by the sessions, we should have sustained the appeal, the present appeal from the sentence of the common pleas ought to be sustained. And as the statutes of the Commonwealth, erecting courts and defining their jurisdiction, are a revision of the provincial acts enacted for the same purposes, it may be useful to take a view of the ancient statutes.

By the provincial statute of 11 Will. 3, c. 1, the court of sessions was erected, its jurisdiction defined, and an appeal given to the superior court, then the supreme judicial court of the province, from any sentence in a matter originally heard and tried in the sessions. And an appellate jurisdiction from the sentence of a justice of the peace is also given to the sessions, in which court the order or sentence was to be final. These provisions were continued in force until after the ratification of our constitution, and until their subsequent sevision; the style of the courts being changed

on the declaration of independence, as they were no longer the courts of the king of Great Britain. It is therefore very clear that such was the policy of the law, that neither this court, nor its predecessor, the superior court, possessed any appellate jurisdiction over the sessions, except in matters there originally heard and tried, for a period of more than eighty years.

By examining the statutes now in force respecting these subjects, it appears that this court was erected by the statute of 1782, c. 9, which gives to this court jurisdiction of all suits, civil and criminal, regularly brought before it by appeal or otherwise.

By the 14th chapter of the same statute the sessions was erected, with power to hear and determine all matters relative to the conservation of the peace, and the punishment of such offences as are cognizable by it at the common law, or by acts of the legislature. By this act original jurisdiction in criminal matters is given to it, but not any power to correct the proceedings of justices by receiving appeals from their sentences; its appellate and its civil jurisdiction being derived from other statutes. And the third section giving this court appellate jurisdiction from its sentences in criminal matters, must necessarily be confined to cases, of which that court was by the first section vested with jurisdiction.

An appellate jurisdiction from the sentence of a justice, was not given to the sessions by any act passed after the revolution until the 15th of March, 1784, when the statute of 1783. c. 51. was passed, about two years after the erection of the sessions. This court of sessions, before the passing of this last act, in fact exercised appellate jurisdiction from the sentences of justices; and also a variety of civil jurisdictions, by virtue of provincial acts then in force. Its civil jurisdiction embraced highways and other matters. Its appellate jurisdiction from the sentences of justices in criminal matters, was founded on the fifth section of the provincial act of 11 Will. 3. c. 1. which section was not revised or repealed until March, 1784. And the appellate jurisdiction derived to the sessions from that section was by the express terms of it to be final.

We are therefore satisfied that this court had no appellate jurisdiction from the sentences of the sessions in criminal matters, not originally heard and tried in that court before the statute of 1783. c. 51. And in our opinion this last statute does not give us this jurisdiction. The third section gives the sessions an appellate jurisdiction from the sentence of a justice in criminal matters, and regulates the manner, in which this jurisdiction may be exercised, when the appellant shall endeavour to defeat it by refusing to enter or prosecute his appeal. And it is true that there is no provision, as in the provincial statute of 11 Will. 3. c. 1. that the judgment of the sessions shall be final.

Hence it has been argued that the sessions now had appellate jurisdiction in this case, not by that provincial statute, but by the statute of 1783; that this statute does not direct that this jurisdiction shall be final; and as in the statute erecting the sessions an appeal is given from all sentences, therefore an appeal in this case now lies from the common pleas, the substitute for the sessions.

As an appeal is given in all cases within the original jurisdiction of the sessions, we will allow that if new cases are added to its original jurisdiction, an appeal will lie in such new cases; and if an appeal had been given in all cases within the appellate jurisdiction of the sessions, and afterwards its appellate jurisdiction is extended to new cases, an appeal will lie in those new cases, because it would be a reasonable presumption that the legislature did not intend that its jurisdiction should in any case be final.

But we are satisfied that where the appellate jurisdiction is final, if it

should be afterwards extended to new cases, of these cases also will its jurisdiction be final, unless a different provision be made by law, notwithstanding its original jurisdiction may not be final. And *a fortiori* when a revising statute shall give it an appellate jurisdiction of the same causes, of which by a former statute it had final appellate jurisdiction. And this distinction results from the manifest intent of the legislature, that the exercise of its original jurisdiction may be controlled on appeal; but that the exercise of its jurisdiction in correcting the errors of inferior magistrates should be final. We do not therefore admit the conclusion from the argument, because when the last statute was made, all the appellate jurisdiction of the sessions was then final.

As a further reason we observe, that any jurisdiction vested in any court must be presumed to be uncontrolable by appeal, unless the presumption is repelled by some legal provision. For a right to appeal is a privilege granted to an aggrieved party, which does not involve in it a right further to appeal from the court, to which he has applied for relief from an inferior jurisdiction.

It has been further argued that the legislature, in giving the common pleas appellate jurisdiction from the judgment of a justice in civil actions, expressly provides that no further appeal shall lie; (Stat. 1783. c. 42. s. 6.) but as no such provision is subjoined to the act giving appellate jurisdiction to the sessions, that in the last case the legislature intended to give an appeal after an appeal.

What effect different expressions in two statutes on new subjects would have, cannot be generally determined, as it must depend on the nature of the expressions and of the subjects of the statutes. But in comparing our revised statutes with the provincial acts which were the objects of revision, it is manifest that they proceeded from different pens. In some a precision of language is introduced, not in the former acts, to prevent doubts which never existed in practice, and this has created doubts in other statutes destitute of such precision. To illustrate this observation, a case may be mentioned, which has been decided in this court. The provincial statutes granted to executors and administrators a right to prosecute or defend any personal action, where the testator or intestate died pending the suit. In practice this right was confined to actions, in which the causes of action survived, and there were no doubts. The revising statutes expressly limited this right to personal actions, in which the causes of action survived. Afterwards was passed the statute of 1788. c. 47. which authorised executors and administrators to prosecute or defend a review of any personal action (without expressing any limitation) if the testator or intestate died pending the writ of review. And in the case of Thayer, plaintiff in review and original defendant, v. Bond, administrator of Dudley, (3 Mass. R. 296,) in which Dudley had recovered judgment in an action for a tort, and died pending the review, the original defendant insisted, that by this statute he could compel the administrator to enter the lists, and again try the cause of his intestate. But the court, confining by construction the provision to personal actions, the causes of which survived, abated the writ of review.

In the present case it may be remarked, that the statute of 9 Will. 3. c. 2. which gave justices civil jurisdiction in matters of small value, gave an appeal to the next inferior court, where the cause was to receive a final determination. An appellate jurisdiction from a justice of the peace in civil actions is also recognized by the statute of 11 Will. 3. c. 2. Two years afterwards the statute of 13 Will. 3. c. 15. was passed, which gave an appellate jurisdiction to the superor court from all judgments of the inferior court, without making any exception whatever. Thus by the letter of this last statute an appeal lay to the superior court in actions, of which the inferior

court had appellate jurisdiction. But in practice no appeal in such actions was allowed from the inferior court; and there was in fact no doubt about the construction. But in the revised statute, by an unnecessary precision, the appeal after an appeal was expressly prohibited. This prohibition was unnecessary, and introduced *ex majori cautela*; and no inference ought to be made to affect the construction of the statute of 1783. c. 51.

Upon the whole it is our opinion that, by a reasonable construction of the several statutes, provincial and republican, relating to this subject, this court has no appellate jurisdiction of this cause. This opinion does not overturn any existing practice, for this is the first attempt, that is recollected, to defeat the appellate jurisdiction formerly vested in the sessions, and now in the common pleas, by claiming a further appeal to this court. And it gives us much satisfaction that by this construction the present appellate jurisdiction of this court appears to be consonant to ancient usage, to a fair exposition of the acts of the legislature, and to principles of sound legal policy.

Appeal dismissed.

Note. After the opinion of the court was delivered, the Chief Justice observed to the Attorney General, that, the judgment of the court below being by this decision in full force, he might, if he thought fit, there move to have the defendant's body brought in to receive sentence.

134.

MELODY, Plaintiff in Error, v. READ, 4 R. 471.

In a *qui tam.* action for the penalty inflicted by stat. 1788. c. 65. for a recous, the defendant cannot give in evidence the illegality of the distress.

The owner of a close is not obliged to fence but against cattle lawfully in the adjoining ground: and if all his fence be insufficient, yet if cattle do not escape through the insufficient fence, but are turned in, he may lawfully distrain them damage feasant.

PARSONS, C. J. after briefly reciting the declaration and pleadings in the original action, observed that on inspecting the record several questions arose.

1. Is it competent for the original defendant to show that the cattle were unlawfully distrained, to avoid the forfeiture? In an action of rescous of cattle distrained, the defendant may at common law defend himself by showing that the distress was without legal cause; because in that case the plaintiff has the cattle unlawfully in his custody at the time of the rescous; (Co. Lit. 47. b. 160. b. 161. a.) For the same reason, if the distrainor should waive his writ of rescous, and sue an action of the case to recover his damages, the defendant may show the distress to be unlawful, for the plaintiff would have suffered no injury by the rescous.

If the statute of 1788. c. 65. had created a forfeiture for a rescous, and had given an action of debt to recover it, without making any further provision, the defendant might without doubt have pleaded in bar of the action, that the distress was unlawful. For if the plea had been true, he might legally retake his cattle from the custody of a trespasser.

But by the sixth section of that statute a forfeiture of forty shilling is created for a rescous, to be recovered in an action of debt *qui tam.* A forfeiture of five pounds is also created for a pound breach, to be recovered in the same manner. And in the case of rescous the party injured may recover his damages by action of the case; and in case of pound breach he may recover double damages by the same form of action. But it is provided that in this last action, as well as in an action to recover damages for a rescous,

the defendant shall not be allowed to give in evidence the illegality of the distress, to prevent the plaintiff from recovering his full damages. This provision the plaintiff in error would, by an equitable construction of the statute, extend to the popular action of debt *qui tam*. to recover the forfeiture incurred by a rescous.

This, it is our opinion, cannot be done. Penal statutes must be construed strictly according to the intention of the legislature, as discovered by the import of the words; and when not remedial, are not to be extended by equitable principles. Further, statutes are not to be construed as taking away a common law right, unless the intention is manifest. Without this provision of the statute, the defendant may plead in this action that the distress was unlawful; and this defence neither the express words, nor any reasonable construction of them, have taken away.

This provision, when applied to an action of pound breach, is in affirmance of the common law; and probably in a popular action to recover the forfeiture created by this statute for a pound breach, the same rule would be applied at law without the aid of the statute. But by the express words of the statute this defence is prohibited only in the actions of the case to recover damages either for a rescous or a pound breach.

2. Another question arising from the record is, whether the allegations in the defendant's bar, and which are admitted to be true by the plaintiff's demurrer, are sufficient to show that the distress was unlawful. It is alleged that the plaintiff's fence was insufficient, and thence it is concluded that the distress was not damage feasant. But is this conclusion just? The owner of a close is not obliged to fence, but against the escape of cattle lawfully in the adjoining ground. If all his fence be insufficient, yet if the cattle do not escape into his close through the insufficient fence, but are turned in, he may lawfully distrain them damage feasant. This is evident, not only from the form of a plea in bar by enclosures, whether it be pleaded to an action of trespass, or to an avowry for damage feasant in replevin; (*Vide* Rast. 561. a. 620. 1.) but from the fifth section of the statute, on which this action is founded. But the plea in this case does not allege that the cattle escaped into the plaintiff's close through the insufficiency of his fence. The plea therefore appears to be bad and insufficient, and the judgment must be reversed.

135.

ROBINS, Plaintiff in Error, v. LUCE, 4 R. 474.

To an action on a promise to deliver certain specific articles at a given day and place, it is a good bar that the defendant was ready at the day and place to deliver the articles.

This was a writ of error brought to reverse a judgment of the court of common pleas of this county, rendered in an action sued by the plaintiff in error against the defendant, for not delivering him twenty seven Ash Barrels, agreeably to the defendant's promissory note in writing.

The defendant, by his plea in bar, admitted the making of the note, but he alleged that it was given in consideration of a waggon which he then bought of the plaintiff, and further states that it was at the same time agreed between them, that if the said R. should call for said barrels before the said 20th day of September, [the day of payment fixed by the note] he, the said L. should deliver them if he had them on hand; and that if the said R. should not call for said barrels before, nor at the said time of payment, the said L.

should not make an actual tender and delivery of the said barrels, but that if he should, on the said 20th day of September, have at his dwelling house the said twenty seven barrels ready to deliver the same whenever he, the said R. should call therefor, in that case the said R. would call for the said barrels and take them in payment of said note, as he should find it convenient; and the defendant avers that at the time of making the note he offered to deliver to the said R. the said barrels, and has always since, and particularly on the said 20th of September, had and still has the said barrels at his dwelling house ready to deliver to said R. whenever he should or shall call for them.

To this plea in bar the plaintiff demurred specially, assigning as a cause of demurrer, that the defendant had by his bar attempted to introduce parol evidence, substantially to vary and annul a written agreement. The defendant joined in demurrer, and the court of common pleas gave judgment that his plea in bar was good and sufficient.

The error relied on by the plaintiff in error, is substantially the same as the cause of his demurrer to the defendant's plea in bar. And this point was argued at some length by Dewey for the plaintiff in error, and Williams for the defendant in error, at the September term, 1806. The cause has stood continued for advisement from that time to the present; and now the Chief Justice observed that it was unnecessary in this case to decide whether the parol evidence stated in the bar was or was not sufficient in law to prove the allegations intended to be supported by it; for in looking into the record, it appears that the plaintiff has declared on a contract of the defendant's, by which he promised to deliver at his dwelling house 27 ash barrels, on the twentieth day of September, 1804. The defendant, in his bar, among other allegations, avers that on that day at his dwelling house he was ready to deliver the same barrels to the plaintiff. If he had also averred that the plaintiff was not there to receive them, this plea, if true, would have been a good bar, and pleaded in good form. By the contract declared on he was to deliver them at no other time or place. He could not tender them, unless the plaintiff was there. He had done all that he could do; and it was owing to the plaintiff's laches that the contract, as written, was not performed. As neither duplicity in pleading, nor any defect of form is assigned as a special cause of demurrer, the bar appears to be good. A material fact is alleged, which the plaintiff might have traversed; and if the defendant had not the barrels ready, or if the plaintiff had been present to receive them, and they were not delivered, the issue must have been found for him. On this ground therefore, without deciding on the admissibility of the parol agreement, we are satisfied that the judgment of the common pleas was right. Let the judgment be affirmed with costs.

136.

COMMONWEALTH v. ALDERMAN, 4 R. 477.

A conviction by a justice of the peace, on the information of a party guilty of breach of the peace, is no bar to an indictment for the same offence.

The defendant being arraigned on an indictment for an assault and battery, and being enquired of by the clerk whether he was guilty or not guilty, said that he was guilty, but added that he had himself informed a justice of the peace for the county of his offence, by whom he had been sentenced to pay a fine, &c.

The court directed the clerk to enter the plea of guilty alone, observing that it had heretofore been solemnly determined that a conviction of a breach

of the peace before a magistrate, on the confession or information of the offender himself, was no bar to an indictment by the grand jury for the same offence.

137.

SLAYTON v. THE INHABITANTS OF CHESTER, 4 R. 473.

When a writ is returned by an officer as duly served, the defendant is estopped from denying the service. And the court will *ex officio* take notice of the return.

PARSONS, C. J. In this action the defendants pray judgment if they ought to be held to answer the plaintiff's writ, because they say that a copy of it was not left with the clerk or with one of the principal inhabitants of the town. wherefore they pray judgment of the writ that it may be quashed. To this plea in abatement there is a demurrer for cause; and one of the causes is, that it appears from the return endorsed on the writ, that a copy of it was left with one of the principal inhabitants of Chester, and that the defendants are estopped from denying it. And this demurrer has been joined.

It is very clear that when a writ appears by the return indorsed by the officer to have been legally served, the defendant cannot plead in abatement of the writ, by alleging a matter repugnant to the return; if the return be false, his remedy is by an action for a false return against the officer.

But it is objected that the return is no part of the plaintiff's demurrer, and that the court cannot *ex officio* take notice of it. Regularly the plaintiff ought to have prayed oyer of the return before he demurred, and then no doubt could have arisen upon the plea, as it would without question have been bad. If the estoppel had been by matter of record in another court, or in another cause in this court, the objection must have prevailed. But as the record relied on as an estoppel is a return on the same writ, against which the plea is pleaded, we are satisfied that we can *ex officio* take notice of it, as in fact, if we read the writ, we cannot avoid noticing the return, unless we wilfully shut our eyes; for it of course is written on the same page which contains the indorsement of the writ by the plaintiff, and which is a part of it. As we notice the return, the plaintiff is estopped from making the allegation of want of service, and the plea must be holden bad, and an interlocutory judgment be entered, that the defendant answer further.

Let the clerk enter the judgment specially after this form.

"Whereupon the court here having inspected the same writ and the return indorsed thereon by Newcomb Cleveland, a deputy sheriff to whom the writ is directed; which return is in the words following, [Here let the return be inserted] it appears to the court that the same plea, and the matters therein contained are bad and insufficient in law to abate the said writ; it is therefore considered, &c. [in the usual form of a *respondeas ouster.*"]

138.

MELLEN ET AL. v. BALDWIN, 4 R. 480.

The action of replevin survives the death of the plaintiff, but not of the defendant.

PARSONS, C. J. It appears from the writ, and the suggestion on the record which is admitted, that the plaintiffs had replevied the chattels described in the writ from the possession of the original defendant, who had attached them at the suit of a creditor as the property of his debtor, who was no-

either of the plaintiffs. It further appears that, pending the suit, the original defendant, who is described in the writ as a deputy sheriff, died, and that John Baldwin, the administrator of his estate, comes into court and moves to be admitted to defend this action. The motion is objected to by the plaintiffs; and whether it ought or ought not to prevail, is the question before the court.

At common law all personal actions died with the party; but by the statute of 1783. c. 32. s. 10. provision is made that when either party dies pending the suit, his executor or administrator may come into court, and prosecute or defend it, if the cause of action doth by law survive. And the counsel for the administrator has argued that the cause of action in this case doth survive.

In replevin the ground of action for the plaintiff is his property either general or special, and a tortious violation of his right of property by the defendant. The defendant is therefore charged with a tort, which cannot survive against his executor or administrator.

By the surviving of the cause of action is to be understood of such a cause as will enable the executor or administrator of the deceased to maintain a suit thereon against the survivor, or against his executors or administrators. Thus actions on contracts may be maintained by and against the executors and administrators of the original contractors. Trespass *de bonis asportatis* and trover, and replevin may be commenced and maintained by the executor or administrator of the owner of the goods against a tort feasor, but not against his executor or administrator.

In the present case the plaintiffs could not maintain any action against the administrator of the deceased defendant for a tort committed by the latter in wrongfully taking these goods. We are therefore satisfied that the plaintiffs could not compel the administrator to take the defence of this suit upon him, so that they might recover damages against the estate of his intestate, for a wrong committed by him when living.

And if the administrator could not be compelled to take on him the defence, nether can he be admitted on his own motion; for his right must depend on the nature of the action, and not on his own consent. And the remedy given by the statute of 1783. c. 32. and enforced by the 59th chapter of the same statute, must be mutual.

But the executor or administrator of a plaintiff in replevin may come in and prosecute, because the chattels of the deceased being vested in him by the law, he might sue a replevin against the defendant, who had lawfully taken and still held them, and this within the equity of the ancient statute. which gave the executor an action *de bonis asportatis testatoris*.

The counsel for the administrator have further endeavoured to maintain the motion by the statute of 1805. c. 99. which passed after the commencement of this suit. This statute was made to regulate the proceedings upon bonds given by a sheriff for the faithful performance of the duties of his office, and to answer for the mal-feasance of his deputies.

The second section has altered the common law by providing that actions for the mal-feasance of the sheriff or his deputy may be sued against the executors or administrators of the sheriff, in the same manner as if the cause of action survived at the common law.

This section cannot apply to the present motion. For the tort of the sheriff, or of his deputy, is made to survive against the executors or administrators of the sheriff, and not of his deputy; and whether the deputy be living or dead, the sheriff, or his executor or administrator is chargeable, and the remedy against the deputy, or if dead, against his executor or administrator is on his bond to indemnify the sheriff. And if we could give this section the construction, for which the counsel for the administrator has ar-

good, yet it could not avail him; for the present action is not sued against the original defendant for his misfeasance as a deputy sheriff.

The motion must be overruled, and judgment be entered that the writ is abated by the death of the original defendant.

139.

JOHNSON, Plaintiff in Error, v. HARVEY. 4 R. 483.

A writ of error does not lie to reverse a judgment against a defendant out of the commonwealth, because the plaintiff sued out his execution, without giving bond pursuant to the statute of 1797. c. 50.

PARSONS, C. J. [After stating from the record the proceedings in the original action, and the error assigned,] we are to decide whether or not the judgment for the cause is to be reversed.

By the statute of 1784. c. 28. s. 7. if the defendant, having been duly served with the writ, makes default, judgment is to be entered against him, his default being considered as a confession of the cause of action.

By the statute of 1797. c. 50. s. 5. if the defendant was out of the state when the writ was served, and did not return before the trial, and had no notice of the suit, a suggestion of his absence must be entered on the record, which the plaintiff at his peril must make, and the court must *ex officio* continue the cause one term. At the next term it is in the discretion of the court, further to continue the cause, or to call the defendant. But if judgment be rendered on default, the plaintiff cannot have his execution, until he has given bond, with one or more sureties, to make such restitution as the defendant may recover on his review of the action sued within one year. And by the statute of 1791. c. 17. s 2. this court may, for any reasonable cause, grant to any party liberty to review the action at any time within three years after the judgment. Upon the second statute the plaintiff in error relies to obtain a reversal of the judgment.

By a writ of error an erroneous judgment on an original writ, or an erroneous award of execution on a judicial writ, may be corrected. Thus error lies on a *scire facias* on a former judgment, or against executors or administrators, or against bail. So error lies to set aside an execution, sued out on a statute merchant or staple acknowledged agreeably to law. And by analogy, error will lie to set aside an execution sued on a recognizance for the payment of a debt taken before a justice of the peace agreeably to the statute of 1782. c. 21.

But when there is a regular judgment, or a regular award of execution, if an execution after irregularly issue, it cannot be a good cause in a writ of error, to reverse a judgment, or award of execution regularly made. The remedy for the party injured is either by *audita querela*, or by motion to the court to set the execution aside.

In the present case no objection is made to the judgment, or to any part of the process previous to the rendition of the judgment. The judgment cannot therefore be reversed for the irregularity of suing out the execution; and the plaintiff in error should have sought relief, if aggrieved, in some other way.

It is not the practice in this state to enter on record awards of execution upon original writs, except in particular cases, as against trustees. By law an execution may be sued, tested out of term, and made returnable on a day out of term; and an *alias* or *pluries* may issue tested on any day within a year after the return day of the next preceding execution. If in legal con-

templation the first execution is awarded by the court, and if wrongly awarded, the award may be reversed on error. The record should be made up with an award of an execution. And were we to order the clerk below to enter on the record an award of execution, we must presume that he would enter it according to his docket. Then an award of execution would be entered, that the plaintiff have execution on his giving the bond required by the statute. In this case the award would be legal, and the execution might have been set aside for irregularity in suing it out. But if the award should appear on record erroneously entered, if we set it aside on error, we could not reverse the original judgment, which is a distinct and independent part of the record, and may be right, although the award of execution may be wrong.

These principles of law do not impose any hardship on the plaintiff in error. If the execution was levied on his estate, the presumption is strong that he knew of the judgment and execution within a year, as he lives in an adjoining state, when he might have moved to set aside the execution, and might have reviewed the action. The presumption is still stronger that he had this knowledge within three years, when this court could have granted a review, if he had suffered by the judgment. But if the execution was not executed, so that a want of notice might be supposed, then the bond required of his creditor by the plaintiff in error would have been useless to him, as there could be no restitution, where nothing had been taken.

The judgment must be affirmed with costs.

After pronouncing the opinion of the court, the Chief Justice observed that an execution in this case ought not to have issued before bond was given. The issuing it was irregular, and the clerk should have been more attentive. If it was procured by the contrivance of the plaintiff's attorney, he ought to have known better; and if he did not, it was malpractice.

140.

M. BLISS AND G. BLISS v. THOMPSON 4 R. 488.

Indebitatus assumpsit for money had and received.

The plaintiffs, the defendant, William Ely, and certain other persons were tenants in common in fee, in different proportions of a large tract of land in the state of Kentucky, purchased, by the agency of the said Ely, of William Alexander. The purchaser was secured by the assignment of the warranty of Richard Gernon. It was afterwards known that there were prior claims to a part of the land, and that the remaining part was of an inferior quality, there being no timber on it; and the principal reliance of the purchasers to relieve themselves against a bad bargain was on the warranty of Gernon. The defendant, having purchased the shares of most of the proprietors, had himself, with the agency of William Austin, agreed with Gernon to procure for him from the partners a release of his warranty for 3000 dollars, of which Austin was to have 2000 dollars. The defendant, concealing his transaction with Gernon, applied to the plaintiffs to purchase their share, under the pretence that nothing could be obtained from the original purchase, but by immediately proceeding to Kentucky, and saving some part of the purchase money by selling the land for the most it would bring; that Gernon's warranty was worth nothing, as he was unable to pay any thing, and that he was intending to proceed to the south of France, whence he had emigrated. The plaintiffs were then ignorant of Austin's connection with the defendant, and of his concern in the contract with Gernon. The information given by the defendant, and written by his agent Austin, was wholly false, and by them known to be so, and was communicated by them with the intention of deceiving the plaintiffs; who giving credit to the representations and information given them by the defendant, sold to him their interest in the purchase, secured by Gernon's warranty, for a sum of money much less than their proportion of the money paid by Gernon, to procure a release of the warranty. The said Ely was treated in the same manner by the defendant; and under the same impression, and with the

same confidence that the defendant had given to the plaintiffs, being present during the negotiation, he likewise sold his share to the defendant for the same price, and the plaintiffs and Ely conveyed their shares to the defendant by the same indenture. These facts were principally proved by the deposition of Ely, the admission of which was objected to at the trial by the defendant, and because that objection was overruled, the defendant moved for a new trial.

PARSONS, C. J. It appears that Ely, though objected to, was admitted as a witness, and that agreeably to the direction of the judge, a verdict was found for the plaintiffs, for the difference between the money paid them by the defendant for the release, and the money received by him of Gernon, to extinguish his warranty on the shares belonging to the plaintiffs.

The admission of Ely is now objected to as a sufficient cause for setting aside the verdict. Ely's testimony was certainly very material for the plaintiffs; and if it was improperly admitted, the verdict ought to be set aside. The objection to him is founded on his connection with the plaintiffs in the same transaction; that for the same supposed fraud, he has commenced his action; and if he can be a witness for the plaintiffs, they will be witnesses for him.

An objection of this nature may very properly be made to a jury, to the credit of a witness, who will decide what weight is due to his testimony; but no objection on account of interest can exclude a witness, unless he be interested in the event of the suit. In this action Ely had no such interest; and the verdict cannot be given in evidence for or against him, in any action in which he may be a party. And although his demand may arise out of the same transaction, this case cannot be stronger than that of an action against one underwriter on a policy of insurance, in which another underwriter on the same policy may be a witness for the defendant. We therefore think that Ely is a competent witness, and that the judge did right in permitting his testimony to be laid before the jury.

Several objections have been made to the verdict. It has been urged that the assignment of Gernon's warranty, which ran with the land, must be considered as an assignment of land, and therefore that the plaintiffs' demand is within the statute of frauds, and so could not be supported by parol evidence, but only on a written memorandum made by the defendant.

Without controverting the position, that the contract to release a covenant of warranty annexed to land is a contract concerning some interest in land, yet in this case the objection cannot prevail. For the action is not brought on any agreement made by the defendant with the plaintiffs concerning the sale of any interest in land, but for money he had in equity received from Gernon for their use, by reason of their having extinguished the interest they had in Gernon's warranty.

Another objection is, that the release to the defendant by the plaintiffs being by deed, they cannot aver that it was obtained by fraud against their own deed, which expresses a sufficient and fair consideration.

It is generally true that a man shall not be received to aver against his own deed. But the case of fraud is always excepted, which vitiates every transaction; and a deed obtained by fraud is to be considered as a void contract as to the fraudulent party.

But the great objection, and the one most relied on is, that the transaction, considered in all its parts, is not in law fraudulent; that the defendant had a legal right to make his bargain for his own benefit with Gernon to procure a release of his warranty, and that he might lawfully conceal it from his partners in interest.

Not only good morals, but the common law requires good faith, and that

every man in his contracts should act with common honesty, without overreaching his neighbor by false allegations or fraudulent concealments.

Let us now look at this transaction. From the evidence reported it was competent for the jury to infer that the defendant was a partner in interest, with the plaintiffs and others, in Gernon's warranty; that as a partner he proposed terms to Gernon to discharge his warranty; that he was to receive $8000 on procuring the discharge; that he concealed this negotiation, and falsely affirmed that the warranty was worth nothing, and fraudulently produced Austin's letter written for this purpose, to give credit to his affirmation; and that the plaintiffs, imposed on in this manner, executed this release, by which the defendant was enabled to fulfil his contract with Gernon, by extinguishing the plaintiffs' interest in the warranty.

As the jury might make these inferences from the evidence, we must presume that they did make them, as they have found a verdict for the plaintiffs.

On this view of the case we are satisfied that the transaction between the parties is vitiated by fraud on the part of the defendant, and will not protect him in holding the money he received from Gernon, in consideration of the plaintiffs' having released their interest in the warranty. Here is not only the suppression of the truth, but also an allegation of falsehood, to deprive the plaintiffs of their interest in the warranty.

It appears that the jury deducted from the plaintiffs' proportion of the money paid by Gernon to the defendant, the sum he had paid the plaintiffs for their release. This deduction we think was right, as the effect is to give to the plaintiffs so much of the money received from Gernon by the defendant, as he against equity and good conscience detained from the plaintiffs. Upon the whole, we do not find any good reason to set aside the verdict; and judgment must be entered upon it for the plaintiffs.

141.

FULLER v. HOLDEN, 4 Mass. Rep. 498.

In an action against a sheriff for not seizing upon execution, chattels which he had attached on the original writ, it is a good defence that such chattels were the property of strangers, and not of the debtor.

PARSONS, C. J. The plaintiff, in an action of the case, demands damages of the defendant, for the neglect of his duty, as a constable of the town of Orange. The substance of the plaintiff's demand is, that having sued out an original writ of attachment against Benjamin Porter, his debtor, the defendant, as a constable of Orange, by virtue thereof attached two cows shown to him by the plaintiff as Porter's property; that having recovered judgment against Porter, within thirty days he delivered his execution to the defendant, to execute; who, regardless of his duty as a constable, and intending to wrong the plaintiff, and deprive him of the benefit of his attachment, neglected to levy the execution on the said cows, or on any other property of Porter's, but levied it on his body, and returned that the two cows had been rescued from him, and that for want of property he had arrested Porter's body, and had committed him in execution. And the plaintiff further complains that Porter was discharged upon taking the insolvent debtor's oath. By reason whereof, the plaintiff has lost the benefit of his attachment, and his debt and costs.

The defendant pleaded the general issue, and offered in his defence evidence to prove that the cows, when attached, were not, and never were afterwards the property of Porter, but of one Johnson and one Eddy. This

evidence the judge rejected. The defendant then offered the same evidence in mitigation of damages, and the judge again rejected it. For which cause the defendant has filed his exceptions, and moved for a new trial.

It appears to us that the wrong complained of is the defendant's neglect to seize the cows on the execution, to the plaintiff's injury; and we are satisfied that under the general issue, the defendant may prove that he was guilty of no neglect, and that the plaintiff has sustained no injury by his nonfeazance. And proof that the cows were not the property of Porter when attached, nor ever after, would be good evidence that the defendant is in no default, but would have been a trespasser, had he seized the cows. Under this impression, we think the evidence offered was improperly rejected.

If it had been urged for the plaintiff, that he has not alleged the property of the cows to be in Porter, and therefore the property of them was not in issue, it might have been answered, that the plaintiff has suffered no damage whatever by the defendant's conduct, if the cows were not the property of Porter, and that the evidence could not injure him. And it may be added, that after a verdict for the plaintiff, the insufficiency of the declaration may be considered as cured by it; for it appears that the plaintiff's title to damages is not in itself defective, but only defectively stated, and that the jury would not have given a verdict for him, unless it had been proved that the property of the cows was in Porter.

Upon the whole we are of opinion that the verdict ought to be set aside, and a new trial granted.

142.

KIMBALL v. CUNNINGHAM, 4 Mass. Rep. 502.

If one would avoid a sale or exchange of a chattel for fraud practiced by the other party to the contract, he must not retain any part of the consideration he received upon the sale or exchange.

PARSONS, C. J. When a horse is sold upon an implied warranty that he is sound, and at the time of sale the vendor knows that he is not sound, this is such a fraud in him as will render the contract void, at the election of the vendee. If he chooses to consider the contract as void, he must return the horse within a reasonable time, and then he may maintain a general *indebitatus assumpsit* for the purchase money, as money had and received to his use. If he had exchanged horses and given money as boot, he may not only maintain that action for his money, but also trover for the horse he parted with in exchange.

But he ought not to retain any part of the consideration he received upon the sale or exchange; as if in the exchange he received money in boot, he ought to return, not only the unsound horse, but also the money he received. For he shall not compel even the fraudulent seller to an action, to recover back the property he has parted with in the exchange. This rule applies only to the case of an implied warranty on a fraudulent sale or exchange. But the party defrauded is not obliged to consider the fraudulent contract as void, but may, at his option, maintain an action of deceit, or a special *assumpsit*, and recover damages (if he has sustained any) for the fraud. If the warranty be express, his remedy, either on a fraudulent sale or exchange, must be by an action of deceit or by a special *assumpsit*.

In the present case, the evidence offered was to prove a fraudulent exchange, with an implied warranty, that the horse was sound, when the vendor knew that he was unsound. The defendant had, therefore, his option to

consider the bargain void. If he chose so to consider it, he ought to have returned all the property that he received on executing the contract. He ought to have returned the horse, and his own note that was delivered up to him by the plaintiff; or if cancelled, the money to pay it. Had this been done, we are satisfied that he might have maintained trover for his horse, and for Philips's note, which he delivered to the plaintiff, and the plaintiff's property in the steers would have been disannulled.

But, in fact, he still has the benefit of the note, which the plaintiff delivered him, to which he can have no claim, if the contract be void. For this reason we are satisfied that he cannot defend himself in this action upon the ground that the exchange was void.

There is another important fact stated; that after he returned the unsound horse, he commenced an action of deceit against the plaintiff, to recover damages for the fraud, which action is still pending; and not an action of trover for his horse, which he had delivered the plaintiff. By this action it is also very clear that he has made his election to consider the contract as subsisting, and to recover damages for the breach of it. And if the contract be considered as subsisting, the plaintiff's property in the steers is not annulled, and the evidence was very properly rejected.

The verdict must stand, and judgment be entered accordingly.

143.

DIX, ET AL. V. COBB, AND WHITNEY HIS TRUSTEE, 4 R. 508.

A book debt for goods sold, is assignable in equity.

If an attaching creditor, having knowledge of an assignment of the debt which he attaches, believes it fraudulent, he may sue the assignee, as trustee, and compel a discovery.

PARSONS, C. J. Has Whitney by his answer to the plaintiff's interrogatory, discharged himself? is the question submitted to the court.

This answer admits that he formerly owed Cobb about fifteen dollars on account for merchandize purchased; that when he was sued, he had no knowledge that Cobb had assigned this debt, but that he has since been informed by the attorney of Higginson, and others, that before the suit this debt had been assigned to them, and was forbidden to pay it to Cobb, but was requested to pay it to the assignees. A copy of the assignment, under the seal of Cobb, the trustee annexes, and makes it a part of his answer.

The plaintiff insists that this debt is not protected from his attachment by the assignment for several reasons. One is, the nature of the debt, resting for its evidence on an account book, and not on a note or bond, is such that it is incapable of assignment. Another reason is, that he made the attachment before the trustee had notice, and also, that the trustee, not being privy to the assignment, it may without his knowledge be fraudulent as to the creditors of the assignor.

After full consideration, we are satisfied, that Whitney discharged himself by his answer. The debt is a chose in action, and like other choses in action, except negotiable securities, is not assignable at law: but all choses in action may be assigned in equity, and the assignee has an equitable right, which he may enforce at law, in the name of the assignor, whose release or bankruptcy shall not defeat it.

In the case of Winch v. Keeley, 1 Term R. 619, the debtor had assigned, as in this case, a debt due for goods sold, and he afterwards becoming bankrupt, it was determined that the assignment should protect the debt against

the assignees, under the commission of bankruptcy. If the debtor has paid the debt to the assingor without notice of the assignment, he shall be discharged; for he shall not suffer by the neglect of the assignee.

The doctrine, which establishes the assignability in equity of choses in action, arises from the public utility of increasing the quantity of transferable property, in aid of commerce and of private credit.

The assignment, in this case, *may* be fraudulent, but on its face it appears to be regular, and for a valuable consideration; and we cannot presume fraud.

When an attaching creditor has reason to believe the assignment fraudulent, of which he has knowledge before the suit, he may sue the assignee as a trustee, and compel him to a discovery on oath. Or if he has not notice seasonably to sue the assignee as a trustee, he may, after he has recovered judgment against the principal, sue an action of debt on that judgment, and summon the assignee as a trustee in that action, and compel him to a discovery on oath, upon the penalty of paying the debt, and if on this discovery the assignment should be fraudulent, the assignee would be adjudged a trustee, so far as he had derived any benefit from it. And it is much better to leave the attaching creditor to this remedy, than to presume an assignment fraudulent, or to defeat the assignability of choses in action.

Although the trustee in this case had no notice of the assignment, until after he was sued as a trustee, yet immediately on the assignment, the equitable interest in the debt, as between the parties to it, immediately passed to the assignee. And if the assignor had afterwards received the debt, he would be obliged to pay it over to the assignee. But an attaching creditor cannot stand on a better footing than his debtor, (if the assignment be not fraudulent as to creditors,) and if he attaches any property of his debtor, it must be attached subject to all lawfully existing liens created by his debtor. And consequently if his debtor have no equitable interest in a chose in action, the creditor cannot acquire any by his attachment.

Therefore, the want of notice in the trustee, will not defeat the assignee's interest in this debt, in favor of an attaching creditor. This point was decided in Suffolk, about eight years ago in the case of Wakefield v. Martin, and trustees; 3 Rep. 558.

Judgment that Whitney be discharged as trustee.

144.

BIGELOW v. JONES, ADMINISTRATRIX OF FAREWELL JONES, 4 R. 512.

PARSONS, C. J. The several questions arising on these facts, have already been decided by the court in the cases of Gore v. Brazier, 3 Rep. 523, and Wyman v. Paigden, ib. 150, and the plaintiff must have judgment, unless we should overturn those decisions, which were made on covenants of warranty in the conveyances of lands, executed by the same devisee, under the same will of the late Lieut. Governor Gill, and which had been broken by the eviction of the grantees, to satisfy the demands of the same judgment creditor.

We have decided that the lands of the testator are liable to be levied on to satisfy the debts which he owed; that the conveyance of these lands by the devisee did not defeat the lien of the creditor, to whom no laches were imputable; that these lands might be levied on and taken from the purchaser; and that the delivery of seizin by the sheriff to the creditor in satisfaction of his execution, is an eviction of the tenant. These decisions necessarily resulted from the obvious construction of the statutes, making lands and tenements liable for the payment of debts.

145.

WELLS, ET AL. v. BANISTER, ET AL. AND SETH BANISTER AS THEIR TRUSTEE, 4 R. 514.

"About thirty-nine years ago, Seth Banister, my father, conveyed to me a tract of land in Brookfield, which I have ever since owned. About five years since, the said Liberty Banister, who is my son, requested my license to erect a dwelling-house and other accommodations, on said land. I consented thereto, and at the same time, told him, that at my decease, if I should leave any property to my children, I might probably bestow that part of my real estate upon him; but I made no contract or agreement, directly or indirectly, with my said son, to convey said land to him, or to pay him for erecting said house and accommodations thereon; nor do I ever expect or contemplate so to do; nor did I ever desire my said son to build said house and accommodations; nor have I any objections, that whoever has a right thereto, should remove the same, provided said land be left in as good a situation as it was in before the said Liberty did any thing thereto. ——— I do not absolutely know at whose expense the said buildings were erected, but suppose it to have been at the expense of my said son. They were erected before the service of the writ in this action upon me, and now remain on said land. I have never paid any body for said buildings, nor did I ever engage or expect so to do."———

By the Court. The facts disclosed by the person summoned as trustee in this case, do not furnish a pretence for charging him. He is the owner of a tract of land, on which he had permitted the principal, his son, to build a dwelling house for the son's convenience and accommodation, under an expectation that the land, on which the house was built, would by devise come to the son, at the death of the father. There was no contract, express or implied, that the father should own the house, or in any event be accountable to the son for the value of it. By the strict operation of the law, it is true that the father, having the property of the land, might disturb the son in the possession of the house, and indeed remove him from it. But it is not to be presumed that he would have taken this advantage of his son; and he ought not to be made the owner of the house, against his consent, by compelling him to pay the expense of building it.

The property of the house is personal property of the son, he having no estate in the land; and the most that can be made of the consent of the father to build upon his land, is a right to occupy the land without rent; and perhaps a right in the son, or persons claiming under him by purchase or execution, to enter and remove the buildings, without being subject to any other than nominal damages in an action of trespass.

The supposed trustee must be discharged.

146.

PLUMB v. WHITING. 4 R. 518.

One cannot be sworn as a witness who would testify under an impression that he is interested in the event of the suit, although in fact he has no legal interest in such suit.

PARSONS, C. J. If the plaintiff's son was immediately and directly interested in the event of the suit, it is very clear that he ought to have been rejected; and if he was to have one moiety of his earnings, he was directly interested in the event of the suit to recover them. Now the witness produced by the plaintiff, swore, that by the bargain, the plaintiff had agreed that the son should have half his wages, and this testimony was not contradicted; nor can the credit of this witness be impeached by the plaintiff who

produced him. The plaintiff has himself proved the interest of his son, whom he offers as a witness; and the son being thus proved to be interested, ought not to have been admitted as a witness for the plaintiff.

For the plaintiff, it has been argued, that the engagement of the father, to let his minor son have half his wages, is a voluntary promise, resulting from the father's bounty, and cannot be enforced at law; and that an interest resulting from a voluntary promise not obligatory in law, will not disqualify a witness.

If a witness would testify under the impression of an interest, which he honestly believes that he has in the event of the suit, he cannot be sworn; for the effect on his mind must be the same, whether his interest arises from a legal contract, or from a gratuitous promise, on which he confidently relies. And in this case, it does not lie with the plaintiff to say, that the witness he produced, does not confide in the promise, which the plaintiff himself has made to him.

The verdict must be set aside and a new trial granted.

147.

THE INHABITANTS OF THE TOWNS OF STOUGHTON, SHARON AND CANTON v. BAKER AND VOSE, 4 R. 522.

If the legislature appoint a committee to cause alternations to be made in the fishways in a river, and order a portion of the expense of such alterations to be borne by the owners of the dams where the alterations shall be made, such owners are not held to pay a portion of the expenses of such committee.

A grant of a dam and wear upon a river, with the exclusive right to take fish in the river below the dam, does not preclude the public from a right to have a convenient passage way for the fish to ascend the river to the ponds.

Every owner of a mill dam holds it under the limitation that a sufficient and reasonable passage way shall be allowed for the fish; and this limitation is not extinguished by any neglect of the government in compelling the owner to comply with it.

The government may compel such compliance by their committee; but if a prostration of the dam, not within such limitation, be made by such committee, the owner may have a remedy by an action at law.

Such committee may cause the alterations to be made under their direction; but they are not personally answerable to those whom they employ; and as the exercise of their authority is personal, it cannot be delegated to any other person, or even to one of their own number.

PARSONS, C. J. The plaintiffs found their claim on the resolution of the legislature recited in the declaration; on the alteration of the former sluice way ordered by the committee therein appointed; on the refusal of the defendants to make that alteration seasonably; on the authority given by Mr. Loud, as a sub-committee to the plaintiffs, to make that alteration; and on the plaintiffs' making it pursuant to that authority.

The defendants object to the claim of reimbursement of the money paid to defray the expenses of the committee; and we are satisfied this objection is well founded. The resolve is silent on this subject, and the only charge which it imposes on the owners of the dam is three-fourths of the expenses incurred in altering the sluice way.

The defendants also object to the claim for the expenses of making the alterations in the sluice way, arguing that the legislature had no authority to pass the said resolve. Because their dam is an ancient dam derived from a grant by the town of Dorchester, in 1633, held by them and by those whose estate they have therein, without any sluice way for the passage of fish from that time to the year 1789, when the legislature first directed that a passage should be opened for fish:—Because in the year 1633, a wear for the taking

of fish was granted as appurtenant to their mill, by which the grantee, his heirs and assigns, had a several fishery between the dam and the sea, and that this grant of a wear was in the same year confirmed by the colony legislature, so that the public have no right for the passage of fish above or through their wear:—Because, if the public have this right, it should be exercised by the intervention of a jury to describe the site and dimensions of the sluice way, and not by a committee of the general court, who may, through error or mistake, order the whole dam to be prostrated, and thereby destroy or render useless the estate the defendants have in the mill:—Because if the public have not this right, but claim to take it for the public use, the Commonwealth is bound by the constitution to make a reasonable compensation to the owners, and not charge them with the expense of making the sluice way.

The grants on which the defendants rely are made part of the case. The grant by Dorchester, relating to the dam is in these words: "It is generally agreed that Mr. Israel Stoughton shall build a water mill if he see cause." Then follows a grant to him of a wear adjoining to his mill; and no person is to cross the river with a net or otherwise to the prejudice of the said wear; but Stoughton is to sell the alewives at five shillings per thousand, and the other fish at reasonable rates. The colony legislature in 1634, confirmed the grant of the wear to Stoughton and his heirs, he agreeing to build and maintain a horse bridge over the river.

The wear thus granted and confirmed amounted to the franchise of a several fishery at that place, but it extended to no other place on the river above it. And this franchise cannot be construed to include a right of excluding all fish from passing above the wear. The value of this fishery depends on the shoals of fish that enter the river to pass to the ponds above to cast their spawn; and if none were allowed to pass, the fishery would be of little value, and the public, to whom Stoughton was obliged to sell, would lose their supply, which was one of the considerations of granting the franchise.

We are therefore satisfied that this franchise, if it were not lost, would be no objection to the right of the public to have a convenient passage way for the fish to ascend the river to the ponds. In examining the grants, this franchise is not appurtenant to the mill; but is a several independent interest granted on conditions. And this case does not state that it was ever exercised by Stoughton, or by those who claim under him; and at this time we must presume that it is lost and gone by non-user.

The ancient grants by towns are very loosely expressed, and when a fee was intended, words of inheritance are seldom used. When a long possession by the grantee, his heirs or assigns, has followed, the original grant has uniformly been considered as a grant of a fee. In this case we are therefore of opinion that Stoughton took a fee in the mill-privilege, as it is usually called in this state. And having a privilege to build a mill, he necessarily had a right to erect a dam, to raise water sufficient to drive his mill.

But the right to build a dam for the use of a mill was under several implied limitations. One was to protect private rights by compelling him to make compensation to the owners of land above for, and damages occasioned by overflowing their lands; another was to protect the rights of the public to the fishery; so that the dam must be so constructed that the fish should not be interrupted in their passage up the river to cast their spawn. Therefore every owner of a water mill or dam holds it on the condition, or perhaps under the limitation, that a sufficient and reasonable passage way shall be allowed for the fish. This limitation being for the benefit of the public, is not extinguished by any inattention or neglect, in compelling the owner to

comply with it. For no laches can be imputed to the government, and against it no time runs so as to bar its rights.

If the government should, in its grant of a mill-privilege, expressly or by necessary implication, waive this limitation, it would be bound. But it would be an unreasonable construction of the grant by Dorchester, to admit that, by it, all the people were deprived of a free fishery in the river above the dam, to which, until the grant, they were unquestionably entitled.

The public therefore having a right to the benefits of this limitation as to the mill and dam of the defendants, there must be some remedy, by which this public benefit may be secured. But this remedy, say the defendants, cannot be obtained by any authority of a committee of the general court; but should be sought for through the intervention of a jury.

The legislature may make all laws not repugnant to the constitution; and we do not know that this law is repugnant to it. And the usage of the general court, to appoint committees to locate and describe the site and dimensions of passage ways for fish, is ancient and has been long continued. But if a committee thus appointed should locate and describe a passage way for fish unnecessary and unreasonable, by which the property of the owner of the mill was injured without any public benefit, we do not admit that he would be without remedy. The owner holds his privilege subject to the limitation, that a reasonable and sufficient passage way should be allowed for the fish. Beyond this, the public has no interest, and private right is invaded. Any prostration of the dam by a committee, not within this limitation, would be an injury to the owner, for which he might appeal to his country, and have a remedy by the verdict of a jury.

Another objection made was, that if this resolution was constitutional, the legislature might authorise strangers to enter without right on the freehold or lawful possession of another.

This objection supposing that strangers enter without right is begging the question. For if the owner of the dam hold it under the limitation mentioned, that limitation must extend to give a right to the government to enter and remove obstructions, which if not removed would defeat the limitation.

In this action it does not appear that at the trial the defendant made any objection to the necessity or reasonableness of the alteration of the sluice way ordered by the committee; on this ground therefore he has now no right to complain.

It has been further argued that if the resolve is constitutional, yet the plaintiffs cannot maintain this action, for several reasons. The resolve authorizes the committee to order alterations in old passage ways, or to direct new passage ways to be made. Whoever, therefore, say the defendants, make these alterations are agents of the committee, and the committee, who are answerable to their agents, must bring the action.

If this objection were to prevail, no committee would ever undertake the trust. And as their powers are to locate and describe the requisite alterations, but not to make them; if this objection should not prevail, it is argued that after the committee have made the order and given notice to the owner of the dam, they have executed all their powers; and it is the duty of the owner of the dam to make the alterations; and if he disobey the order, he may be punished by indictment. There might be some weight in this objection, if the authority of the committee were confined to the issuing of orders; but they are expressly authorised to cause new fishways to be opened. The work may therefore be done under their direction, if the owner refuses to remove the obstruction, which he has placed or continued.

But it is denied that the committee could authorize three towns jointly to make this alteration, so as to give them a joint action.

We think there is some weight in this objection, as it is not easy to conceive how a joint authority could lawfully be vested in three distinct independent corporations, who can act only by a major vote, in distinct corporate meetings, by the committee under this general authority given them. But we do not think it necessary to decide on this point, because we are satisfied that the remaining objection is fatal against the action.

This objection is, that it was not competent for Mr. Loud, as a sub-committee, to execute any of the powers of the committee, and therefore he could not authorise the plaintiffs or any other persons to make the alteration, so far as to give them a right of action to recover a compensation.

The authority given to the committee is by the terms of the resolve to be exercised by them, or the major part of them. The exercise of this authority is personal, and cannot be delegated. If it could be delegated, it might be delegated to any other man, as well as to Mr. Loud, one of the committee. If the committee, or a major part of them, had exercised the powers given them, it might have been thought by them reasonable to give the defendants time until the next spring to make the alterations; or they might have employed other persons than the plaintiffs to make them. However this might have been, it is extremely clear that the powers given to the committee must be exercised by all, or by the greater part, and that they could not be delegated to Mr. Loud, or to any other person.

For this reason the verdict must be set aside, and a general verdict be entered for the defendants.

148.

Pidge v. Tyler, et al. 4 R. 541.

This was a real action, in which demandant counted on his own seizin within thirty years. Trial before the Chief Justice.

"The demandant's title was founded on a deed of bargain and sale executed to him on the fifteenth day of April, A. D. 1766, by John Pidge, who was then seized in fee of the demanded premises, in the presence of two subscribing witnesses, John Pidge, jun. and Benjamin Ide. It was not acknowledged by the bargainor in his life, but after his decease at an inferior court of common pleas holden at Taunton, within and for the county of Bristol, on the second Tuesday of September, A. D. 1773, the said Benjamin Ide made oath in court that he was present and saw John Pidge, the bargainor, sign, seal and deliver the said deed, and that John Pidge, jun. the other subscribing witness, signed as a witness at the same time, which affidavit of the said Ide was indorsed on the said deed in open court, and a record thereof made by the clerk of the same court. When the said affidavit was made, the said John Pidge, jun. was living in the then colony of Connecticut, but at the trial he was dead. The said deed, with the said affidavit endorsed thereon, was on the 16th day of September, A. D. 1773, duly registered.

Now if the court are of opinion that this deed thus authenticated, without any further proof, was duly and legally read in evidence to the jury, then judgment is to be entered on the verdict; otherwise the verdict is to be set aside, and a general verdict is to be entered for the tenants, and judgment accordingly."

The question upon this report having been submitted without argument to the decision of the court, their opinion was now delivered by

Parsons, C. J. The deed in this case was objected to at the trial as not within the provincial statute of 9 W. 3. c. 7. regulated the conveyances of

land. It was admitted *de bene esse* for the purpose of reserving the question for the opinion of the whole court, if the demandant obtained a verdict. The jury found the issue for him, and we are now to decide on the validity of the objection; the parties having agreed that if the deed ought not to have been admitted, the verdict shall be set aside, and a general verdict be entered for the tenants.

It is well known that livery and seizin were necessary to pass lands at the common law, when the conveyance was by feoffment. This was required to give notoriety to the alienation by preventing secret transfers of the freehold.

After the introduction of uses, which passed by grant, and which were enforced by a court of equity, conveyances to uses were as general as they were mischievous, the freehold being in one man, while the use or beneficial interest was in another. To remedy this inconvenience the statute of uses [27 H. 8. c. 10.] was passed, by which the freehold and use were necessarily united in the same person. In consequence of this statute the owner might sell the use, and the statute transferred the freehold, so that the alienation might be private, attended with no circumstances of notoriety.

To prevent this mischief, at the same session of parliament the statute of enrolments [27 H. 8. c. 16.] was passed. This statute prohibited the passing of lands by bargain and sale, unless the same was by deed indented and enrolled within six months in one of the courts at Westminster, or in the county before certain public officers therein mentioned. On the construction of this statute; the land, after executing the indentures, did not pass before the enrolment; but after the enrolment within six months the bargainee was seized by relation from the execution.

That this statute was passed to give notoriety to alienations by bargain and sale is manifest, because it is holden that although the first bargain and sale be not enrolled, yet a second conveyance to one who in fact had notice of the prior conveyance is fraudulent and void. The statute extends but to one kind of conveyance, and does not require an acknowledgment of the bargainor, or make any express provision that the deed shall be good against him and his heirs without enrolment.

As the intent of the statute was to give notoriety to bargains and sales of land, if a ficticious conveyance not executed by the bargainor should be enrolled, greater mischiefs would arise, and the public records might deceive in place of informing intended purchasers. The officer therefore, whose duty it was to make the enrolment, must have evidence that the instrument produced for enrolment had been in fact executed. Hence arose in England the acknowledgment of the deed by the bargainor; which was made either in the court where the deed was to be enrolled, or before the officer, who was directed to make the enrolment, as the best evidence of the execution; although there are cases, in which the enrolment has been holden good when the deed was otherways authenticated than by acknowledgement; (Godbolt, 270.)

Thus stood the law when our ancestors emigrated, and settled the colony of Massachusetts-Bay. To give publicity to the conveyances of lands was soon an object of their attention. In 1641, after the colony had been formed into counties, and county courts created, an ordinance passed making the clerk of the county court recorder, and directing him to enter all grants and sales of land, with the names of the grantors and grantees, thing and estate granted, together with the date thereof. It was also ordained that all grants, sales and mortgages of land, where the grantor remains in possession, shall not be in force except against the grantor and his heirs, unless the same be acknowledged before some magistrate, and be recorded.

Unless express provision had been made for the acknowledgement before a magistrate, every grantor must have repaired to the recorder in the shire town, to acknowledge the deed before him. For before he could record the deed, he must have regular evidence that it was a deed executed by the grantor, of which his acknowledgement would be the best proof. In a young country this must have been laborious and inconvenient, and tending to embarrass the alienation of lands. The legislature therefore prevented this embarrassment by directing the recorder to record on the authority of the certificate of a magistrate, to one of whom access could every where easily be had. This ordiance extended to cases only where the grantee remained in possession.

Afterwards in 1651, another ordinance declared that no alienation of land should be good unless by deed executed with livery and seizin, unless the deed be acknowledged and recorded. Thus the acknowledgement authorized the recording of the deed, and the record was made an act of notoriety of the alienation equivalent to the delivery of seizin at the common law.

Thus stood the law under the colonial charter. If the grantor remained in possession, the conveyance must be by deed acknowledged and recorded, and was not otherwise good, except against himself and his heirs. But if the purchaser entered into the possession on the alienation, the conveyance must be by deed, either with livery of seizin, or what was considered as an equivalent, by deed acknowedged and recorded. But no time for making the record was limited.

After the repeal of the colonial charter, and the grant of the provincial charter, the legislature made a new provision for the registry of conveyances of land. By the provincial statute of 9 W. 3. c. 7. it was enacted that any conveyance of land by deed executed by the party granting the same, having good and lawful right thereto, and acknowledged by the grantor before a justice of the peace, and recorded at length in the registry of the county, shall be valid to pass the same, without any other act or ceremony in the law whatever. And that no conveyance of land shall be good in law to hold the same against any other person but the grantor and his heirs, unless the deed be acknowledged and recorded. And if the grantor live in parts beyond the sea, or be removed out of the province, or be dead before the deed be acknowledged, proof of the execution by two of the subscribing witnesses before any court of record shall be equivalent to the acknowlegement by the grantor.

This statute continued in force until the revolution, and the merits of the present question depend on the construction of it. These provisions in some respects differ from the colonial ordinances. Although the deed must be acknowledged before it can be recorded, yet instead of a magistrate is substituted a justice of the peace, who was not an officer known under the first charter.

Livery of seizin is in all cases rendered useless, and lands without it will pass by deed unacknowledged, so as to bind the grantor and his heirs. As the object of acknowledgement was to authorize the recording, and the recording was substituted to livery of seizin, as giving equal or greater notoriety, it is unnecessary to record the deed to bind the grantor, because he is conusant of his own conveyances, and his heirs must be bound by his acts.

That the acknowledgement is intended to authorize the register to record the deed, is further apparent from the necessity the law imposes on the party producing and claiming under a deed acknowledged and recorded to prove the execution of it, in the same manner as if it had not been acknowledged. And that it is the recording of a deed, which is the legal equivalent for livery of seizin, as creating sufficient notoriety, results from a series of

decisions, by which a second purchaser, having knowledge of a prior conveyance by a deed unrecorded, shall not hold the land against the first purchaser.

The recording a deed has its effect here from the provisions of the statute, and unless these provisions are conformed to, the conveyance is not good, but against the grantor and his heirs, except in cases of fraud or prior notice. But the statute has not declared that a deed recorded shall have effect without any other ceremony in the law. The deed must first be acknowledged by the grantor, as the regular evidence to authorize a record.

This is the general rule, and the provisions of the statute clearly show that this rule must necessarily be complied with, except in the cases specially provided for. One case is the absence or death of the grantor. And in this case the proof of the deed, before it can be regularly recorded, must be by the oath, not of one, but of two of the subscribing witnesses in a court of record. The other case is where the grantor shall refuse to acknowledge the deed. In this case the relief is by the commitment of the grantor until he shall acknowledge his deed; and after proving the deed before a justice by one or more of the subscribing witnesses, by filing a copy in the register's office, and not even in this case by recording the original.

There seems to be no room for us, by any rules of construction, to consider a deed unacknowledged by the grantor, and not proved by two of the subscribing witnesses as regularly recorded, so as to entitle it, as against strangers, to the effect of a deed within the statute. For the statute introduces a new law, by which a conveyance by deed executed and acknowledged by the grantor, or the execution proved in a court of record by the oaths of two of the subscribing witnesses and recorded shall, if the grantor be seized, pass the freehold to the grantee, who shall be deemed to be in the legal and actual possession, so that without entry he may convey the same to any other person, who, by force of the conveyance, if it be in like manner acknowledged or proved and recorded, will be deemed actually seized.

In England, where generally the deed must be acknowedged before enrolment, if there are more parties than one to the deed, an acknowledgement by one of the parties is sufficient to obtain an enrolment, which is good as to the other grantors; (Taylor v. Jones, 1 Salk. 389.

And the same construction may be given to this statute. For clearly the grantee is entitled to have the deed recorded as the deed of the acknowledging grantor; and if it be regularly recorded, the record will give equal publicity to the conveyance as to all the grantors, and so the intent of the statute will be satisfied.

Had the deed in question been made by two grantors, and acknowledged by one of them, or had it been executed under the present revised statute of 1783. c. 37. there would have been no question. By this last statute the legislature, probably aware of the great strictness of the former statute, have authorised the recording of a deed by the proof in a court of record by one of the subscribing witnesses, when the grantor was absent, or had died not having acknowledged it. This alteration shows that by the language and intent of the former statute the proof by two witnesses was necessary.

Upon the whole, as the deed in the present case was not acknowledged by the grantor, nor proved in a court of record by the oaths of two of the subscribing witnesses, it was recorded without any legal authority, and cannot therefore have the effect of a deed acknowledged or proved and recorded within the statute. And not having that effect, it ought not to have been read to the jury.

Before the court ordered an entry to be made, that the verdict be set aside and a general verdict entered for the tenants, the demandant stated that since

the trial he had discovered evidence to maintain the issue on his part without the deed in question, and moved that a new trial might be ordered. The tenants consenting, the verdict was set aside, and a new trial was granted.

149.

CARVER v. MILLER, 4 R. 559.

PARSONS, C. J. This action is brought to recover of the defendant compensation for repairing a corn-mill, of which the parties were, when the action was commenced, tenants in common. The declaration contains several counts.

In the first, the plaintiff declares that on the first of June, 1802, he was seized of three-fourth parts of the mill in fee, and one Joanna Lucas of the other fourth part for the term of her life, the reversion of which belonged to the defendant; that the mill being then out of repair, Carver and the tenant for life agreed that it should be repaired; and as she was unable to repair her fourth part, Carver should make all the repairs, and should receive her fourth part of the profits, until he was reimbursed out of it one fourth of the expenses of the repairs; that Carver accordingly made all the repairs, one-fourth part of the expenses of which amounted to 78 dollars 63 cents with the interest, and received all the profits so long as the tenant for life lived, and afterwards until the 4th of February, 1805, when the defendant entered, who has ever since taken his fourth part of the profits, leaving the sum of 36 dollars 45 cents, part of the expense of repairing the fourth part, in arrear and unpaid; of all which the defendant has had notice, but has refused to pay the sum in arrear.

The second count is a *quantum meruit* for repairing one fourth of the mill, the property of Miller, done at the request of Joanna Lucas, the tenant in possession, and which Miller promised to pay.

The third count is a general *indebitatus assumpsit* for money laid out and expended by the plaintiff for the defendant's use.

The fourth count is also a general *indebitatus assumpsit* for money had and received.

The verdict in this case, was found by the consent of the parties, subject to the opinion of the court on the following facts. That in July, 1802, Carver was seized of three fourths parts of the mill in fee, and Johanna Lucas of the other fourth part thereof, as tenant in dower, the reversion in 6-11ths of which, belonged to the heirs of her husband, Barnabas Lucas, and in the other, 5-11ths to Miller. That Carver and Johanna Lucas, then agreed, that Carver might repair the mill, and reimburse himself out of the profits. That he thereupon repaired it, one fourth of the expenses of which are truly alleged in his declaration, and afterwards he received all the profits during Johanna Lucas' life, and afterwards until the fourth of February, 1805; when Miller, having purchased the interest of the heirs of Barnabas Lucas, entered and has received one-fourth of the profits ever since, leaving the sum of 36 dollars, 45 cents, part of the expenses of repairing the said fourth part, unpaid and in arrear. The question submitted to the court is, whether in this action, Carver can recover against Miller, the said arrears, or any part of them. And the verdict is to be made conformable to the opinion of the court.

In examining the facts, there does not appear to have been any express promise of Miller to reimburse Carver any part of the expenses of the repairs. And if Carver can recover in this action, it must be maintained in consequence of some legal obligation imposed on Miller, by the common law, or by the statute of 1795, c. 74.

At common law, if there be two jointenants or tenants in common of a wood, or of arable land, the one has no remedy against the other to make enclosures or repairs for the safeguard of the wood or crop. But a house or a mill, is of higher legal consideration; and one jointenant or tenant in common may have a writ *de reparatione facienda* against the other; for each one is holden to repair and sustain his house or mill; 11 Rep. 82, b.—Co. Litt. B. 3. c. 4 s. 323.

Whether this maxim of the common law, as applied to mills, is in force here, may be doubtful, especially since the provincial statute of 7 Ann, c. 1. was passed, which was revised by the statute before mentioned. In the early settlement of this country, mills were erected over streams of water then sufficient, but which by the clearing of the country, have so far failed, that the mills could now be wrought but a small part of the year; and the profits would not be a sufficient inducement to keep them in repair. To this discouragement may be added the erection of new mills in the neighborhood, in more convenient situations. And as to saw-mills, the consumption of all the timber in their vicinity has rendered many of them useless. As there have been many mills heretofore erected, which could not now be wrought with adequate profit, it would be unreasonable to enable any individual part-owner to compel his partners in all cases to keep their mill in repair. And the statute has accordingly provided, that if a part-owner will repair against the consent of his partners, he shall look to the profits only for his reimbursement.

But it is not necessary now to determine whether this common law remedy can or cannot be applied at this time by our courts; for the action of contribution lay by a tenant in common or jointenant against his co-tenants only, and not against a reversioner. For the consideration on which the writ is founded, is the perception of the profits by all the parties to the action; and he in remainder or reversion is not entitled to the profits; F. N. B. 295.

If, therefore, this action can be maintained, it must be supported on the statute of 1795. c. 74. It is not very easy to give a construction to some parts of this act, so far as it provides a new remedy. By the sixth section, if the major part of the proprietors in interest of any mill, shall agree to repair or rebuild, they may do it, and they shall be reimbursed out of the profits of the mill, in case any proprietor shall refuse to agree to the repairs or rebuilding, or to pay his proportion of the expenses; and they may have their actions against the deficient proprietor to recover the same. But any particular contract to repair or rebuild, entered into by the proprietors, shall not be avoided by this act.

It seems, therefore, that when all the proprietors contract to repair or rebuild, and to pay the charges, a remedy must be had on the contract, if it be broken, and not on the act. But if any proprietor shall refuse to contract, then if the mill be repaired or rebuilt at the charge of the greater part in interest of the proprietors, they shall be entitled to a reimbursement out of the profits of the deficient proprietor, and may maintain an action against him; but if his profits should be insufficient, they can have no other remedy. And the action is not given against the heirs or assignees of the deficient proprietor, but against him only; and consequently the profits are not charged by the words of the statute, if his share of the mill shall be vested in others.

From the facts in this case, there was no refusal to repair or to pay on the part of the tenant in dower, but an express agreement, that Carver should make all the repairs, and receive the profits until he was paid. He cannot, therefore, claim any benefit under this statute; and if, by the death of the

widow, he is no longer entitled to all the profits under his contract, and suffers a loss, it is in consequence of the nature of his contract, which as to his receipt of the profits, was determined by the death of the tenant in dower. He is no longer entitled to those profits. or to their value, unless the tenant could by her contract charge them after her decease in the hands of the reversioner.

But we know of no legal principle, on which she could thus charge them; and a power of this kind would be very unreasonable. She held this estate subject to impeachment for waste; and if through her refusal or neglect, the mill had been suffered to decay, it would have been waste, for which she would have forfeited the place wasted, and treble damages, to be recovered by the reversioners. If she could, by charging the profits in the hands of the reversioners, repair the mill, she would protect herself against them at their own expense. We are, therefore, satisfied that the plaintiff cannot call upon the reversioners for the expenses of any part of the repairs, which he made pursuant to his express contract with the tenant in dower.

When a deficient proprietor is answerable in an action to the proprietors who have repaired, he cannot be holden to pay beyond the value of the profits he may receive. If, therefore, an action of the case was the proper suit, the declaration ought to contain an averment of the value of the profits received, to furnish a measure for the damages to be recovered. This averment has not been made by the plaintiff; nor does it appear either in the declaration, the verdict, or the case agreed, what profits the defendant received. But the proper action is account for the profits, charging the defendant with being the bailiff of the plaintiffs; for, if the plaintiffs have a lien upon them, the defendant must be liable to account for what he has received.

If such deficient proprietor, being tenant in fee, shall after the repairs made, aliene or die, before the charges are reimbursed, it may deserve consideration, whether within the equity, although not within the words of the act, his assignees or heirs may not be holden to account. For the deficient proprietor might lawfully have charged his interest in the mill with the reimbursement, and they hold the estate under him. But it is not necessary now to decide this point, for the reversioner does not claim either as heir or assignee.

By the seventh section of the statute, it is enacted, that for the purpose of repairing or rebuilding under this act, a guardian of a minor, a husband of a *feme covert*, tenant for years, for life, in mortgage, or intail, who are entitled to receive the profits of the mill, shall be deemed proprietors. And all advances made by them respectively, shall be recoverable by action against the minor, heirs of the *feme covert*, remainder man, reversioner, or the other party to the mortgage, if not adjusted and paid by agreement. This section, whatever may be its construction, cannot apply to the present action, for it is not brought by tenant in dower against the reversioner, for other advances by her made.

The intent of this section is certainly obscure. It is easy to understand that guardians shall be reimbursed their advances out of the estate of their wards, and tenants for years, in some cases by their landlords. Perhaps the the husband ought sometimes to be repaid by the heirs of his wife, after her decease, if he was not tenant by the courtesy. But it is difficult to conceive, why tenants for life, answerable for waste, should be paid for repairs, which they are obliged to make under the penalty of forfeiting the estate with the treble damages. If they have voluntarily incurred expenses not required by their tenures, and of which he in remainder or reversion will have the benefit, for these expenses a repayment may be intended. But why

tenant in tail should be provided with a remedy, when he may at his pleasure, become tenant in fee simple, requires some explanation, unless the mill should not be worth the expenses; and then the mill ought not to have been repaired.

It is unnecessary to consider the other counts. For the second count is quite unsupported, Miller not having the property of the quarter of the mill, when the repairs were made. A general *indebitatus assumpsit* cannot be maintained upon this statute, and there is no express promise admitted.

As we are of opinion, that the facts agreed do not support either of the counts, the verdict must be set aside, and a general verdict entered for the defendant, and judgment be rendered accordingly.

150.

HOLBROOK v. FINNEY, 4 R. 566.

A. conveys land to his four sons in fee, who by deed of the same date, mortgage the same land to the father to secure the payment of a sum of money, and also a maintenance for the father during his life; it was held, that the two deeds were parts of the same contract, and that the seizin of the sons was not sufficient to entitle the widow of one of them to her dower in the land.

PARSONS, C. J. [After reciting the substance of the case as agreed by the parties.] The question before the court, upon these facts, is whether Ezra Finney, the husband, was, during the coverture, so seized of the premises, that the demandant has a right to her dower. He was not so seized, unless from the operation of the deed from his father to himself and his three brothers.

The tenant has made two objections: 1. That this conveyance was of an estate to jointenants, of which the demandant's husband was not the survivor. 2. That her husband had that instantaneous seizin only, which will not entitle her to dower.

It is settled, that if an estate be devised to two or more, equally to be divided, they are tenant in common. The same construction is applied to a devise to two or more share, and share alike; Show. Parl. Cases, 210. Also the words, "equally to be divided," in a covenant to stand seized, or in the surrender of a copyhold, or in a deed appointing uses, create a tenancy in common; 2 Vent. 365, 6.—1 Salk. 391.—1 Wils. 341, 2. This construction has been adopted, because the words "in equal shares," or "equally to be divided," import a division *in futuro*.

The words in this deed are, "in equal proportion;" and it is said, that they do not imply a future division, but are applied only to the respective interests in the thing conveyed. On this ground they must be considered as wholly inoperative; for without them, the grantees would have taken an equal interest in the lands granted. To give them operation, may they not be considered as equivalent to the words "in equal purparties or shares," and thus contemplate a future partition?

But is not necessary now to decide this point, for the statute of 1785, c. 61, passed three days after the execution of these deeds, it is enacted, that all estates which had been, or which should be aliened to two or more persons, shall be deemed to be tenancies in common, unless it be manifestly the intent of the alienor, that they should be held as joint estates; with a saving to the survivor of any estate in jointenancy before created and already vested in him. This statute has a retrospective effect, and comprehends this conveyance; and there seems to be no constitutional objection to the power of

the legislature to alter a tenure, by substituting another tenure more beneficial to all the tenants.

If this objection had been pressed, it would have been unnecessary to consider it, as the statute of 1783, c. 52, in force when the deeds were executed, although repealed by the last cited statute, had abolished the principle of survivorship among jointenants, and had enacted, that on the death of a jointenant, the joint estate, of which he was seized, should descend to his heirs. In consequence of these provisions, the wife of a jointenant is dowable, as on the death of her husband there could be no survivor, who would be in by a title paramount to her claim of dower.

The demandant must, therefore, recover, unless the second objection should prevail. It certainly is law, that where the husband is seized but for an instant, of this seizin his wife shall not be endowed. The seizin for an instant is where the husband by the same act, or by the same conveyance, by which he acquires the seizin, parts with it. Thus if tenant for life make a feoffment in fee, his wife shall not be endowed, for by making the same feoffment which passed the fee, he acquired a fee; 2 Cro. 615. And if a jointenant make a feoffment, his wife shall not be endowed, for by the feoffment he was seized of a several estate but for an instant, which he acquired and parted with by the feoffment; 2 ibid. So if a feoffment be to B. and his heirs, to the use of C. and his heirs, the wife of B. shall not be endowed, for he was but an instrument; and the same feoffment which gave him the seizin, by the statute of uses transferred it to C. Nor shall the wife of the conusee of a fine be endowed, when by the same fine the estate is rendered back to the conusor; 2 Co. 77, a.

Let us now compare the present conveyances with these principles; for the previous agreement may be laid out of the case. If the deeds pursue it, it is useless; and if they do not, we must be governed wholly by the construction of the deeds. The mortgage back to the father, from the terms of it, is of even date with the conveyance from him. They are, therefore, to be considered as parts of the same contract, as taking effect at the same instant. The conveyance from the father took effect when he delivered his deed: the mortgage back took effect when the mortgage deed was delivered; but both being of even date, were delivered at the same time. The mortgagors were, therefore, seized but for an instant, taking an absolute estate in in fee, and instantaneously rendering back a conditional estate in fee. These two instruments must, therefore, be considered as parts of one and the same contract between the parties; in the same manner as a deed of defeasance forms with the deed to be defeated but one contract, although engrossed on several sheets: and no interval of time intervened between the taking, and the rendering back of the fee.

But if the husband had continued seized for any portion of time, however short, his wife would have been entitled to dower; as if the conveyance back had been made posterior in point of time, or by a deed distinct from the first grant. There is the case of Nash v. Preston, reported in Cro. Car. 190. illustrating and supporting these principles. In that case, J. S. seized in fee, bargains and sells the land to the husband for 120*l.* in consideration that the bargainee shall redemise it to the bargainor and his wife for twenty years, rendering a nominal rent, with a condition that if the bargainor at the end of twenty years, paid back the 120*l.* the bargain and sale should be void. The bargainee accordingly redemised it and dies. His wife shall have dower, because the land by the bargain and sale was vested in the husband. But it would have been otherwise if the land was in, and was out of the husband by one act. In the case at bar, the execution of the two deeds, they being of even date, was done at the same instant, and constitutes but one act.

The demandant, therefore, cannot support her claim, as her husband was never so seized as to entitle her to dower. According to the terms of the agreement, submitting the case to the court, the demandant must become nonsuit.

151.

LOBING v. BACON, 4 R. 575.

Assumpsit for labor and materials employed in repairing the defendant's house, and for money laid out and expended.

A. owns a room on the lower floor of a dwelling house, and the cellar under it, and B. owns the chamber over the room, and the remainder of the house; the roof becoming ruinous, B. makes the necessary repairs; held, that A. is not liable to contribute to such repairs.

PARSONS, C. J. The plaintiff declares in case upon several promises. The first count is *indebitatus assumpsit* in the sum of eighty dollars, according to the account annexed to the writ, the items of which are for timber, boards, shingles, nails and labor, and victualling the workmen. The second count is a *quantum meruit* for the same items, technically supposed to be different but similar. The third count is a general *indebitatus assumpsit* for eighty dollars, laid out and expended.

The facts being agreed by the parties, the question of law comes before the court on a case stated. From this case, it appears, that the defendant is seized in fee simple of a room on the lower floor of a dwelling house, and of the cellar under it; and that the plaintiff is seized in fee of a chamber over it, and of the remainder of the house; that the roof of the house was so out of repair, that unless repaired, no part of the house could be comfortably occupied; that the defendant, though seasonably requested by the plaintiff, refused to join with him in repairing it; and the plaintiff then made the necessary repairs, and has brought this action to recover damages for her refusal to join in the repairs. It is also agreed that the parties had from time to time repaired the respective parts of the house at their several expense. And the question submitted to the court is, whether the plaintiff can recover in this action.

This is an action of the first impression. No express promise is admitted; but if there is a legal obligation on the defendant to contribute to these repairs, the law will imply a promise.

We have no statute, nor any usage upon this subject, and must apply to the common law to guide us.

Although in the case, the parties consider themselves as severally seized of different parts of one dwelling-house, yet in legal contemplation, each of the parties has a distinct dwelling house adjoining together, the one being situated over the other. The lower room and the celler are the dwelling house of the defendant; the chamber, roof, and other parts of the edifice, are the plaintiff's dwelling house. And in this action it appears that having repaired his own house, he calls upon her to contribute to the expense, because his house is so situated that she derives a benefit from his repairs, and would have suffered a damage, if he had not repaired.

Upon a very full research into the principles and maxims of the common law, we cannot find that any remedy is provided for the plaintiff

Houses for the habitation, and mills for the support of man, are of high consideration at common law; and when holden in common or jointenancy, remedies are provided against those tenants, who refuse to join in necessary

reparation, by the writ *de reparatione facienda*; Co. Lit. 200, b.—Fitz. N. B. 295. In Co. Lit. 56, b. it is said, that if a man has a house so near to the house of his neighbor, and he suffers it to be so ruinous that it is like to fall on his neighbor's house, he may have a writ *de domo reparanda*, and compel him to repair his house. In Keilway, 98, b. pl. 4, there is a case reported, in the time of Henry the Eight, in which Fineux and Brudenell, justices of the king's bench, were of opinion, that if a man have a house underneath, and another have a house over it, as is the case in London, the owner of the first house may compel the other to cover the house, to preserve the timbers of the house underneath; and so may the owner of the house above compel the other to repair the timbers of his house below; and this by action of the case. But some of the bar were of opinion, that the owner of the house underneath might suffer it to fall; yet all agreed that he could not pull it down to destroy the house above. And in Fitz. N. B. 296, there is a writ of this kind. But in the case of Tenant v. Goldwin, 6 Mod. 314, lord Holt was of opinion, that this writ was by virtue of a particular custom, and not of the common law; and he doubted the case in Keilway.

But there is unquestionably a writ at common law *de domo reparanda*, the form of which we have in Fitz. N. B. 295, in which A. is commanded to repair a certain house of his in N. which is in danger of falling, to the nuisance of the freehold of B. in the same town, and which A. ought, and hath been used to repair, &c. This writ, Fitzherbert says, lies, when a man, who has a house adjoining to the house of his neighbor, suffer his house to lie in decay, to the annoyance of his neighbor's house. And if the plaintiff recover, he shall have his damages; and it shall be awarded that the defendant repair, and that he be restrained until he do it. But it is otherwise in an action of the case; for there the plaintiff can recover damages only. And there appears no reasonable cause of distinction in the cases, whether a house adjoin to another on one side, or above, or underneath it.

But if the case in Keilway is law, the plaintiff cannot recover, for by that case the defendant could have compelled the plaintiff to repair his house, or compensate her in damages for the injury she had sustained from his neglect to repair it. And he has the like remedy against her.

If the case in Keilway is not law, then upon analogy to the writ at common law, the plaintiff cannot compel the defendant to contribute to his expences in repairing his own house. But if his house be considered as adjoining to hers, she might have sued an action of the case against him, if he had suffered his house to remain in decay to the annoyance of her house.

In every view of this case, there is no legal ground on which the plaintiff's action can be supported. We do not now decide on the authority due to the case in Keilway; but if an action on the case should come before us founded on that report, it will deserve a further and full consideration. The plaintiff must be called.

152.

COMMONWEALTH v. BROWN, 4 R 580.

If one to whom a waggon load of goods, consisting of several packages, is delivered to be transported from one place to another, fraudulently take away one of the packages, such taking is felony.

PARSONS, C. J. The counsel for the defendant move for a new trial; and they have argued that he was a carrier, having the lawful possession of the

goods, until the load was delivered at Sudbury, and that if he took the goods on the route, it was an unlawful conversion, and not a felony, because he did not open the package, and take part of the goods, but took the whole package.

Upon considering this case, I am of opinion, admitting the defendant to have been a common carrier, and thus to have had the lawful possession of the goods; yet all the goods in the waggon were delivered to him as one mass or body, and his taking away one of the packages, was a separating a part from the whole, and thus was determined the supposed privity of contract. For the contract with him was not to carry the several packages of which the load was composed, but to carry the load to Sudbury in the state in which it was delivered to him.

I have thus far considered the defendant as a common carrier, having a special property in, or a lawful possession of the waggon load. But the defendant was not a common carrier; he was a mere servant to Willis the carrier, to drive his team to Sudbury. And it would be extremely mischievous to have it understood that every driver of a team, employed by a common carrier, has a special property in the load, so that if he drives elsewhere than he was engaged to drive, and takes the whole load, he will be chargeable for an unlawful conversion only, and not for a felony.

A new trial cannot be granted.

153.

CLAP ET AL v. M'NEIL, 4 R. 589.

If one grant land as bounded on a thirty feet street, with a privilege of passing in said thirty feet street; and at the time of the grant, the grantor had a building on other land of his, which projected ten feet into the street, no action lies for the grantee for the continuance of such obstruction.

PARSONS, C. J. The question submitted to us by the statement of facts agreed by the parties in this suit is, whether the plaintiffs can or cannot maintain their action? And it is our opinion that the action cannot be maintained.

It is agreed that the way remains now in the same state, in which it was when the title of the plaintiffs to it commenced, the defendant having done nothing to alter or abridge it. The plaintiffs therefore cannot complain, unless the defendant has stipulated, either to widen it, or to remove any obstructions then existing. In looking into the deed, we find no covenants of this kind; and the plaintiffs' right to the way must depend wholly on the construction of that part of the deed describing the estate conveyed. Among the bounds of the land sold, there are these words, "then turning and running southerly by land of said M'Neil seventy feet to a thirty feet street, then turning and running westerly by said thirty feet street fifty feet." By these words the plaintiffs cannot claim even a right of way in that street. But after the description of the close are added these words, "with the privilege of passing in the said thirty feet street." These words give the plaintiffs a right of way in that street, as it was then opened as a way; but cannot have the effect of a covenant by the defendant that the fixture to the ropewalk should be removed, so that the street, called a thirty feet street, should be every where thirty feet in width, or as a grant of any way, but in that street as it was then opened and used. On this construction the defendant must have judgment.

184.

Tippets v. Walker, Whittemore and Whittemore, jun., 4 R. 595.

When a committee appointed by the directors of a turnpike corporation covenant under their hands and seals to pay money to one who contracts to make part of the turnpike, they are personally liable on such covenant.

Parsons, C. J. When a turnpike corporation is created, it has power to make a road over the land of others, paying the owners for the easement, or they may purchase the soil with the consent of the owners, which, however, is not frequently done. When the road is made, the corporation is entitled to demand and receive a toll of travellers for the use of it, in trust for the members of the corporation in proportion to their respective shares. The property of every member is a right to receive a proportional part of the toll, which is considered as personal estate, is alienable, and may be seized and sold on execution against him, as his private property.

The right of the corporation seems to be a franchise, a mere incorporeal hereditament; and as no provision is made in the act creating it, by which it may be aliened, or taken in execution, it may hereafter perhaps require consideration, whether on a judgment against such a corporation this franchise can in any manner be taken in execution. But if it may, it will sometimes happen that the right to take toll is not of sufficient value to reimburse the expense of making the turnpike; and the remedy the corporation possess of assessing the shares may be inadequate, their value on a sale not being equal to the amount of the assessments; and as the bodies or private property of the individual members cannot be taken in execution to satisfy a judgment against the corporation, it certainly is a prudent measure, in those who contract to do the labor to insist on the responsibility of individuals, and not trust to the corporation for payment. And if any individuals, who are agents for the corporation, or of any officers of it, will voluntarily stipulate with the workmen for their payment, it is certainly reasonable that they should be holden to their contract.

A case of this kind is not like a contract made by an agent for the public, and in the character of an agent, although it may contain an engagement to pay in behalf of the government. For the faith and ability of the state in discharging all contracts, made by its agents in its behalf, cannot in a court of law be drawn into question.

The decision of this cause must therefore depend upon the construction of the deed. If the defendants have by their deed personally undertaken to pay, they must be holden. To the agreement the defendants have not (if they had legal authority) put the seals of the directors, or the seal of the corporation; but have put their own seals. It is therefore their deed; and if it be not their covenant, it is not the covenant of any person or corporation; and the apparent intent of the plaintiff to have his payments secured by a covenant will be defeated.

The defendants do not describe themselves as a committee of the corporation, but of the directors appointed to contract. The corporation are therefore not bound by this contract, unless it gave the directors, its immediate agents, a power to substitute agents under them, by whose contracts it should be bound. But this does not appear; and we cannot presume it without some evidence. The directors are not a corporation, but the agents of one; and if answerable, are answerable for their personal contracts as private persons. The contract before us is a contract of some individual persons for others; and if they have bound themselves, they must look to their principles for indemnity.

But they have expressly bound themselves. The agreement is between the plaintiff and Edward Walker and the others, who are described as a committee, and this committee stipulate that they will make the payments agreed on to the plaintiff, in behalf, not of the corporation, but of the president and directors, who are officers and agents of it.

As they have covenanted to pay in behalf of others, and have not made the payments agreeably to their covenants, their own covenants have been broken; and they must be answerable to the plaintiff for the damages he has sustained by the breach of them, which the jury have assessed; and judgment must be entered on the verdict.

155.

GROUT, ADM'R. Plaintiff in Error, v. CHAMBERLIN, 4 R. 611.

An administrator *de bonis non cum testamento annexo* cannot maintain a writ of error to reverse a judgment recovered by the original executor.

PARSONS, C. J. This is a writ of error brought to correct the errors of a judgment recovered by Bela Grout, as executor of the last will of Elizabeth Grout deceased, on a bond given to her by the defendant in error. The writ states, that since the judgment the said Bela has died, and that the plaintiff in error is administrator *de bonis non* with the will annexed of the said Elizabeth. And we are called upon to decide whether, from these allegations, the plaintiff has or has not entitled himself to this writ of error. And we are of opinion that he has no title to sue this writ, because there is in law no privity betwee. the executor and the administrator *de bonis non cum testamento annexo;* and a judgment recovered by the executor cannot be executed by the succeeding administrator.

If the judgment has been satisfied, then the debt for which it was rendered has been administered; and if the judgment has not been satisfied, then it has become ineffectual, and the administrator *de bonis non*, &c. may maintain a new action.

The law is the same where an administrator recovers a judgment and dies, the succeeding administrator cannot execute this judgment, but may bring a new action.

There are several cases in point, all of which it is not necessary to mention; as Yelv. 33, Gaites v. Gough; Yelv. 83; S. P. and Latch, 140.

By an English act of parliament, (17 Car. 2 c. 8,) not in force here, provision is made that the second administrator may execute a judgment recovered on verdict by the first administrator, and it is to be wished that we had some statute including the same, and perhaps some further provisions.

Now, if the second administrator cannot execute a judgment recovered by a former executor or administrator, it is very clear that he cannot bring error to reverse it; for it has become ineffectual if not satisfied, and if satisfied, the debt recovered by it has been administered.

The writ must abate, and the defendant in error is entitled to costs.

156.

GROUT, ADM'R. v. CHAMBERLIN, 4 R. 613.

A judgment recovered by an executor is no bar to an action brought by the administrator *de bonis non cum testamento annexo* for the same cause.]

This was an action of debt on the bond of the defendant, upon which the judgment referred to in the preceding case between these parties was rendered.
The defendant pleaded the former judgment in bar. The plaintiff demurred to the plea, and the defendant joined in demurrer.

Curia. We are of opinion that the plea is bad, because a judgment recovered by an executor cannot be executed by the administrator *de bonis non cum testamento annexo;* but is become ineffectual, and the second administrator may maintain a new action.

For the authorities in this case we refer to the opinion of the court in the case of Grout v. Chamberlin in error; the two cases resting for decision on the same principles.

157.

HUNT v. WHITNEY, ADMINISTRATOR, 4 R. 620.

William Hunt brought his action of *assumpsit*, as indorsee of a promissory note against Daniel whitney, the defendant's intestate, as maker of the note. Pending the action the original defendant died, and administration of his estate was committed to the now defendant, who was afterwards admitted, upon his own motion, to take upon himself the defence of this action, pursuant to the statute of 1783. c. 32. § 10. which provides that in case of the death of any party to any action or suit depending in this court or in the common pleas, the executor or administrator of such deceased party, whether plaintiff or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such action until final judgment. The estate of the said intestate being represented insolvent, commissioners were appointed by the judge of probate to receive and examine the claims against the same; and the demand, for which this action was instituted was among others received and reported by them. The estate furnished no dividend for the creditors, being wholly absorbed in the charges of administration.

After the present defendant had become a party to the suit, Hunt the plaintiff, also died, leaving Eliakim Morse and Jane Hunt his executors, whom the defendant notified to appear at the last October term of this court, and take upon themselves the prosecution of this action, at which term the defendant moved the court that the said executors might be called to prosecute the suit against him, and they not appearing, he moved that a nonsuit might be entered, and he have judgment for his costs, pursuant to statute of 1783. c. 59. § 1. by which it is provided that in all actions pending in the supreme judicial court or in any court of common pleas, if either party shall die before final judgment, and the executor or administrator of the deceased party, after taking upon himself the said trust, and after being duly served with a notification from the clerk of the court where such suit is pending fourteen days beforehand, shall neglect or refuse to become a party to the suit, the court, in case the cause of action does by law survive, may enter up judgment against the goods and estate of the deceased party, as it might have been entered, in case the executor or administrator had voluntarily after such death made himself a party to the suit.

PARSONS, C. J. The defendant, having summoned the executors of the plaintiff, moves that they may be called, and, if they do not appear, that he may have judgment for costs against them as upon a nonsuit. The counsel for the executors in fact, but appearing as *amicus curiæ* objects, because the statutes relating to this subject do not extend to a case, where both the parties have died.

The words of the statute extend to all cases where either party shall die pending an action, which by law survives. The object of the statute is remedial, and it ought to have a liberal construction. If either of the origina parties die, his executor or administrator may be a party, because the action might be commenced by or against an executor or administrator, in which the survivor may be a party. If therefore, on the death of one of the original parties, his executor or administrator has, pursuant to the statutes, been

made a party, he is now a party to an action pending; and if the other original party afterwards die, it is a case within the words of the statute; and it is also within the reason of it, because a new action for the same cause may be commenced, in which the executors or administrators of both the deceased parties shall be the parties. By a liberal and reasonable construction of these statutes, we are of opinion that the executors of Hunt, might have voluntarily appeared and prosecuted it, and may therefore be compelled to prosecute or suffer a nonsuit to be entered.

The counsel for the executors, in further support of his objection, has argued from the great injustice that would be done in this case, if they were compellable to prosecute or be nonsuit, because by the death of the original defendant insolvent, and the settlement of the estate in the probate office, the cause of action is taken away; and if they appeared, it must be for the purpose of having a judgment for costs against their testator, in an action duly commenced, and for legal cause.

If this objection were well founded, it would certainly induce the court to give such a construction to the statute as would remove the foundation of it, if it could be done consistently with the manifest intent of the legislature. We have therefore considered the several provisions of our insolvent laws that relate to this subject, supposing the facts alledged by the counsel to be admitted.

The object of our insolvent laws is the distribution *pro rata* of the effects of a deceased insolvent debtor among all his creditors, by the executor or administrator, except debts due for all rates and taxes, and debts due to the Commonwealth, and for the last sickness and necessary funeral expenses of the deceased. All the personal estate of the deceased, and all the real estate, of which he died seized in fee simple or in tail, compose the funds for the payment of his debts; and they are to be collected and reduced to cash by the executor or administrator. The claims of the creditors, and the distribution of the effects are adjusted and decreed in the probate court, and by proceedings under its commission. The executor or administrator has a year, after he has taken upon himself the trust, to ascertain the probability of the insolvency of the deceased. He will ascertain, as well as he can, the amount of the debts, which he will compare with the effects of which he has knowledge, and thus form his opinion. If he believes the estate to be insolvent, he will represent these facts to the judge; and if the judge shall allow the representation, and award a commission of insolvency, the estate is then apparently insolvent, and the law will not permit any of the effects to be taken from the executor or administrator by legal process, to satisfy the demand of any creditor; but a demand may be settled by legal process, so far that it may be evidence of the amount of the claim.

If on the return of the commission, and the settlement of the administration account, the judge shall decree a distribution of the effects, then there is legal evidence of an absolute insolvency and not before. For the insolvency may depend on a claim allowed by the commissioners, which may be disputed by the executor or administrator, and defeated by a trial at law. Upon an absolute insolvency, the executor or administrator must administer the effects pursuant to the decree. As it has been observed, that, after an apparent, and before an absolute insolvency, the creditors may ascertain the amount of their claims by legal process, it may be necessary to consider the action of a creditor.

The executor or administrator may become a party defendant, either during an apparent insolvency, or before, or after it be defeated by neglecting or refusing to settle an administration account, or after it has become absolute by a decree of distribution. In the first case the action may be brought

in consequence of exceptions to the report of the commissioners, when it is expressly provided that the creditor shall proceed to judgment, which shall be conclusive evidence of his claim, but he shall not have execution; or the action may be brought without submitting the claim to the commissioners. In this case the defendant may abate the plaintiff's writ, by pleading the apparent insolvency, and admitting the creditor's demand. But if he dispute the demand, the plaintiff may proceed to judgment, as conclusive evidence of his claim to be laid before the commissioners, but shall not have execution. For it would be an unreasonable construction of the act, to permit the defendant to abate the writ when he disputed the demand, and to drive the creditor before commissioners, whose report might be excepted to by the defendant, and the plaintiff compelled again to resort to a court of law for justice.

If the action be commenced before an apparent insolvency, it shall be continued, until it shall appear whether there is, or is not an apparent insolvency: because until there is an apparent insolvency, if judgment be rendered for the creditor, he will be entitled to execution, which would be injurious to the other creditors, if the estate should in fact be insufficient to pay all the debts. But after there is an apparent insolvency, the plaintiff may proceed to judgment, as evidence of his claim before commissioners, but he cannot have execution.

The doubt, which has been conceived as to this last point, has arisen from the direction in the statute, that actions commenced before the estate be represented insolvent, shall be continued, until it appear whether the estate is or is not insolvent. If by this last insolvency, is intended an absolute insolvency determined by a decree of distribution, then the action must be continued to the time of that decree. But when the statute further provides that when it is known that the estate is insolvent, the proceedings shall be conducted as aforesaid, that is, to judgment as evidence of the claim, and not to execution to satisfy it, it seems to remove the doubt. The judgment, if rendered after an absolute insolvency, would be useless to the creditor; for the commission is closed, and all the effects distributed, to the total exclusion of his demand. But if an apparent insolvency be intended then a subsequent judgment will be evidence of his claim, and he may have it allowed, and receive a *pro rata* dividend of the effects.

There is one difficulty in the statute of 1788. c. 66. § 2. It is there provided that an executor or administrator shall not be compelled to defend any action commenced against him within twelve months after he has accepted the trust, with certain exceptions, one of which is, when the action is brought to ascertain a claim that is contested. To preserve a consistency with the other statutes, this exception must be confined to a case, in which an apparent insolvency has taken place within the year. Upon this construction the several provisions are consistent; and it is manifest that during an apparent insolvency the executor or administrator may be compelled to defend an action, so far as to ascertain a claim which he contests, but not to be obliged to satisfy it.

But where there is an apparent insolvency pending the action, the creditor is not obliged to proceed to judgment to ascertain his claim. It may not be the subject of dispute, and may be ascertained without difficulty. But he need not discontinue his suit, as the estate may not eventually become absolutely insolvent, or the apparent insolvency may be defeated by the negligence of the executor or administrator in settling his account, or contrary to his expectations, his claim before the commissioners may be disallowed or disputed. In the two first cases he may proceed to judgment and execution, and in the last to judgment. There is therefore no impropriety in continuing

his action in court, while he submits his claim to the commissioners. If there should be an absolute insolvency, the executor or administrator may then plead a special *plene administravit*. If the creditor admits the truth of the plea, he can have no judgment, for he must claim his distributive share under the decree, which is a new cause of action, if payment be refused.

But can the administrator have judgment against him? The action was well commenced, and for a legal cause; but the effect of it has been avoided, not by any objection to the form, or to the original merits of it, but by subsequent appropriation of the assets pursuant to law. Does, therefore, the executor or administrator prevail against the creditor, within the intent of the statute of 1784, c. 28, s. 9, giving costs to the party prevailing? Certainly this construction would be unjust, as the plaintiff is in no fault, but the misfortune of trusting a debtor unable to pay. If the defendant, executor or administrator, cannot have judgment, the consequence is, that all further proceedings in the action must be stayed, and that thereof the parties go without day. If it should be said, that the executor or administrator ought to have some means to bar any other action for the same cause, the answer is, that a confession by the plaintiff on record, of the truth of the defendant's plea of *plene administravit*, would forever be an estoppel to him in maintaining another action for the same cause.

It is unnecessary to consider the cases, where a creditor sues after an apparent insolvency is defeated by the neglect or refusal of the executor or administrator, to settle his account, or where the action is brought after an absolute insolvency. In the former case, the proceedings are the same as where there has been no apparent insolvency; and in the latter case, the plaintiff will be barred by a plea of a special *plene administravit*, unless he is able to satisfy it.

In applying these principles to the objection made by the counsel for the executors in the present case, we shall consider Mr. Hunt as now the plaintiff; for if the administrator would be entitled to costs against him, no good reason can be given, why he should not have costs against his estate when dead. Hunt, therefore, brought his action in due form, and for a just debt, but pending the action, by an insolvency of his debtor, the effects are all specially appropriated, and he cannot have judgment against the goods and estate of his debtor. The administrator shows these matters to obtain costs; the truth of them is admitted. And does the administrator prevail within the intent of the statute, giving costs? Would Hunt, at common law, be *in misericordia* for his false clamor? We think not; that no judgment for either party could be rendered, but that all further proceedings would stay. In this case, therefore, the administrator cannot recover costs, and so the objection of the counsel for the executors, is not well founded, and the executors of the original plaintiff must be called to appear, upon pain of a nonsuit being entered. But if they appear, no costs can be taxed against them, on the allegation of the administrator, that the effects of the original defendant have been specially appropriated, pursuant to law, since the rightful commencement of the original suit.

158.

PRESCOTT v. TRUEMAN, 4 M. 627.

PARSONS, C. J. The action is covenant broken, and comes before us on a general demurrer to the forth count. In this count the plaintiff alleges that Trueman, on the 26th of September, 1800, being then seized in fee of certain lands in Westford, which seizin he acquired by a conveyance from

Thomas Symmes, who was in by disseizin, by his deed of that date granted and sold the same to the plaintiff in fee; and covenanted that the said lands were free from all incumbrances. The breach alleged is that the heirs of the disseizee had, at the time when the deed was executed, a paramount right to the same lands.

All the facts contained in this count, which are well pleaded, are confessed by the demurrer. And the question is, whether this paramount right to the lands in the heirs of the disseizee, at the time of the grant to the plaintiff, is an incumbrance on the land granted.

No authority in point on either side has been produced; and the question must be decided on general principles. On these principles we are of opinion that every right to, or interest in the land granted, to the dimunition of the value of the land, but consistent with the passing of the fee of it by the conveyance, must be deemed in law an incumbrance. We say consistent with the passing of the fee of the land by the conveyance, because if nothing passed by the deed, the grantee cannot hold the estate under the grantor. Thus a right to an easement of any kind in the land is an incumbrance. So is a mortgage. So also is a claim of dower, which may partially defeat the plaintiff's title, by taking a freehold in one third out of it. And for the same reason, a paramount right, which may wholly defeat the plaintiff's title is an incumbrance. It is a weight on his land, which must lesson the value of it.

It may be objected, that if a paramount right is an incumbrance, for which the grantee may recover damages, it would operate unreasonably and unjustly as between the parties to the covenant. For after the grantor had paid for the value of the lands in damages, the grantee would still hold it, and might never be disturbed by a dormant title. Or, if he should be afterwards evicted, the grantor would again be liable to the grantee on the warranty in consequence of the eviction.

If these inconveniences would follow from considering a paramount right as an incumbrance, the objection would have great weight, not only on this point, but also in cases of mortgages and claims of dower, which it is not disputed are incumbrances. But by duly attending to the rule in assessing damages, the objection will vanish. Where a subsisting easement is alleged as the incumbrance, the injury arising from the easement, or the fair and reasonable price paid by the grantee to extinguish it, of which the jury will judge, is the measure of the damages. If a mortgage, which is a collateral security, is the incumbrance, the grantee can recover only nominal damages, unless he has removed it, because the mortgagee can compel the mortgagor to pay the debt by suing the principal security; but if the grantee has paid it, so that the mortgagor is discharged, the sum secured by the mortgage is the measure of damages. If a right to dower is the incumbrance complained of, if it be not extinguished by the grantee, he can recover only nominal damages. But if he has extinguished it, the jury will allow him in damages the fair price it necessarily cost him. For if this right be extinguished, it can never after be the foundation of any claim on the grantor.

So in the case before us, if the plaintiff, the grantee, has not extinguished the paramount right, but it still remains against his title, he shall recover nominal damages only, for the reason on which the objection is founded. For the plaintiff shall not recover the value of the land against the grantor, and still hold the land on a contingency that he may never be disturbed in his possession. Neither shall the grantor, the defendant, after having once paid the value of the land, be afterwards called on by the plaintiff on a subsequent eviction. But if it should appear to the jury, who may enquire of the damages, that the plaintiff has, at a just and reasonable price, extinguished

this title, so that it can never afterwards prejudice the grantor, they will consider this price as the measure of damages.

The law thus settled will be generally convenient. For if we are mistaken in the law, the grantee can have no remedy on the usual covenants in our deeds of conveyance, until he is evicted. In the mean time he may be unwilling to make improvements; and when he is evicted, the grantor may be unable to make him any compensation.

The covenant of seizin is not broken, for it is admitted that the grantor was seized; neither is the covenant of a right to convey broken, for a man seized has a right to convey; and on the warranty there is no remedy, until after eviction.

In English deeds there is sometimes inserted a covenant that the grantor has good right to convey an indefeasible estate in fee. On this covenant only nominal damages would be given, until the estate conveyed had been defeated, or the right to defeat it had been extinguished. This covenant is not usually, if ever, introduced into our deeds of conveyance, and upon the construction of covenants against incumbrances is unnecessary.

In adopting this construction, we have not been governed entirely by arguments *ab inconvenienti*, but have used the language of these covenants in the popular sense of the country, and consequently in the sense, in which it is generally understood by the parties to conveyances. A purchaser from one who is seized is not therefore obliged to wait in painful suspence, until he be evicted, before he can obtain an adequate remedy; but as soon as he can extinguish the incumbrance, he may call on his grantor for an indemnity.

Declaration adjudged good.

159.

FARWELL v. JACOBS, Administrator, 4 M. 634.

PARSONS, C. J. At common law no action lies to recover a legacy, or damages for the non-payment of it. The remedy of the legatee is either in the ecclesiastical court or in chancery. Having neither of these courts, by the provincial statute of 5 Will. & Mar. c. 3. it was enacted that any certain legacy, or any residuary or uncertain legacy, reduced to a certainty by the executor's account, may be sued for and recovered at the common law. By the statute of 1783. c. 24. in which this part of the provincial statute is revised, it is enacted in general terms, that any person having a legacy given him may sue for and recover the same at common law.

In consequence of these statute provisions, legacies have always been recovered by actions at law, in which the legatee shows the bequest, the probate of the will, the official capacity of the defendant, and his reception of assets making him liable to pay, of which the probate records are evidence; whence an action has accrued by law to the legatee to demand and have the legacy of the defendant, and that he after notice and demand has refused to pay; to the damage of the defendant.

In the present action the defendant is not the executor, but is the administrator of the estate not administered by the executor, with the will annexed; and he is liable in all cases for debts and legacies not paid by the executor, which the executor was liable from his official character to pay. And the general rule is, that the duties of an executor, resulting from the nature of his office, and charged upon him as executor, devolve on an administrator *cum testamento annexo*; where the authority is not necessarily connected with a personal trust or confidence reposed in him by the testator.

What is called in this case a legacy to the plaintiff is a direction to the

executor to support and maintain him during his life. This bequest could be enforced by a bill in chancery; but having no chancery here, damages are given at law, to be paid out of the estate of the testator, sufficient to compensate the legatee, for the non-execution of the trust of supporting and maintaining him. In this way justice is done to legatees by suits at law, but, it must be admitted, not so conveniently and correctly in many cases, as could be done by a court of equity.

Upon these principles we are of opinion that the present action is maintainable. The direction to support and maintain the plaintiff results from the bounty of the testator declared in his will, and must be considered, as to the remedy, as a legacy. It is made the duty of the executor, in his official character, to furnish this support and maintenance out of the estate of the testator in his hands, of which he had sufficient. He did not discharge his duty, and it has devoled on the defendant, in his character of administrator *de bonis non cum testamento annexo*, who has sufficient assets; and for neglecting this duty the plaintiff is entitled to judgment against the estate in the defendant's hands for a sum of money in damages, which shall be a reasonable compensation for the bounty of the testator, which has been withholden from him. Let the defendant therefore be called.

160.

FARNSWORTH, JUN. v. CHILDS, 4 P. 637.

Though a deed of conveyance be not acknowledged or registered, yet the conveyance shall be good against a second purchaser with notice; and such notice may be either express or implied.

Where a second bona fide purchaser had read a prior deed of conveyance, but the grantee neglected for two years to put it on record, and for personal reasons permitted the grantor to remain in the visible possession and occupation of the land, the first purchaser was held not entitled to relief, and the second purchaser entitled to the land.

PARSONS, C. J. Upon this case the plaintiff moves for judgment upon the verdict, because one of the judgment creditors of the grantor well knew, before the execution was levied, that the close had been conveyed to the plaintiff, and the levy was therefore fraudulent, notwithstanding the plaintiff's neglect to record his deed. On the other side, the defendant moves to set aside the verdict, because there was no evidence that James Brazer, the justice, ever knew what lands were conveyed by the deed, his attention having been wholly confined to the tenure created by it, whether it was or was not created by suitable words; that if it must be presumed that James, when he took the acknowledgment, knew that the close was conveyed to the plaintiff by the deed, yet as there was no apparent change of possession, the occupation being in fact by the grantor, he might well presume that the conveyance was rescinded by the parties, or the close reconveyed to the grantor, the occupier. But if the conveyance would be deemed good against James, yet it should not affect William, the other partner, who it is said had no knowledge whatever of the conveyance; and, as William must suffer if James suffers, neither ought to suffer by the laches of the plaintiff.

At common law, a freehold estate could not pass but by livery of seizin, that the freeholders of the county might have notice of the conveyance. By a law of the colony of Massachusetts Bay, (1641–2) it was ordered that no alienation of any land, where the grantor remains in possession, shall be good against any persons but the grantor and his heirs, unless the deed be acknowledged before some magistrate, and recorded by the clerk of the

county court. Afterwards, by another law, it was ordered that no alienation of any lands shall be good, unless by deed executed by livery of seizin, unless the deed be acknowledged and recorded. Thus, under the old colony laws, conveyances of land might be made by deed executed and seizin delivered, or without livery of seizin, if the deed be acknowledged and recorded.

By the provisional statutes of 9 Will. 3 c. 7, it was enacted that alienations of land by deed, acknowleged and registered, should be good in law without any other legal ceremony. And that no alienation, unless made in that manner, should be legal, except against the alienor and his heirs By this act, the common law conveyance by deed with livery of seizin, was made void except against the grantor and his heirs.

These provisions were re enacted by the statute of 1783, c. 37, s. 4, now in force. In the construction of this statute it has been held, that although the deed of conveyance be not acknowledged or registered, yet the conveyance to the first purchaser shall be good against a second purchaser, who had notice of the prior conveyance. The registry of a deed was required, to give more general notice of the conveyance than would result from livery of seizin, which was prescribed by the common law for the purpose of notice. But if a second purchaser has in fact notice, the intent of the registry is answered, and to permit him to hold against the first purchaser would be to convert the statute into an engine of fraud, instead of a protection against it.

And it has very reasonably been determined that notice to the second purchaser may be either express or implied. It is express, when knowledge of the prior conveyance has in fact been communicated to him. It may be implied from circumstances, as when the first purchaser is in possession claiming the land. For the offer by the original grantor to sell land not in his possession, but which is in possession of another claiming it, is sufficient to rouse suspicions of an intended fraud, and to induce an enquiry of the possessor respecting his title.

In the application of these principles to the present case, it is contended by the plaintiff, that one of the judgment creditors of the grantor had express notice of the prior sale, because he had read the deed of conveyance, although for the purpose only of giving his opinion as to the form of it. It is certainly possible that a man requested to read a deed, to give an opinion whether it is well drawn, may overlook the description of the estate intended to be conveyed, and fix his attention only on the formal parts of the deed, and a jury, from all the circumstances of the case, might infer this to be the fact. But as it is stated that he read the deed, we are bound to consider him as having knowledge of all the contents of the deed, not being at liberty as a jury is, to make a different inference.

But it is said by the defendant, admitting the creditor once knew the contents of the deed by reading it two years before, that he had no reason to presume that the plaintiff's estate remained in him, as the deed had lain by unrecorded, and there had been no apparent change of possession or occupation. This observation appears to have weight. The creditor's debt was due, and the lands of the grantor were liable to satisfy it. The grantee does not put his deed on record, and for personal reasons, he permits the visible possession and occupation to remain in the grantor; and no reason is assigned why the deed is not recorded.

The words of the statute are, that a deed not acknowledged and recorded shall not be valid in law to pass the estate, but against the grantor and his heirs. We are willing to construe the words liberally, to guard against fraud, but not to the injury of the second purchaser. If the grantee had entered

into possession, the notice of the prior conveyance must have been considered as a continuing notice. But when the grantor remains in possession for a long time, during which the grantee might have recorded his deed, but does not do it; it would be unreasonable to defeat the subsequent title of a judgment creditor by imputing to him a fraud; because he might well presume, from the length of time that the deed had remained unrecorded, either that it was not *bona fide*, or that it had been cancelled, or that the estate had been reconveyed; and if the first purchaser suffers, it is owing entirely to his own neglect.

When express notice of a conveyance, not accompanied or followed by a change of actual possession, is given to any person, and he shall soon after levy his execution upon the estate as the property of the grantor, or take a second conveyance from him, before the grantee has had a reasonable time to put his deed upon record, according to the usage of prudent purchasers, who carry or send their deeds to the registry the first convenient opportunity, we are willing to relieve the first grantee against the rigor of the words of the statute, by imputing fraud to the second purchaser; but we cannot go further against the words of the statute, to protect him from his own laches. If the grantee had taken visible possession of the estate before the levy or the second purchase, the case would rest on different principles, and would receive a different decision.

It is then our opinion that the plaintiff must abide by the letter of the statute, and is not entitled to be relieved against it by any construction of the common law. Consequently the verdict must be set aside, and a general verdict entered for the defendant, on which he may have judgment.

161.

BRIDGE v. FORD, JUN., 4 R. 641.

In debt upon a recognizance to a party taken before a justice of the peace, conditioned for prosecuting an appeal, it must be shown that the justice had jurisdiction of the action, and that the recognizance has been entered of record in the common pleas; and the condition must be set forth, and the breach alleged.

PARSONS, C. J. We are satisfied that this declaration is bad for several reasons.

1. It does not appear from any part of the record, of which the recognizance is now a part, that the justice had any jurisdiction in the cause therein referred to. We cannot conjecture in what manner the process was instituted, or what was the cause of it, or whether it was a cause within the jurisdiction of a justice of the peace. And we cannot presume any thing in favor of the jurisdiction of an inferior magistrate, as it is not general, but given and limited by particular statutes. In the condition of the recognizance, the justice ought to have recited so much of the cause, that it might appear that he had legal cognisance of it. If it were not within his jurisdiction, the proceedings as well as the recognizance are void.

2. The recognizance does not appear to have been delivered to, and entered of record in the common pleas. Debt as well as *scire facias* will lie on a recognizance to a party; but this recognizance must be matter of record, and in debt upon it the defendant may plead *nul tiel record*. Whenever, therefore, a justice recognizes a party to appear at any court of record, it is his duty to transmit the recognizance to that court, that it may be entered of record.

3. There is a material variation between the declaration and the recognizance; as it appears to be acknowledged on a condition which is totally

omitted in the counts. If this can be got over, as variance is not assigned for cause of demurrer, yet the declaration is substantially bad, for oyer of the recognizance being bad, and it being spread on the record, it must now be taken as part of the plaintiff's second count. The debt is then acknowledged on condition, and (unlike the case of a bond *in pais* upon condition) no debt is due, until the condition is broken. But the breach of the condition is no where alleged. In 2 L. Raym. 1256, there is a precedent of debt on a recognizance of bail, and many other precedents of the like action are given and referred to in 7 Wentworth's Pleadings, 54—88. In all the recognizances is alleged, either to be taken by a court of record, or to be delivered to the court and recorded. In all the condition is set out, and a breach of it alleged. In a recognizance to the party, it may not be necessary that the breach of the condition be a matter of record, as it is when the recognizance is to the Commonwealth, who can take only by record. In this latter case, it is usual to call a party recognized to appear, and to enter his default on the record. But this last point it is unnecessary to decide.

The condition of the recognizance is no part of the first count; but it is clear that an action of debt does not lie on any acknowledgment of a debt taken before a justice of the peace.

It appears to the court that the declaration is bad and insufficient in law for the plaintiff to maintain this action, and the defendant must have judgment for his costs.

162.

COMMONWEALTH v. KINISON, 4 R. 646.

Upon an indictment for having in possession a counterfeit bank note, it is not sufficient for witnesses to swear to the identity of the note, unless it has been constantly in their possession, or they have put a private artificial mark upon it before parting with it.

PARSONS, C. J. We have looked into this case, and on consideration are all of opinion that the verdict must be set aside, and a new trial granted.

It is an indispensable rule of law, that evidence of an inferior nature, which supposes evidence of a higher in existence, and which may be had, shall not be admitted.

In the present case, Pecker was an unexceptionable witness to prove that the defendant passed a bank note to him; but when he testified that the bank note he had received had been out of his possession, and in the possession of the justice, whose testimony might have been had, it was irregular to admit him to testify to the identity of the note produced, from his recollection of accidental marks. The testimony of the justice would have been direct, and is of a superior nature.

If the witness present had, before he parted with the note, made any private artificial mark, which he recognized on producing the note, and to which he could positively swear, we think such testimony ought to have been admitted, as being of as high and satisfactory a nature as the justice's testimony; because it could not be presumed that a *fac simile* of his private artificial mark would be imposed on another note by another person. But any accidental marks on this note might have happened to be on other notes.

In the case of Williams v. The East India Company, (3 East. 192,) the testimony of witnesses, from which a strong and satisfactory presumption arose, was rejected, because it appeared that there was a witness, who might have been produced, and who could have testified directly to the fact.

The same objection lies to Pecker's wife as lies to him, and a new trial must be granted.

163.

MITCHEL, PER PROCHEIN AMI, v. LUNT, 4 R. 654.

A creditor of an intestate, having recovered judgment against an executor *de son tort* cannot levy his execution issued upon such judgment upon the lands of which the intestate died seized.

PARSONS, C. J. The demandant in a writ of entry *sur disseizin*, counts on the seizin of his father of the tenements demanded within thirty years, and of a disseizin done to him by the tenant. The cause was tried on the general issue, and a verdict was found for the tenant by the consent of the parties, subject to the opinion of the court upon a case reserved.

Without detailing all the facts agreed, it is sufficient to observe, that the merits of the cause depend on the question whether a judgment, recovered by a creditor of an intestate against an executor *de son tort*, can be satisfied by levying an execution issued on that judgment upon the lands which were the intestate's, but have descended, and of which the heir is in possession.

By our laws the lands of the debtor are made liable for the payment of debts, and may be taken on execution, either in the hands of the debtor, or after his decease in the hands of his executor or administrator. But after the debtor's decease the lands are made liable in aid of the personal estate, which must first be applied to the payment of the debts as far as it is sufficient. And when deficient, the executor or administrator may obtain license for the sale of enough to make up the deficiency. Or if they are not sold on a license duly obtained, the creditor may take them by execution in satisfaction of his judgment. And if by the fault of the executor or administrator, in not collecting the personal estate, or in not applying it to pay the debts, the lands are taken from a devisee or heir, the executor or administrator is liable in an action for waste to the devisee or heir, who is injured by the waste.

An executor *de son tort* has no legal control over the personal estate; he has no authority to collect the effects of the deceased. His intermeddling is an unlawful act, by which he is liable to a creditor, so far as he has intermeddled; or if, when sued, he falsely deny that he is executor, he is made chargeable by his false plea for the debt out of his own estate, if he has not personal estate of the deceased sufficient to pay it. But no action lies against him for waste by subjecting the real estate to be taken in execution, for not paying the debts of the the deceased. And no intermeddling with the lands of the deceased will charge him as executor, but such intermeddling is a wrong done to the heir or devisee.

From this short view of the character, authority and liability of an executor *de son tort*, and of our laws making lands liable for the payment of debts, we are satisfied that the lands of one deceased are not liable to be taken to satisfy a judgment recovered against an executor *de son tort*; that having no character by which he can obtain license to sell lands for the payment of debts, the lands cannot in legal construction be estate of the deceased in his hands; and that to admit the lands to be taken to satisfy a judgment recovered against him would be extremely mischievous, as no action for waste in not collecting the personal estate, and paying the debts, will lie against him for a devisee or heir, who may consequently be unjustly deprived of their lands without an adequate remedy.

The levy, in the case before us, by the tenant on the lands of the demandant's father, who was lawfully seized of them, was an entry unjustly and without judgment of law, and amounted to the disseizin complained of. Pur-

suant to the agreement of the parties, the verdict must be set aside, and a general verdict for the demandant be entered, and judgment be rendered upon it for him to recover his seizin with costs.

It may be proper to remark, that in cases like the present, where a creditor would avail himself of the lands of an intestate for the payment of his debts, if the next of kin refuse administration, as a creditor he is entitled to it, and in this character, on a deficiency of personal assets, he may have a license to sell land enough to pay his own debt.

164.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE PORTLAND BANK V. STACEY AND MANSFIELD, 4 R. 661.

Replevin of the schooner Ann and appurtenances, also of one hundred and thirty-five bales of cotton, fifty nine tierces and twenty-two half tierces of rice.

"That Joseph M'Lellan and Hugh M'Lellan, mentioned in the pleadings, were on the 26th of December, 1807, holden, and in law bound to pay the plaintiffs the sum of $80,334 50; that to secure the payment of that sum to the plaintiffs, the said Joseph and Hugh, by their bill of sale under their hands and seals of that date, bargained and sold, among other property, the schooner Ann, mentioned in the writ, with her appurtenances, and also the cargo, if any, which might be shipped on board the said schooner, for and on account of the said Joseph and Hugh, to consist of cotton and rice, which said deed was on condition to secure to the plaintiffs the payment of the money due to them as aforesaid, and was in due form of law: that when the said deed was made, the said schooner was in Charleston, S. Ca. having two days before taken on board, for and on account of the said Joseph and Hugh, a cargo consisting of the cotton and rice mentioned in the writ: that the said schooner arrived at Gloucester in the county of Essex on the 4th of January, 1808, when her said cargo was attached in due form of law by the defendants, at the suits of the attaching creditors named in the pleadings, who are bona fide creditors of the said Joseph and Hugh, having no knowledge of the conveyance aforesaid; that the plaintiffs, as soon as they had knowledge of the arrival of the said schooner and cargo, took possession of the same without any negligence on their part, viz. on the 18th of January, 1808; and that no other conveyance was executed, instrument made, or act done by the said Joseph and Hugh, to transfer the property of the said schooner and cargo to the plaintiffs, excepting the executing the bill of sale aforesaid."

PARSONS C. J. On the trial of the issues, the question submitted to the jury, was, whether the chattels replevied, were the property of the plaintiffs. A verdict being found by consent of the parties for the plaintiffs, subject to the opinion of the court, on a case stated, we have examined the facts agreed upon, and upon consideration are satisfied that the verdict is right. The property being in Joseph and Hugh M'Lellan, they mortgaged it by a deed in due form, duly executed, and for a valuable consideration, to the plaintiffs.

But it is objected, that the goods, when the deed was executed, were in South Carolina, and that the plaintiffs did not in fact take possession of them, until after they had been attached at the suit of certain creditors of the M'Lellans.

Personal property passes by grant on the execution of the deed, and at common law an actual delivery is not necessary to the validity of the grant. By the English statute of 21, Jac. c. 19, which forms a part of their bankrupt system, a grant, where the possession is not delivered, but remains in the grantor, will not protect the property against the assignee of the grantor, if he become bankrupt. But the English bankrupt laws were never in force in this state. By the construction of that statute, a sale of a ship and cargo abroad is good, although possession be not immediately delivered, provided

the evidence of the title be delivered, and the vendee take possession as soon as the property is within his reach. In this state the neglect of delivery may be a circumstance, from which a jury may with other circumstances presume fraud; but the sale is not thereby void. Now the schooner in this case arrived at Gloucester, on the 4th of January, 1808, and it is agreed that the plaintiffs took possession of her and her cargo, as soon as they had knowledge of her arrival. Here was, therefore, no delay in the plaintiffs, nor any circumstance from which it might be inferred that the sale was not *bona fide*. The mortgage must be deemed to have legally vested the property in the plaintiffs, and judgment is to be rendered on the verdict.

Note. After the Chief Justice had delivered the opinion of the court, as above, he observed that one reason, which induced him to save this case, was, that it might be ascertained, whether there was any distinction between what is commonly called the grand bill of sale in England, which is necessary to pass ships at sea, and the bills of sale for vessels used in this country. He said he knew no distinction, and believed there was none. He thought on the whole that the case was so plain, as to have been hardly worth reserving.

165.

Smith and others v. The Newburyport Marine Insurance Company 4 R. 668.

Parsons, C. J. observed, after stating the facts agreed, that the question reserved was simply whether the plaintiffs had, or had not seasonably abandoned after the knowledge of the peril, so as to entitle them to recover a total loss. They had notice of the loss, and of the nature and extent of it, on the 24th of February: they lived in the town where the defendants kept their office, but did not offer to abandon until forty-five days after notice of the loss was received, and no reason is assigned for the delay.

The owner must abandon within a reasonable time after notice. He shall not delay for the purposes of speculation, or wait for further intelligence to guide him in his speculations. What is a reasonable time must depend on facts. When the facts are agreed or found, it is a question of law. In the case at bar, the offer to abandon was delayed until the 10th of April. This delay unaccounted for is unreasonable, and the court are all of opinion, that in not offering to abandon sooner, the plaintiffs lost their right to abandon, and can recover for a partial loss only.

Let commissioners be appointed to liquidate the damages, and let the cause stand over for their report.

166.

Freto, who sues by Lefavour, his guardian v. Brown, 4 R. 675.

Parsons, C. J. The action is *assumpsit*, by Freto, a minor, who was fifteen years old in 1805, to recover of Brown his earnings in Brown's service during that year.

The parties have agreed to a case, in which it is stated, that the plaintiff's father is dead, and his mother married to Robert Pierce: that during the year 1805, the plaintiff lived in the family of his father-in-law, and was maintained by him; but was a fisherman in the defendant's fishing schooner, for the season, in which he earned the money demanded in this action, exclusive of the advances made for his use by the defendant, which are deduct-

ed. The balance is 71 dollars 87 cents, which Pierce, the father-in-law also claims.

The father in law is not obliged to maintain the plaintiff, and consequently is not entitled to his earnings. While the plaintiff lived in his family, and was maintained by him, he must be considered a servant *de facto* as to strangers, who cannot question the right of the father in law to his minor's earnings. But this rule cannot bind the minor. He may quit the family at his own discretion, and can make no contract, which he cannot avoid, except for necessaries. The father in law may recover against him for necessaries, upon an implied *assumpsit*, but he cannot claim his earnings against the minor's consent. If he could, the earnings might greatly exceed the expenses of maintenance; the whole of which the father-in law would receive, and the next moment might turn him out of doors.

In this case, it was intimated, that the mother is guardian by nature, and that her right devolves on her husband. We know of no such right of devolution. If the right devolved, the duty must devolve, but it is clear that the father in law is not obliged to maintain his children in law, whether the mother be living or dead.

Judgment must be entered for the plaintiff for $71 87, the balance of his earnings, with costs.

167.

WORCESTER TURNPIKE CORPORATION v. WILLARD, 5 R. 61.

That an express promise by a member of a turnpike corporation to pay his assessments is good in law.

PARSONS, C. J. observed, The contract declared on and produced in evidence, was signed by the defendant and the other members of the corporation. In this contract the defendant engages to take one share, and to pay all such legal assessments as should afterwards be made by the government of the corporation; on condition, that the number of shares should be six hundred, and that the turnpike should be located as there described. But the defendant contends, that the remedy by statutes providing for the sale of the shares of a delinquent proprietor, for the payment of assessments in arrear, is the only remedy which the plaintiffs by law have.

The indemnity which a turnpike corporation can, by the statute creating its claim for the expenses of locating and making the turnpike, arises wholly from the legal toll to be received. And after it is created with all the necessary powers, it may be very uncertain whether the indemnity will be sufficient, as the expences and the toll are each uncertain; and the directors can have no funds to enable them to contract with, or pay the workmen, but the value of the shares when sold, unless they bind themselves personally to the payment. This cannot reasonably be expected from them, without some further security from the proprietors, than the value of their shares, which in fact may be unequal to the reimbursement. This further security, therefore, is a reasonable one, and of convenience to the public, as far as turnpikes are a common benefit.

There is no legal objection to a contract between the corporation and the individual members of it, more than between a town and any of its inhabitants, when the authority of the corporation to contract with the members is within the reason of the powers vested in it, and may be necessary for their execution; although this authority may not be expressly given by the incorporating act, or by any other statute.

Notwithstanding the remedy of sale given by statute, if the proprietors, to induce the corporation to make the turnpike, will expressly promise to pay their proportion of the legal assessments, for the expences; and the corporation proceed in the execution of their powers, on the faith of these promises, the promises are good in law. They are made between parties competent to make them, and for a legal consideration. If the promise is good in law, an action to recover damages for the breach of it, may be maintained.

168.

Commonwealth v. Ryan, 5 R. 90.

Where a statute annexes a fine, for an offence, for the use of the town in which the offence is committed, can a taxable inhabitant be of the grand jury who shall find the indictment?

Parsons, C. J. said, That great care should be taken to provide judges and jurors as free from interest as possible, there can be no doubt. It is not only a maxim of law, but a sound principle of natural justice. It is sometimes not possible perfectly to adhere to it. Every fine to the use of the Commonwealth may affect the interest of every citizen, as it may lessen the public taxes; but if citizens cannot be judges and jurors, no offences can be punished by fine. Where fines are given to counties, the inhabitants may have an interest somewhat greater; and where penalties accrue to towns, the interest of the inhabitants may be a little more affected.

This is all true in theory, but in practice it cannot be believed to have any effect. As some degree of interest in all cases of public prosecutions for fines, will necessarily be attached to jurors, it is for the legislature to direct when this theoretic interest shall be no good objection to a juror. And here, the law must be considered as repelling the objection of interest; otherwise the offence must remain without prosecution, since Boston and the small town of Chelsea constitute the only towns from which the jurors must be returned, It were to be wished, that all fines should be paid into the county treasury, for the use of the commonwealth. But there can be good reason, why the legislature may not constitutionally provide that a remote and small corporate interest shall not be a legal objection to a juror's trying a cause, in which the defendant may be sentenced to pay for the use of the commonwealth a fine imposed by a public statute.

169.

Briggs v. The President, Directors, &c. of the Nantucket Bank, 5 R. 94.

Assumpsit; and the defendants plead misnomer of the corporation in bar; and upon joinder in demurrer.

Parsons, C. J. observed, The defendants admit their bar is bad, but they contend that the writ ought to abate, because it appears from the face of it, that the court to which it was returnable, had no jurisdiction. The objection is the want of a venue laid in the county. But the want of venue is no objection to the jurisdiction, although at common law it is an objection to the declaration. In England a venue in point of form is necessary, but so far from its being an objection to the jurisdiction, the court will change it

to another county, to prevent oppression in the plaintiff, or to secure an impartial trial.

The venue at common law, regulates the process of summoning a jury, who anciently were always returned from the vicinage; but in this commonwealth venues are of no use. In early days of our law they were not averred; and tradition has handed down the first case, in which they were held necessary. It happened about sixty years ago. Since that time they have been considered as a necessary part of technical form, but as not a substantial part of the writ.

We, therefore, hold a declaration without a venue, or with a wrong one, as bad in form when specially demurred to for this cause; but for no other reason, that I can devise, but a long usage; S. P. 5 ib. 97.

170.

SILAS BULLARD v. THE PRESIDENT, DIRECTORS, AND CO OF THE NANTUCKET BANK, 5 R. 99.

Plea of misnomer in abatement, averring their true corporate name to be The President and Directors of the Nantucket Bank. Replication, by way of estoppel, that the defendants in issuing their notes, used the name by which they were sued.

PARSONS, C. J. The defendants ought not to have opposed the plaintiff's motion to amend, as the plaintiff was led into the mistake by the fault of the defendants in issuing their notes by a wrong name, which the plaintiff supposing to be their true name, and sued them by it. And we are of opinion that the plaintiff is not chargeable with laches, in not making the motion in the court below. But it might have been made in this court at the last term, and by the plaintiff's delaying it, the defendants have incurred expense. The plaintiff may, therefore, amend the misnomer in the writ, paying the defendants their costs, for attendance after the first day of he last term, and for their travel and attendance this term. By the rule the court are obliged to allow an amendment, after demurrer and before joinder, on the terms of the rule: but they are not restrained from granting it on any terms, which they may think reasonable and equitable.

171.

JONES, ET AL, v. FALES, 5 R. 101.

PARSONS, C. J. The admission of parol evidence by the judge to prove the contents of certain promissory notes, said to be lost, is objected to on exceptions filed by the defendant; and for this cause a new trial is moved for.

By law the plaintiffs, after they had been delivered to the jury in evidence, had no longer the custody of the notes; but they were intrusted to the clerk of this court; and it appeared from his testimony that they were lost, and that he could not find them. This was a proper case to let in evidence of the contents; and the attorney of record was a proper witness to prove the facts. But the defendant's counsel have argued against the admission of the copies, because they were not proved to be taken before the loss of the original; and his argument, is founded on principle, if the copies were produced to prove the originals. But the copies were produced, to have the confession of the indorser written on them, that he believed them to be true copies, and that the originals were lost, for the use of the defendant if he should have occasion to resort to the indorser for a remedy; and not to prove the contents of this note in this action.

172.

WHEELOCK v. WHEELWRIGHT, 5 R. 104.

Case.

Defendant hired a horse to go an agreed distance, and to return at a time mentioned by defendant; but he went beyond that distance, and the horse died without being rode immoderately, or other neglect of defendant.

PARSONS, C. J. The defendant, by riding the horse beyond the place for which he had liberty, is answerable to the plaintiff in trover. For thus riding the horse is an unlawful conversion; and if the horse had been returned to the plaintiff, the defendant might have given it in evidence in mitigation of damages. As the horse was not returned, the plaintiff might have recovered the value of the horse in damages. What that value was, must be settled by a jury. If the horse in fact labored under a mortal distemper, although unknown before his death, the damages would have been the value of a horse so diseased. But it would have been incumbent on the defendant to have proved that from any causes the horse was not worth the apparent value; and if he failed to satisfy the jury of the reduced value, the plaintiff ought to recover the apparent value.

According to the facts, the plaintiff's action is misconceived. It should have been trover, and not case for improperly using the horse. And if this verdict should stand, it would not be a bar to an action of trover for a conversion by riding the horse to a place without the contract.

Verdict set aside, and a general verdict entered for the defendant.

173.

COMMONWEALTH v. KINGSBURY, AND OTHERS, 5 R. 106.

PARSONS, C. J. The defendants are charged with conspiring to get possession of the chattels of Pons, carrying them away, and secreting them, under color of authority from the owner to sell them; and that they in fact carried their conspiracy into execution. The fraudulently obtaining possession of the chattels of Pons, carrying them away, and secreting them, is unquestionably a felony. But it is said that the conspiracy is a complete offence by itself, before it was carried into effect, and therefore is not merged in the felony. We are of opinion that the misdemeanor is merged. Had the conspiracy not been effected, it might have been punished as a distinct offence; but a contrivance to commit a felony, and executing the contrivance, cannot be punished as a distinct offence from the felony, because the contrivance is a part of the felony, when committed pursuant to it.

The law is the same respecting misdemeanors. An intent to commit a misdemeanor, manifested by some overt act, is a misdemeanor; but if the intent be carried into execution, the offender can be punished but for one offence.

If the jury had acquitted the defendant of executing the conspiracy, and convicted him of the conspiracy only, sentence might have been passed against him for the misdemeanor, because the offence is not laid to be done feloniously. But they have found him guilty of acts which without doubt amount to felony.

Judgment arrested.

174.

SPEAR v. BICKNELL, 5 R. 125.

PARSONS, C. J. The defendant pleaded an easment, for the public in the

plaintiff's land. This is not personal estate, but is a real franchise, holden by the Commonwealth for the benefit of all the citizens, and which greatly affects the plaintiff's interest in the close. And although in common parlance, a right of way over the land of others may not be called real estate; yet, I think it must be so considered within the intent of the statute, excluding justices from taking cognizance of actions in which the title to real estate shall be in question.

It is objected that the defendant having prescribed for an highway in his bar, and the plaintiff having set up another prescription in his replication, he ought to have traversed the defendant's prescription; and it is contended that this exception may be taken on general demurrer. If well founded, the objection may be so taken without doubt; for it is a substantial fault. If the plaintiff does not, when replying another prescription, traverse the defendant's, the pleadings can never be brought to an issue. The defendant cannot traverse the prescription set up by the plaintiff in his replication, because it would be a departure from his bar; and if he rejoined his own prescription, the plaintiff might surrejoin his prescription, and the pleadings might be endless.

But is this objection well founded? The defendant, in his bar, pleads no prescription, but only alleges an highway for all persons. This allegation the plaintiff is not disposed to deny, but to qualify. He confesses the highway, but prescribes for a gate, to be opened and shut by all persons passing through. The proscription may be good in law, for it might have a lawful commencement. And a replication of this kind is in principle like the case of Kenckin v. Knight, 1 Wils. 253. There the defendant in *trespass quare clausum fregit* justified by a custom to put all cattle *levant and couchant*, and that he accordingly put in his swine. The plaintiff replies, and admits the custom to be true as far as it goes, but alleges that, by the custom, the swine must be rung. On demurrer it was holden that the plaintiff need not traverse the custom pleaded by the defendant, because his replication is only a qualification of it.

If it be true that the plaintiff might have traversed that the gate was wrongfully on the way, and that on this traverse an issue might have been joined, this objection is certainly formal; because the defendant might have regularly averred the wrongful erection of the gate, and traversed the plaintiff's prescription, on which a regular issue might have been joined on the merits.

This objection ought not to prevail. And on this point there is much doubt whether this traverse of the wrongful erection of the gate would have been good. For the defendant in his bar, pleads it not directly, but as a mere inference, because it was on an highway.

Another objection is, that the plaintiff has not brought himself within his own prescription. By his prescription he cannot erect a gate at all seasons of the year at his pleasure, but only when it shall be found necessary to preserve the close, and the grass, and the emblements; and the words "when it shall be found necessary" must be understood as equivalent to the words "when it shall be necessary." But he alleges that in July, 1799, the plaintiff finding it necessary, erected the gate. This is certainly an informality in his averment, but I think not matter of substance; for if the defendant had traversed that the plaintiff found it necessary, the issue would have been with him, unless in fact the gate had been necessary. For if it had not, the jury would not return that the plaintiff found it so.

Another objection is, that the plaintiff alleges that from that time the gate had been kept up and maintained to the time when, &c. in manner aforesaid,

for the purpose aforesaid, without alleging that at the time when, &c. even he, the plaintiff, had found it necessary to do so.

There appears to be great weight in this objection. The plaintiff may be considered as averring that he kept up and maintained the gate, to be shut by all persons who opened and passed through it, for the purpose of preserving the close, and the grass, and the emblements. All this may be true, and yet, at the time when, &c. the gate might not be necessary for that purpose. And the replication is certainly defective for not averring that at the time of the trespass, the gate was found necessary for the preservation of the close, and of the grass and emblements. And of this defect the defendant might have availed himself by demurring to the replication.

But there are faults in pleading, bad on demurrer, which may be waived by the adverse party pleading over. The rule seems to be correctly stated in 1 Lev. 194, Cutler *et al.* v. Southern *et al.* Where the plaintiff in his replication makes a title, and it thereby appears he has a bad title, no rejoinder can by any implication make it good. But when it appears that he has a title, but it is defectively pleaded, the rejoinder admitting this matter, and tendering an issue on other matters, will make the replication good.

In the present case, the plaintiff avers that at the time when, &c. he kept up the gate for the preservation of the close, and the grass and emblements. The implication is strong, that the gate was then necessary for this purpose; and if the defendant had traversed the necessity of the gate at that time, a material issue might have been joined, and judgment might have been entered on the verdict for the party prevailing. But the defendant neither demurs, nor makes the traverse; but traverses several other distinct matters, so that his rejoinder is bad on special demurrer for duplicity. By not traversing the necessity of the gate, he has admitted it, when he traverses other matters, and does not demur.

This rule in pleading is very reasonable. The defendant might, by traversing the prescription, or the keeping up the gate pursuant to it, have had a trial upon the merits. The pleadings on his part are so conducted as to avoid a trial on the merits. If he did not admit the necessity of the gate, he ought to have traversed it. If he intended to avail himself of the defective averment of the necessity of the gate, he ought to have demurred. He has taken neither of these methods, but has pleaded a bad rejoinder, in which he has not traversed the necessity of the gate, and has thereby admitted it. I am glad that we are able to render judgment on this record according to the apparent merits of the case, consistently with the rules of pleading, which are founded in good sense. All needless refinements ought to be rejected, and all finesse intended to ensnare should be avoided. The plaintiff must have judgment. Rejoinder adjudged bad.

175.

SHERBURNE v. FULLER, 5 R. 133.

The plaintiff proved the agreement declared on, by parol evidence, producing no memorandum in writing signed by the party, (defendant) or by any person authorised by him, except a certain receipt, of the the tenor following: "Boston, July 24, 1807. Received of Samuel Sherburne a deed, signed by R. M. for a certain lot of land therein mentioned, the consideration thereof being $5371, 67, which sum I promise and engage to account with said Sherbure for. Witness my hand. Seth Fuller.

It appeared by parol evidence, that the defendant signed the above on the following account, viz. That the wife of said M. had not released her dower to the lands, in the said deed; and that defendant was to obtain her release, and then return the deed to the plaintiff.

PARSONS, C. J. It is objected to the verdict, that it is found for the plaintiff on the breach of a contract touching the sale of lands, and so is within the statute of frauds, and that the contract declared on, was proved only by parol evidence.

It is answered by the plaintiff, that when a contract within the statute, is lawfully rescinded, either party may demand of the other, the repayment of money advanced, or the return of any thing delivered under the contract, and may support such demand by parol evidence. This position is generally true; and in this case, had the plaintiff advanced money to the defendant, or delivered him as bailiff a deed, for safe custody, an action would have lain for the money or deed, or even trover for the deed, and parol evidence would support such action. For the original bargain may fall through, because one of the parties fraudulently refuses to have a written memorandum of it signed by him.

If the deed to be returned by Fuller was in his custody as bailiff, this principle would apply, and the verdict be good. But this is not the case. The land was conveyed to Fuller by M., and the deed delivered to the former as evidence of his title; although he promised by parol, that he would return it, unrecorded, if the contract was rescinded; and on the return and cancelling of the deed, it was understood, that he would be divested of the land. A promise to return a deed under such circumstances, is a promise within the statute concerning the sale of lands, as the title to the lands was intended to be changed by the performace. This promise, therefore, cannot be proved by parol evidence. This defect of written evidence cannot be aided by the receipt in writing; for that instrument proves a contract to account for money, and the parol evidence, given to explain it, either contradicts the contract declared on, or materially varies it.

As the justice of the case is with the plaintiff, he may declare on the receipt, as on a promise to pay money. The verdict must be set aside, and a new trial granted, with leave to the plaintiff to amend, on payment of the costs.

176.

WIDGERTY, ET AL. V. HERSKELL, 5 R. 144.

The assignment made by an insolvent debtor, for the benefit of his creditors, is void, unless the creditors become a party or assent to the assignment or conveyance.

PARSONS, C. J. The merits of this case, as to the ship, depends on the validity of the transaction, as it relates to the creditor B. who was not a party, nor assenting to the transaction: For if the bill of sale, relied on by the plaintiff, is in law fraudulent, as to creditors, not parties nor assenting to it, the plaintiffs must fail in their action, The deed of conveyance, to be valid in this case, it must have been made for a valuable consideration, and in good faith. First, the consideration. The grantors make the deed with honest intentions, but they receive no consideration for it; they have parted with all their estate of every description, without any estimate of its value, and they do not even obtain in consideration the discharge of a single debt. It is true that a conditional release is executed on the same day, but it depends upon the further conduct of the grantors themselves, to obtain any benefit from this release.

In a case of this kind, it is incumbent on the grantees to show a valuable consideration, and they have failed. But from the facts agreed, the presumption is, that the property conveyed, was of much more value than the debts

due to the grantees, and to the indorser and sureties of the grantors. For the admission is, that the plaintiffs have not received more than enough in cash for the payment of these debts; whence we ought to conclude that they have already received enough for these purposes; and there is a surplus property conveyed to the value of the ship Mac, and her outward bound cargo of cotton. To have established a valuable consideration, there ought to have been proved a fair and just value of the property conveyed, so that its adequacy might be apparent. Was this conveyance *bona fide?* Was it made with honest intentions, expressed in the contract, or at least not intentionally omitted; and for purposes, for which the law will authorise an insolvent debtor to convey all his effects? It purports to be made for the benefit of the indorsers and sureties of the grantors, and for the grantees to secure their debts. But it is evident that the intent of the parties went much further, to compel the discharge of the grantors from all their debts, by locking up from every creditor who would not discharge them every part of the estate of the grantors. And it was not enough for a creditor to entitle himself to a part, to release his debtors; but he must be content to have his demands settled, not by a jury or impartial arbitrators, but by the plaintiffs themselves, who have an interest to lessen the amount of all the debts due but their own.

Does the law allow the insolvent debtor to make this bankrupt law for himself? By our law a debtor's property is liable to attachment by any creditor: and on the other hand, a debtor may prefer one creditor to another, by paying his debt, either in cash, or by conveying so much of his estate as will be adequte to the payment. But the creditor must be a party, or assenting to this payment or conveyance. If he be not, nothing passes to him, and nothing passes from the debtor and his estate intended to be conveyed, remains liable to attachment by any other creditor.

But it is argued that a creditor, to whom the conveyance is made, must be presumed to assent, or he may afterwards assent. We cannot always presume that he will assent, and especially on releasing the whole debt on receiving a part: and the present case proves, that one creditor did not assent. A creditor may afterwards assent, and then he may be bound by his assent; but until his assent, the property remains the debtor's, so far as to be liable to the attachment of another creditor; and if the property does not pass by the conveyance when executed, it can never afterwards pass by virtue of such conveyance, so as to defeat an intervening attachment by another creditor. If this were not law, great mischiefs would arise. The conveyance may be made to the use of a creditor beyond sea, and how long must another creditor wait, to learn whether or not an assent is given? and the insolvent grantor may, in the meantime, dispose at his pleasure, of the property so conveyed, to any person ignorant of the prior conveyance.

It is, however, argued, that this deed conveys a trust estate, according to the intent of the parties, which immediately vests the property in the trustees, so that no legal interest remains in the grantors liable to attachment. He may thus convey in trust *bona fide*, and for a valuable consideration; but not without the assent of the creditors. If such a trust estate were allowed in this state, where there is no court to compel a discovery, or an execution of a trust, the creditors would be without remedy. They could not attach, because the estate passed to the trustees; they could not compel an execution of the trust, if they had evidence of it. And what action could they maintain at law, not being in possession of, or parties to the deed of trust?

But if they had evidence of the trust, and deviating from the rules of the common law we should allow the creditors to maintain a special action of the case against the trustees, it would be inconvenient, if practicable, to

make out their claim to any ascertained portion of the property conveyed before a jury. The policy of the law, therefore, providing for attachments, and not providing any remedy in equity against the trustees, prohibits the establishment of a trust estate created by an insolvent debtor for the benefit of his creditors not parties to it. We do not decide that an insolvent debtor cannot convey an estate in trust to pay particular creditors who are assenting and parties to the conveyance; for we perceive no difference, as to the effect on other creditors, whether the estate be conveyed directly to the particular creditors, or with their assent to others in trust for them. And if they have no convenient remedy to compel an execution of the trust, yet *volentibus non fit injuria.*

It is also argued that it does not appear that the clear and unincumbered value of the property conveyed exceeded the amount of the debts due to the grantees, and that the monies raised to pay the indorsers and sureties were the proceeds of the estates previously mortgaged to them, and therefore the conveyance may be good to the grantees; who, if they admitted other creditors, would pay them out of their own funds. But the intent of the parties apparent from the deed, was not the true intent, which was the *pro rata* payment of the other creditors, on their discharging the grantors; the deed therefore, was on a confidence not expressed, for their own benefit, reposed by the grantors in the grantees. We say for the benefit of the grantors, because they expected in this manner to obtain a discharge from their debts, on paying a part of them. The presumption is, that the property did exceed the amount of the debts due to the grantees. For the plaintiffs have cash enough to pay the endorsers, sureties and grantees, without crediting the ship Mac and her cargo, which were included in the conveyance. This cargo was cotton, as appears by the statement of the factors of the grantors, in Liverpool, and was by them appropriated to pay them their debts, due them from the grantors. If the ship had put into Portland, in distress or for any cause, after the conveyance the plaintiffs would have received this cargo; and it does not appear that those factors who had the benefit of it, were either indorsers or sureties, and certainly they were not among the grantees. The result is that the title deed set up by the plaintiffs to the ship Mac, is fraudulent and void as against B. But the return cargo comes under a different consideration. It was not purchased with the proceeds of the outward cargo, but on the credit of the plaintiffs, to whom it was shipped. The plaintiffs must, therefore, pay for it. If they pay for it out of the money of the grantors, received from the effects conveyed, for those monies must they account as trustees, if, as is our opinion, the conveyance was void; and they ought not to account for those monies, and for the cargo purchased with them. The return cargo is, therefore, the property of the plaintiffs.

The verdict must be amended conformably to the agreement of the parties; so that the property in the ship Mac may be found not to be the plaintiff's and nominal damages must be assessed for the defendants; and the property of the cargo found for the plaintiffs, and nominal damages also to them.

177.

LANE ET AL. v. JACKSON, 5 R. 157.

An insolvent consignee may, before receiving the goods, disagree to the consignment, unless the consignor shall dissent.

PARSONS, C. J. The plaintiffs claim the goods on two grounds. That

the consignees while the goods were *in transitu*, disagreed to the consignment, to which, as they were insolvent, the assent of the consignors must be presumed. An insolvent consignee may, before he receive the goods, disagree to the consignment, and the assent of the consignor shall be presumed unless he, in a reasonable time, declare his dissent, or neglect to give notice of his assent. That he avail himself of this disagreement, the consignee should give reasonable notice thereof, and he must within a reasonable time declare his intention. For if, after notice he is silent, his assent shall no longer be presumed. If the goods arrive here before the consignor can have notice that his consignee has disagreed to the shipment, any person, at the request of the consignee, may receive and take care of them, until the consignor can have notice; and an intermediate attachment shall not defeat his right. For the insolvent consignee having refused to receive them, the goods are *in transitu*, and may be seized by the consignor while they continue *in transitu*. And on his giving notice of his assent, within a reasonable time, to the disagreement of the consignee, the contract is rescinded *ab initio*, and nothing ever passed by it to the consignee.

But this case is different. The consignees here undertake to assign the goods, and authorise a sale thereof for the use of the consignor. This is in affirmance of the contract; and we cannot presume that the consignor would consent to the appointment of a factor, with power to recive and sell. The authority of the factor is derived from the consignee, and necessarily supposes an interest in the goods. The plaintiffs, therefore, cannot support this action upon the ground that they had never parted with their property in the goods by the supposed disagreement of the consignees.

This ground failing, they claim that the assignee of the goods hold the same in trust for the plaintiffs; but this must also fail, upon the principles settled in Widgery *et al.* v. Haskell.

As a matter of practice, we have considered what constitutes an attachment of goods; and we are of opinion, that the officer must have the actual possession and custody. This results from the legal import of the word; and in this sense it is now to be understood. There ought certainly to be the same possession and custody as on seizure by execution. Otherwise an officer attaching would not be obliged by law to seize on execution, because he had attached. But goods seized on execution must be sold at the expiration of four days after seizure, and the officer cannot sell, unless he can deliver the goods to the purchaser.

The plaintiffs having failed to support their property in the goods at the time of the replevin, the verdict must be set aside, and a verdict with one dollar damages be entered for the defendant.

178.

Tucker v. Bass, 5 R. 164.

Parsons, C. J. Special *assumpsit* against defendant for not fulfilling his undertaking made in behalf of a turnpike corporation.

An agreement had been made between the plaintiff and the defendant, the latter acting on behalf of the corporation, that the plaintiff was to let the corporation have his land for the turnpike paying at the rate of $100 per acre, making a wall and railing, and complying with some other specified terms. A memorandum of this agreement was signed by the defendant; also evidence was produced, that pursuant to the act of incorporation the turnpike had been legally located over the plaintiff's land, and an agreement

under the defendant's hand was also produced, undertaking in behalf of the corporation to fulfil this contract. But the plaintiff did not prove that he had in fact conveyed the land to the corporation, or signed any memorandum in writing promising to convey it; and whether he ought not to have produced this evidence to maintain the issue on his part is the question reversed.

The agreement of the plaintiff to let the corporation have the land, may possibly admit of two constructions; either an agreement to sell the land, or a consent that the turnpike may be located over it on stipulated terms. If the expression be equivocal, it must be taken most strongly against the defendant, in whose language the memorandum is expressed. But the corporation have by their own act explained it in the plaintiff's favor, if they have no conveyance, nor an agreement to convey from the plaintiff. The road has in fact been located over the plaintiff's land by the direction of the corporation, and no damages have been estimated for the plaintiff pursuant to the act. The agreement therefore must be construed as a contract to sell a perpetual easement over the plaintiff's land to the corporation, to which easement it now has a legal and indefeasible title; and the plaintiff has a right to recover the stipulated damages. This construction is also supported by the terms of the agreement, in which there is no description, as to quantity or site of the land which the corporation is to have. Land cannot be holden by this corporation but for a turnpike, and when the road is located, it is a public highway, and cannot be incumberred.

179.

COLT AND OTHERS v. NOBLE, 5 R. 167.

PARSONS, C. J. The point in this cause substantially submitted to the decision of the court is, whether the agents in London of the holders of the bill in Madras were bound to give notice of the protest to the defendant, the indorser, or only to return the bill with the protests to their principals. It is stated in Kyd on Exchange, p. 118, that when a bill is remitted to a factor to procure acceptance, it is the duty of the factor to use due diligence to have it accepted, and to give advice to his principal of the event, that in case of non-acceptance he may take the proper steps. And if the holder present the bill, and it be dishonored, he is bound to give notice to all the preceding parties, to whom he intends to resort. And this course of conducting the business, we are satisfied is agreeable to the law on this subject.

A factor appointed to cause a bill to be presented is entrusted with no other powers, and it is his duty to notify his principal. The factor may not know to which of the prior parties to the bill the principal intends to resort, and if he does, he may not know their domicils, as he has no interest in the bill, or privity with the parties.

There is no difference between the cases of a bill sent to a factor to procure acceptance, and of a bill remitted in payment, if the bill be dishonored. And the indorser cannot legally complain of the legal consequences of his own conduct. He sold a bill at Madras payable in London. He must, therefore, presume the bill might be holden by the indorsees at Madras, and sent to London for payment; and that if it was, and was dishonored, notice to him would come from Madras.

180.

BOND ET AL. v. FARNHAM, 5 R. 170.

Assumpsit by the indorsees against the indorser of a promissory note, and held, that the latter having assigned his interest in the note to the former is not entitled to notice of non payment, &c.

PARSONS, C. J. The case states that before this note was payable, the maker had assigned all his property to the defendant, for his security against his indorsements; and that the property was not, in fact, sufficient to meet his other indorsements, exclusive of this note. The defendant, therefore, had no right to insist on a demand upon the maker, for he knew it would be fruitless. He had secured all the property the maker had, for the express purpose of meeting this and his other indorsements; and he must be considered as waiving the condition of his liability, and as having engaged with the maker, on receiving all his property, to take up his notes. And the nature and terms of the agreement cannot be varied by an eventual deficiency in the property; because he received all that there was. We do not mean to be understood that when an indorser receives security to meet particular indorsemants, it is to be concluded that he waives a demand or notice as to any other indorsements. That, however, is not this case. But if he will apply to the maker, and receive security to meet particular indorsements, he shall not afterwards insist on a fruitless demand upon the maker, or an useless notice to himself, to avoid payment of demands, which on receiving security he had undertaken to pay.

181.

COMMONWEALTH v. CHURCHILL, 5 R. 174.

An indictment to recover a penalty on a penal statute, and an action qui tam. may appear to be for the same cause.

PARSONS, C. J. It is very well known that a man cannot bring a second action for the same cause, for which he has a prior action pending. The same rule extends to *qui tam* actions, where the plaintiffs are different, if the cause of the two actions is the same. The same reason will extend the rule to informations *qui tam*. and to indictments to recover forfeitures on penal statutes, but not either to informations or indictments for crimes; Doug.240. Fost. 104. As to informations for penalties, it was determined in Regina v. Harris, Cro. Eliz, 261; that an information on the stat. 5 Edw. 6. for buying wool, &c. filed in the Kings Bench, when there was pending in the common pleas, a prior information by one Lewis for the same offence, must abate. And Hawkins P. C. B. 2. c. 26. s. 63. lays down the law generally, that whenever any suit on a penal statute may be said to be actually pending, it may be pleaded of a subsequent prosecution, being expressly averred to be for the same offence. Now an indictment is a prosecution and an expensive one, for the defendant may be arrested and imprisoned or held to bail; and if acquitted, he cannot recover costs.

I believe that it has been sometimes supposed that in pleading in abatement to a second writ the pendency of a former one, the former must be pending at the time of the plea. The entries of pleas of this kind generally, but not always aver the then pendency of the first writ; but in examining the books it is very clear that such averment is unnecessary; and it is sufficient if the first action was pending when the second writ was purchased.

In the 39 H. 6. 12. pl. 16. this point is discussed with much learning and ingenuity. It was holden that it must appear of record that the two actions are for the same cause, and that the first writ was pending when the second was purchased. When the certainty of the cause of action does not appear in the writ, nor until the plaintiff has declared, if the first action was nonsuited before he counted, the first writ could not be pleaded in abatement of the second, for it could not appear from the record that the two writs were for the same cause. But if the cause of action appear with certainty in the writ, there if the plaintiff be nonsuit before he counted, the second writ would abate. And in all cases where the plaintiff was nonsuit in the first writ after he had counted, the second should abate, if purchased pending the first. And it was not necessary that the first writ should be pending when the plea was pleaded; for if by law, it was once abateable, the subsequent nonsuit could not make it good. This law is recognized 5 Co. 61, Sparry's case; and in Gilb. Hist. of C. B. 205, 206, and cited in 3 Intr. Cler. 118. In Cro. Eliz. 261, it is said that an information is pending as soon as it is brought into court, and before process on it issue. For the cause of bringing it, is certainly alleged in it, and it is recorded as soon as it is brought into court.

By the course of proceedings in our courts, the count being inserted in, and making a part of the writ, the plaintiff does not count after his appearance, to his writ; and if he be nonsuit at any time, the writ may be said to be once depending. As in nonsuits at common law, after appearance to writs containing the cause of action in certainty, the writs were once pending because the plaintiffs had appeared. So it would seem to be necessary here, that the plaintiff should enter his action before his writ can be averred to be pending in court, so as to abate a subsequent writ. For its pendency must be a matter of record, and there can be no record of a nonsuit, unless the plaintiff be called after he has appeared in court, and entered his action. Therefore a subsequent writ is not abateable, unless the plaintiff enter his action on his prior writ.

But it is objected that this rule of law applies only to cases where the two writs are sued for the same cause by the same plaintiff; and that it will not apply to *qui tam.* actions, sued by different plaintiffs, or to informations *qui tam.* for the benefit of different persons, or to a subsequent indictment to recover the same penalty.

The reason of the law applies to these cases, which is to prevent a man from being twice vexed for the same cause; and the principle, by applying the rule, certainly extends to these cases. The principle is, when the prior action is ponding, the subsequent writ is bad *ab initio*; it is wrongly sued out, as not given by the penal statute, while another action is pending for the same cause. The statute may give a *qui tam.* action or information, or an indictment; but it does not provide that all these prosecutions may be pending at the same time. If it did, then the pendency of the former could in no case, be cause to abate the latter, which is not contended for. When therefore a prosecution given by the statute, is regularly pending, no other prosecution is, during the pendency of the former, authorized by the statute. Therefore the second prosecution is irregular and unauthorised at its commencement; and if once abateable, it seems very clear that no subsequent act of the first prosecutor, after his suit is pending, can make the institution of the second regular and legal.

It may be said that extending the rule to *qui tam.* actions and informations, and to indictments on penal statutes to recover a forfeiture, may introduce fraud and covin; for the first prosecutor may continue to prosecute until the limitation of penal suits shall take effect, and then become nonsuit, and the

second prosecution being abated, the penal statute will be defeated. But the second prosecutor, when the pendency of the first is pleaded in abatement, may reply that the first was by fraud and covin between the parties, and if the fraud be found, the plea will be avoided. But if a fraud not capable of proof may be presumed, still the objection will fail; for the fraudulent first prosecutor will not become nonsuit or discontinue, until the second prosecution is in fact abated. Extending the rule or confining it to cases where the former suit is pending when the plea is pleaded, will not tend to exclude fraud; for fraudulent parties will always conform to it. The plea is therefore sufficient to abate the indictments, if the averments in the plea are regular.

It is averred in the plea, that the writ and the indictment are for the same cause, and to recover the same penalty. Now on comparing the plea and indictment together, if it substantially appears that they are for different causes, the averment is bad, because it is against the record.

The offence charged in the indictment is the taking of unlawful interest on a loan of 400 dollars to E. C. by a contract to be performed in 90 days from the 19th of Aug. 1807. In looking into the plea, the offence charged in the declaration to the first writ, is the taking of unlawful interest on loan of 400 dollars to E. C. in 93 days from 19th Aug. 1807. These contracts are not the same, but are substantially different. And the averment that they are the same is an averment against the record, which the law will not allow. For this cause only, we think the plea in abatement is bad, and that the defendant must answer further to the indictment.

If the Solicitor General, on looking into the evidence, should find that the grand jury have mistaken the effect of the contract, and that in fact it was to be performed in 90 days with grace, he will determine, whether the ends of justice can be answered by further prosecuting the indictment.

Nolle prosequi entered.

182.

TAPPAN v. BRUEN, 5 R. 196.

In respect to a suit against several defendants on a joint contract, and some of them being out of the state, having no place of abode within it.

PARSONS, C. J. observed—It has been an immemorial practice, in the service of a writ sued on a contract against two or more defendants, if some are without the state, so that their bodies cannot be arrested, and having no usual place of abode within it at which a summons may be left, to cause the writ to be served on the defendants within the state, and to proceed only against them for the breach of contract by all the defendants. The defendants, upon whom the service is made, plead that they, with the others, did not make the promise, if the action be on *assumpsit*, and so *mutatis mutandis*, if the action be debt. This practice has also been extended to actions against the executors or administrators living in different states, as the judgment is against the estate of the deceased.

183.

ANDREWS v. HERRING, 5 R. 212.

PARSONS, C. J. observed—A stranger to the suit, in which a trustee is examined, is not concluded by the examination from proving other facts

within the knowledge of the trustee, which he did not disclose, or that there was collusion between him and the plaintiff and defendant in such suit. But when a party in a suit will produce the examination of a trustee as evidence of his confession, he ought to be bound by it.

184.

AMORY v. FELLOWS, 5 R. 219.

PARSONS, C J. At common law no testimony of witnesses is admitted, unless they are present and testify *viva voce*, and may be cross-examined by the adverse party. As this rule, adhered to without exception, would sometimes produce injustice by excluding testimony material to the issue, because the witnesses, living without the jurisdiction of the court, would not voluntarily, and could not be compelled to appear, affidavits are admitted in certain cases by our statutes, when taken pursuant to *dedimus*, or before certain magistrates.

And where a probate court is authorised to issue a *dedimus* to take the examination of the subscribing witnesses to a will, the judge may permit the will to be taken out of court, to accompany the *dedimus*, on proper security being given for its due return, as is done in chancery, when the subscribing witnesses cannot swear to their attestation, unless on inspection of the original instrument. But a *dedimus* cannot issue in any case, unless a cause be so far pending, that proper parties are, or may be in court, with such a knowledge of the matters in controversy, as to frame with pertenence all the interrogatories necessary to support their respective allegations. This rule is analogous to the statute regulation for taking depositions. Before the plaintiff can take a deposition, his writ, which includes his count, must be served on the defendant, who thus has notice of the matters in controversy as fully as if the writ had been returned and was pending in court.

But in the probate court, when the *lis contestata* is upon the execution of a will, the will, as the foundation of the suit, must be present in court, before a *dedimus* can issue. The offering of the will for probate is the institution of the suit. It is true, the devisee or executor may allege to the judge, that such a will is in existence; he may state to him the contents, and the names of the subscribing witnesses; he may exhibit evidence to support his allegations; and he may pray a citation to all parties interested, to show cause why the will, when produced, should not be proved. But if the judge, satisfied with the allegations, should issue citations, and a party adverse in interest to the probate should appear, he will then find no controversy pending. All he can learn is, that there may be a controversy, when the original will is offered; for, until then, the judge has no authority to proceed. A different rule might subject a party adverse in interest to great inconvenience. The nature of his interrogatories might depend on the inspection of the will. It might appear to be signed by the testator, or it might purport to be signed by some other by his direction; the handwriting of the testator, and of the subscribing witnesses, may be known to the party; he may recognize or he may deny their signatures. How then, without a sight of the will, can he frame his interrogatories?

Further, if a judge can call the parties before him, and issue a *dedimus*, on receiving a paper purporting to be a copy, what evidence has he that it is a true copy? In the present case, the copy was certified by the American consul. But he is not made by law a certifying officer of the copy of a will. Neither is a public notary. And the law has not ascertained what evidence of a copy shall be sufficient. It is admitted by the appellee, that

If it afterwards appear that the copy produced was not a true copy, the depositions must be suppressed. Upon this admission it must be concluded, if the present *dedimus* is to be supported, that a judge may regularly issue a *dedimus*, when it does not judicially appear that he has authority. For an error in the copy would vacate the *dedimus*. This conclusion must be rejected, for to vacate the writ, it must appear that it irregularly issued, either for want of authority to issue any such writ, or because it was issued in a case not authorizing it.

Our laws have made every reasonable provision to guard against inconvenience. Instead of supposing a case, let us take the present. The appellee might have proved this will in Cuba, where part of the deceased's real estate lies. Afterwards a copy of the will, certified under the seal of the court of that Island, approving it, with a copy of the probate, might have been transmitted and been filed and recorded here, if no reasonable objection had been made. And this record would have been, as to the estate here, equivalent to a probate. But this course has not been pursued; although we cannot suppose that a probate in this state would establish the title of the devisee to the lands in that Island.

But if we suppose this will to have been made in a country, where there is no court analogous to a probate court, it may not be necessary to send the will back, after it has been filed here, to obtain the testimony of the subscribing witnesses. A copy might have been taken and compared by the subscribing witnesses, who might make their marks on the original, and deliver it to the persons who were coming to this state with the will. Could they not have annexed this copy to their depositions, swearing that they attested the original, which they marked and delivered to certain persons whom they name? and could not those persons depose here, that the original they produce, they received from the subscribing witnesses, and is the same instrument they marked?

But a case may be so circumstanced that the will must be sent back to the subscribing witnesses. When this happens, the devisees, who wish to avail themselves of the bounty of the testator, must submit to the hazard and inconvenience of sending it back, or suffer the heirs to avail themselves of their hereditary rights. And the hazard is not greater than sending abroad a bond or other instrument, to obtain evidence of its execution, which is sometimes necessary.

We are, therefore, satisfied that the commission issued irregularly, and for this cause it must be suppressed. For it is admitted that the appellant objected to the issuing of it before the original will was produced.

It is also objected to the evidence, that if the commission was regular, the depositions were not regularly taken; because two of the witnesses did not understand English, and two of the commissioners did not understand French, and no authority was given by the commission to swear an interpreter, and no person was sworn to interpret truly between the witnesses and the commissioners.

As this point may often arise in practice, we have taken it into consideration. The testimony of witnesses, whether *viva voce* or in writing, cannot be admitted in evidence to a jury, unless there is regular evidence that it was given on oath duly administered. In this case two of the witnesses not understanding English, and two of the commissioners not understanding French, there is no evidence that the affidavits of these witnesses is their testimony, given on oath, but the declaration of the interpreter. If he was not on oath, there is no evidence on oath of the testimony of these two witnesses, or that they testified on oath. We admit that the commissioners had authority to swear an interpreter, although not expressly mentioned in the

commission; for they had authority to examine on oath such witnesses as should be produced, and the interpreter for this purpose, is a witness produced in the cause; and also, because the authority to swear an interpreter is necessary for the examination of witnesses, whose language the commissioners do not understand, but which witnesses they are authorised to examine on oath.

But there is no return by the commissioners that Masias, who appears to have acted as interpreter, was sworn by the commissioners to interpret between them and the witnesses. To remove this difficulty, it is said that he acted the character of a public sworn interpreter of the place. These sworn interpreters are frequently appointed in foreign ports, to facilitate commercial intercourse between strangers and the inhabitants. But we know not the nature or the extent of the oath under which they act, and are satisfied that the imployment of a person as a public sworn interpreter is not sufficient, but he ought to have been sworn by the commissioners truly to interpret between them and the witnesses. It is said that this was the fact, as appears from the deposition of one of the commissioners taken afterwards under another commission. We have the deposition of the interpreter, and of the other two commissioners, taken at the appellants motion; but they are silent as to this point. The words of the first commissioner are "Masias, who was sworn to interpret, he being a sworn interpreter." The language is equivocal; and the commissioners should have returned the fact; and the omission cannot be supplied by affidavits taken afterwards.

Another objection is, that the appellee prepared and wrote the depositions in the absence of the witnesses, before they appeared before the commissioners This objection is fatal. The mere form of the caption, or the stating of the questions might have been got over. But here the answers may be considered as stated, for the depositions contained all the facts afterwards sworn to.

The statute, by virtue of which this issue was joined, and tried by the country, authorises the court, whenever either the sanity of the testator, or the attestation of the subscribing witnesses in his presence are in dispute, to cause these facts to be tried by a jury. At the trial of the issue in this cause, the appellant's counsel construed the issue as including only the signature of the subscribing witnesses in the testator's presence. This construction was not opposed by the counsel for the appellee, and was admitted by the court. Under this impression, the jury were directed that in the trial of the issue the fact of the signing of the testator might be taken for granted, as it was no part of the issue; and, therefore, the appellants now object to the direction of the court as wrong.

The words "the attestation of the witnesses in the testator's presence," may be confined to their subscription in his presence; but on deliberation it is our opinion that the most just and reasonable construction is, that this attestation includes the facts attested to, and not merely the subscription of their names. This is the most natural import of the words; and this construction is strongly supported by the extreme difficulty of assigning any plausible reason why the legislature should authorise a jury to decide on the subscription of the witnesses in the testator's presence, and not on the signing and publication by him.

The verdict, therefore, finds a fact, which was considered as not in issue, and which the jury were instructed not to inquire into, but to take for granted. But we add, that if the jury were by law confined to enquire into the subscription by the witnesses only, yet we are satisfied that they ought not to have taken the signing by the testator as granted; because connected with other evidence in the cause, the jury might infer from it the fact of the sub-

ecription of the witnesses, which certainly was in issue. If the fact of the testator's signing had not been in issue, yet the appellee might have given it in evidence, because connecting it with the other evidence in the cause, the jury might have inferred the existence of the facts in issue.

Another objection, which is of the negative kind. It appeared from the evidence taken under the first commission, that the subscribing witnesses swore to their subscribing their names in the testator's presence. It appears from the evidence taken under the second commission, that two of these witnesses swore that they did not subscribe their names until after his death. Whence the appellant's counsel infer that they are not credible witnesses, and as there was but one witness who swore that all three subscribed in his presence, the testator did not sign in the presence of three credible witnesses; and that the court ought so to have directed the jury.

This is a legal objection, and if it should prevail, it would be unnecessary to send the issue to another jury for trial. But we are clearly satisfied that this objection cannot prevail. The construction of the words, "credible witnesses," used in an English statute of wills, has heretofore been a subject of much dispute. In our opinion it is used in the sense of *competent*; and those witnesses are credible, whom the law will trust to testify to a jury, who may afterwards ascertain the degree of credit they have. Upon any other construction we must conclude that the law has authorised the admission of incredible witnesses, and submitted their credit, of which the law presumes they have none, to be weighed by a jury.

There is another difficulty. The judges must determine whether witnesses are competent, and rules of determination are prescribed to them; but the judges are not entrusted to decide what witness is credible. This is within the exclusive powers of a jury. The appellant has admitted that the objection ought not to prevail, if the denial by the witnesses of their subscription was the effect of fraud. In this cause fraud was certainly attempted to be proved. But we do not see any ground for the distinction. If the witnesses are competent at the trial, they must be sworn, and the whole evidence must be left with the jury. If they are satisfied that the will was executed in the presence of three witnesses, who then were competent, so that the law would permit them to be sworn, and their credit to be weighed, it is enough. The objection, therefore, goes to the weight of the evidence; and on this ground we are by no means prepared to say that the verdict was against the weight of the evidence laid before the jury.

We are satisfied that the commission issued too soon, that it was irregularly executed, and that the construction of the issue was misconceived; and that for these reasons the verdict must be set aside. As to this last reason, if the issue had been rightly conceived, although the jury were directed to consider as granted the fact of the testator's signing, which could be determined only by the court; yet, if on enquiry by the court, it should be settled as a fact that the testator did sign, there would seem to be no reason to send the cause to another jury, who have proof of the same fact which the former jury considered as proved.

185.

Commonwealth v. The Union Fire and Marine Insurance Company, 5 R. 230.

Parsons, C. J. Information in the nature of *quo warranto* are properly grantable for the purpose of enquiring into the election or admission of an officer or member of a corporation, when moved for by any person inter-

ersted in, or injured by such election or admission, if the same was unduly made. And upon such information, if the election or admission was illegal, judgment of a motion might be entered, and a fine might also be imposed on the party who had usurped upon the commonwealth.

We are well satisfied that a corporation, as well when created by charter under seal of the commonwealth, as by a statute of the legislature, may, by nonfeasance or misfeasance forfeit its franchise, and that by judgment on an information, the commonwealth may seize them. But an information for the purpose of dissolving a corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the commonwealth, to be exercised by the legislature, or by the attorney or solicitor general, acting under its direction, or *ex officio* in its behalf. For the commonwealth may waive any breaches of any condition expressed or implied, on which the corporation was created; and we cannot give judgment for the seizure of the franchises of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment. This distinction between informations in the nature of a *quo warranto*, to impeach any election or admission of a corporate officer or member, and informations to dissolve a corporation is well settled, and upon sound principles of law. (2 Burr. 869.)

The parties applying for this rule state that they are members of the corporation, and allege that the corporation have been guilty of malfeasance, in not requiring from the members payment of the fifty per cent. of their subscriptions within the time limited by the statute of incorporation, and also in taking greater risks than are authorised by the terms of their incorporation. We have not enquired into the truth of these allegations, because this rule is not moved for in behalf of the commonwealth, or by its authority. Rule discharged.

186.

PORTER v. PERKINS ET AL. 5 R. 233.

PARSONS, C. J. Since the statute of frauds, partition by parol is void. But a several possession may be the consequence of a parol partition; and there is no fact disclosed, from which it appears that a deed of partition was executed. Whether a deed of partition was or was not executed is a question of fact and not of law. The fact ought to have been stated by the parties, or left to the decision of a jury on evidence. The severance of possession commenced about twenty-seven years since, and yet, two years after, B. one of the tenants, released all his right to N. the other tenant; and this is all the evidence, whence an inference could be made, that the partition was by deed.

The other question is, as the plaintiff has clearly proved a seizin, either by right or by wrong, whether the title the defendants have shown authorised them lawfully to enter. For if they entered unjustly, the plaintiff must recover on his seizin in fact.

No man having a title to land can pass the same by release, when neither of the parties to the release have any possession, actual or legal, in the land released. Nothing here passed by B's release to N., A. being then in possession claiming a fee simple.

Neither can a man having right, convey when he is dissesed. When N. conveyed to S., the plaintiff, either by right or by wrong, was in fact seized. If by right, N. had no estate to convey; if by wrong, N. was dissesed, and so long as the disseizin continued, no estate could pass by his convey-

ance to 8. It is unnecessary to state the defendant's title further, for the foundation failing, the superstruce must fall.

Let the defendant be called.

187.

WILLARD v. NASON, Administratrix, Defendant in Error, 5 R. 240.

PARSONS, C. J. As an executor or administrator cannot at common law maintain a real action, to recover the possession of lands of the deceased, if such action can be maintained, it must be by force of some statute: no such provision is expressly made by any statute; and if it exists, it must arise by implication, as necessary to make the real estate assets for the payment of debts on the deficiency of personal estate.

It has been thought that when the executor or administrator is out of possession, he cannot sell the lands of the deceased, although a license therefor has been obtained. The law upon this subject has been misunderstood. Lands devised, pass by the will to the devisee, who has the right of entry and possession; and if undevised, they descend to the heirs, who are entitled to the possession. The executor or administrator has in no case, *virtute officii*, a right to the possession of the deceased's lands. If they are wanted to pay the debts of the deceased, the executor or administrator may on license sell them, when in the possession of the devisee, his heirs or assigns; or of an heir, his heirs or assigns, or of a disseisor of the devisee or heir. The right to sell being a naked power, which cannot be defeated by alienation or disseisin. And the purchaser of lands lawfully sold by an executor or administrator, may enter and maintain a real action on his own seizin, by virtue of the conveyance and of his entry.

That many real actions have heretofore been maintained by administrators must be admitted, arising from a want of due attention to legal principles. And there is reason to believe that anciently administrators have maintained real actions, where there was no deficiency of personal assets.

An old statute of 9 G. 1. c. 1. enacts that rights of common, as being real estate, descend to the heirs, who alone shall recover them: and that actions to recover them, sued by an administrator *de bonis non* shall be dismissed. It is not easy to decide on the principles, upon which this statute was made. Perhaps rights of common have been supposed to be personal estate. And it is more difficult to determine, why the prohibition to maintain a real action for their recovery is confined to an administrator *de bonis non*. For the first administrator might die soon after the deceased, and the second administrator might indeed want them to administer as assets. But the principle that rights of common being real estate, descend to the heir, who alone may maintain a real action to recover them, is equally applicable to all real estate whatever.

As the knowledge of the law has been improved, many errors in practice have been discovered; and when not sanctioned by a series of judicial decisions, they have been avoided. Whatever usage has existed for an administrator to maintain a real action, arose probably from a mistaken opinion, that he could not sell on license to pay debts, unless he was in the actual possession. In consequence of this mistake it has also been supposed, that when an insolvent intestate had conveyed land with intent to defraud his creditors, they could have no remedy after his decease, unless the administrator would sue the purchaser to recover the land, which suit he was not obliged to prosecute. In such a case the intestate died seised as to creditors, and the land being assets may be sold in the possession of the fraudulent purchaser: and the vendee may enter and maintain an action on his own seisin. For what-

ever estate of the intestate, an administrator may lawfully convey, is assets in his hands. The point was considered in Drinkwater v. Drinkwater, (4 Mass. R. 354.

188.

LUMMIS v. FAIRFIELD, 5 R. 248.

A commission of bankruptcy, without a certificate of discharge, is no bar to an action to recover a demand under the commission, although the creditor had received a dividend.

189.

COFFIN v. STONER, 5 R. 252.

If a person hires a vessel for a voyage at an agreed price per month, and the vessel is wrecked before voyage is completed, but the cargo is afterwards transported to the port agreed upon for delivery, the hirer is liable to pay the hire, only deducting the expence of transporting from the wreck to the port of delivery.

PARSONS, C. J. The charter-party provides for a successful voyage, and no agreement is made in case of an eventual misfortune. But it is a general rule of the marine law, if the ship be wrecked in the voyage, that when goods are saved and delivered to the owner with his assent, he shall pay freight for them *pro rata itineris peracti*. If there are no express stipulations in the charter-party precluding this rule of the marine law, it ought to have effect, and oblige the party receiving his goods to pay a proportional freight; in the same manner as he would be held to pay the full freight; if the master had hired another ship, and transported and delivered the goods at the port of delivery originally agreed upon. The charter-party in the present case does not exclude the marine law, which therefore ought to oblige the parties.

The plaintiffs acted as agents for the defendant; he might have disavowed the agency, and by refusing to receive the goods he might have avoided any charge of freight, but he did receive the goods transported to B., and thereby confirmed the agency of the plaintiffs. But he is not to be considered as receiving the goods on board the wreck, but must be holden to have received them by his agents when they were brought on shore at E. He must therefore pay the freight from D. to E. in proportion as the part of the voyage from D. to E. is to the voyage from D. to B. We do not mean the proportion in time of sailing, as was determined in the case of Luke, *et al.* v. Lyde, 2 Burr. 882, but the proportion in the respective rates of freight, so that the defendant may eventually pay according to the benefit he has actually received, which as the principle on which the marine law is founded. In this case let the average time that would be employed by the brig after her outward cargo was discharged at D. to her arrival at B., if she had not been wrecked, be ascertained, and the freight for this voyage is to be computed by the terms of the charter party at the rate of two dollars and one eigth per month. From this sum must be deducted the expence of the freight or transportation from E. to B., and the remainder is a charge on the defendant.

On this principle the master received the same freight that he would have received, if he had himself furnished another vessel at his own expence to transport the defendant's goods to the destined port of delivery. And so

far as the defendant is benefitted by the transportation of the goods from D. to E. so far he shall pay the freight. This demand for a *pro rata* freight, adjusted on these principles, is a reasonable one; but the rule adopted in the case of Luke v. Lyde, is manifestly unjust; for it is in that case admitted that the expence of freight to the destined port, from the port where the freighter received the goods, was as great as from the shipping port, so that he received no benefit from the proportion of transportaion, for which freight was demanded of him.

If the goods had been shipped at D. for B. on a freight there stipulated, from the amount of freight thus stipulated, the expenses of the freight from E. to B. should be deducted. But in this case we have recourse to the charter-party, because the rate, of the freight is there agreed, and probably at a less rate as the defendant was to become interested in the voyage, and to pay one fourth of the outfits, expenses and wages; and as he is bound by this agreement, he ought to have the benefit in a reduced rate of freight.

In the application of this rule, we have supposed that the brig had on her return, a full cargo, and that the whole of the fourth part was delivered to the defendant at E., either sound or damaged. But it appears from the case, that a part of the cargo was totally lost, and if the brig was deficient in her lading, a proportional deduction ought to be made, not only for a fourth part of the loss, but also of a fourth part of the deficiency; for the hire agreed by the charter-party was for a full lading, or for such a cargo in bulk as was usually imported from D.

Another point submitted is, what proportion of the salvage, and of the transportation to B. the defendant ought to pay. The defendant is not obliged to pay any part of the expenses of landing the cargo at E., nor any part of the seaman's wages accruing after the discharge of the outward cargo at D. These are all the charges on the freight of the goods saved and received by the freighter, and must be borne by the owners of the brig, who must look to the freight for their indemnity. As to the subsequent charges of transportation from E. the defendant must pay the expense of transporting his own goods. The voyage was then terminated, and upon this point it is not material, after he received his goods, whether they were taken from the brig, or whether he purchased them at E.

Upon these principles let the rule of reference be made.

190.

THATCHER, JUDGE OF PROBATE v. LYMAN, ET AL. 5 R. 260.

Debt on bond; and the defendants prayed oyer of the bond.

The court said, "We cannot give you oyer of the original bond. That remains still in the office of the register of probate, and is not to be brought into court, unless upon a trial of the general issue, *non est factum*. In all other cases a copy is sufficient. Let a copy be furnished the defendants.

191.

COMMONWEALTH v. WAITE, 5 R. 261.

The confession of a witness as to his incompetency to testify in a criminal case, is not admissible.

PARSONS, C. J. If the law were not so, any unwilling witness for the

Commonwealth, might deprive the same of his testimony by declarations of his interest in the presence of the friends of the defendant, who by testifying to those declarations might always prevent his being sworn.

In the trial of offences, but a small part of the trial is intrusted to the judges. The offender's peers are to pass on him; and to set aside a verdict merely at our discretion, and not on grounds which the law considers as sufficient, would be an arbitrary interference in judicial proceedings, and a violation of the important rights of jurors. The motion to set aside the verdict on the ground that the defendant now has evidence to discredit the witness against him, cannot avail him. He does not pretend that he was surprised at the trial, by the testimony of this witness. He expected it, and attempted at the trial, by the testimony of witnesses, to destroy his credit, by proving that his general character, as to truth, was bad. This evidence was encountered by the testimony of witnesses sworn in behalf of the government; and the trial was by a jury of the county, who probably knew the general character of the witnesses. General character must, from its nature, be generally known; and the witness R, must be known in the town where he lived. His home is at P. where the trial was had, and any number of witnesses might have attended on short notice. To give time to a defendant to scrutinize a neighborhood, and discover some who may testify to a witness' general bad character, which if the testimony be true, must be generally known; would be preposterous and dangerous.

It is alwas a cause of regret that a man will commit an offence which subjects him to punishment; and the regret is greatly increased when the offender has some rank in society, with respectable connections who may suffer with him. But to all considerations of this kind, the law is inflexible; and as its ministers we must discharge our duty. If there are any equitable or humane causes for relief, they belong to the executive. Sentence must be passed on the verdict.

192.

BURNHAM v. WEBSTER, 5 R. 266.

PARSONS, C. J. The legislature may unquestionably regulate the taking of fish within the state, and oblige all the citizens to conform to the regulations, by inflicting penalties for the violation of them. And such a statute is a public statute. It is obligatory on all the citizens; and they must notice it at their peril. We must, therefore, *ex officio* take notice of it. Indeed all the laws regulating the taking of fish are made for the public benefit, to preserve the fish, and are public statutes.

The exception taken,—Because the plaintiff has declared for different penalties, at different times, in the same count, when there ought to have been four different counts in the declaration for the said penalties; and no day in particular is mentioned, when three of the said penalties were incurred—might have prevailed, if it had been taken on demurrer. But as one offence is properly laid, and the jury have found but one penalty forfeited, we must after verdict presume that the jury have convicted the defendant of the offence rightly laid, and that the judge did not permit evidence of any other offence to be given. This is settled law in tresspass, when several trespassers are laid to be committed at divers days, and times between two certain days, where from the generality of the verdict of guilty, it is not certain but the jury might have found the defendant guilty of, and assessed the damages for all the trespasses. But *a fortiori* judgment ought

not to be arrested in this case; for the jury cannot be presumed to have found the defendant guilty or more than one offence.

The last exception, is, "Because it appears from the pleadings in the case, that the debt was incurred, (if any) by the defendant jointly with other persons, who ought to have been joined in the action." The truth of this allegation does not appear of record. The plea in abatement, making it, was waived, by voluntary pleading to the action, which he was not obliged to do without a judgment of *respondeas ouster*, and it must now be considered as if it had never been filed. If it were not waived, no resort could be had to it on a motion in arrest of judgment, where the allegations of the plea are a cause only of abatement. But as a matter of practice, we have considered this point, and we are satisfied that the plea would not have been sufficient to abate the writ. When an offence, created by statute, may be committed by one alone, but in fact is committed by several, the offence is not in the nature of a joint contract, but of a trespass, although the penalty be sued for in a *qui tam* action of debt or information.

In an information against several defendants, the plea is that they are, and each of them is not guilty. And in an action of debt *qui tam*, not guilty is also a good plea. But if debt *qui tam* be sued against several, demanding a joint forfeiture, on a plea of *nil debet*, all the defendants ought to be found indebted, because the form of the action is on a joint contract, although the debt arises from a tort. But unquestionably the action might have been sued against any one or more of the defendants; for the tort being several, as well as joint, the debt may follow the nature of the tort, on which it is founded. The exception to this rule arises from the nature of the offence. As when the offence created by a statute is the making of a contract prohibited by it, the contract must be charged and proved according to the truth of the case. For if it be proved to be different from the contract alleged, they cannot be presumed to be the same contracts; 2 Hawk. P. C. 26, s. 75.

The plaintiff must have judgment on the verdict to recover the penalty of $15, with full costs; for although the action be in its form on contract, yet it is not a simple contract, within the stat. of 1303, c. 154, s. 5.

193.

WATSON, ET AL. v. TODD, AND TRUSTEE, 5 R. 271.

PARSONS, C. J. At common law, goods seized on a *fieri facias*, cannot be seized by the same sheriff on another *fieri facias;* because they must be sold on the first, and because the sheriff has already acquired in himself a special property by the seizure.

But in this state, the law of attachment is different. Originally the defendant was attached by his goods, to appear, and when he appeared, the attachment was dissolved. Afterwards the attachment was continued to the judgment, when it was dissolved. And finally the property attached, if the plaintiff recovered, was to be holden by the sheriff thirty days, that the plaintiff might out of the property satisfy his execution. But if he did not deliver his execution to the officer in thirty days, the attachment was finally dissolved. And on these principles the priority of attaching creditors is founded.

But as the defendant might be attached by his lands or goods, when in fact there was no cause of action, the same officer, who had the goods in possession, might again attach them, or rather continue to hold them, to compel the defendant to appear and satisfy the judgment of other plaintiffs.

Hence a second attaching creditor may have the benefit of goods, or a balance in cash remaining after the satisfaction of the first execution.

As to lands, the practice is different Originally, when a man was attached by his lands, the officer to compel his appearance, ought to have taken the profits into his own hands. But in fact, the defendant is never disturbed in the possession or pernancy of the profits, until the execution be leivied. Different plaintiffs may cause the same lands to be attached, and by different officers, as by a sheriff and by a coroner. And after enough has been taken by the first attaching creditor by appraisement, the second attaching creditor may take enough of the remainder by an appraisement, and so on to a third, until all the land be appraised.

As to goods, the officer must hold them in his actual custody, so that he alone can control the possession; they cannot, therefore, be attached at the suit of a second creditor, but by a writ executed by the officer, who already has the possession. For another officer in order to attach, must lawfully take the possession; but he cannot lawfully take the goods from the officer, who has first lawfully attached them, he having a special property by his prior attachment. When we speak of different officers, we do not mean different deputies of the same sheriff, for all are the servants of the sheriff, and the possession of any deputy, by virtue of an attachment, is the possession of the sheriff.

194.

JEWETT v. JEWETT, ADM'X, 5 R. 275.

PARSONS C. J. On the decease of C. Jewett, the defendant was duly appointed administratrix on his goods and estate. This action was then sued against her, to recover a debt due from the intestate. Pending the action the judge of probate removed the defendat from the office and trust of administratrix, upon the petition of the plaintiff. Afterwards the defendant pleads this removal in bar of the action; and to this plea there is a demurrer and joinder.

The plaintiff to maintain his demurrer, has argued, that if the matter of the plea be sufficient, it ought to have been pleaded in abatement in bar; and that if pleaded in abatement or in bar, it ought to contain an allegation that she had fully administered; for as the action was rightfully commenced, she might retain sufficient assets against a subsequent administrator.

The general rule is, that matters, which show that the plaintiff has no cause of action in any form against the defendant, are properly pleaded in bar. But if the plainitff has a good cause of action, which can be supported in another writ in another form, the plea then ought to be in abatement.

In the case at bar, if the matter of the plea be good, it shows that the plaintiff has no cause of action against the defendant, either in this or any other writ.

The other objection deserves further consideration. The defendant ought not to be twice charged on account of the plaintiff's demand; once in this action, and again by the subsequent administrator. The plaintiff insists that she will not be twice charged, because she may retain sufficient against the subsequent admininistrator. This may be correct at common law. By that law, the assets of the intestate are marshalled according to the nature of the contracts, on which the debts are due; and a judgment debt is of the highest nature, and is entitled to the preference. When, therefore, an action is rightly commenced against an administrator, a subsequent determination

of his power, pending the action, shall not defeat it; and if judgment be recovered, their is no inconvenience in the defendant's paying it, and retaining against his successor; because whether it be reduced to a judgment, either against the defendant or against his successor, having become a judgment debt, it may be satisfied without injury to the rights of other creditors. And to this point, in Comb. 465, there is a dictum of Lord Holt, that an action, rightly commenced against a special administrator, may be prosecuted against him after the determination of his power, and he may retain sufficient to satisfy the judgment.

But by our laws, the rights of creditors are different. No one debt has a a priority over another, but are all to be paid *pari passu*, excepting debts due to the United States, to the commonwealth, and for the charges of the last sickness and funeral of the deceased: And if there are not assets sufficient to pay all the debts, the estate must be represented insolvent, and a *pro rata* distribution made among the creditors, Here the character of the estate, whether solvent or not, is not yet ascertained: we must, therefore, determine the merits of the plea on general principles.

If the defendant can retain, she would suffer no inconvenince; but the other creditors might be injured. To adjudge the plea bad, will amount to a declaration that the plaintiff have satisfaction of his judgment, if the estate be insolvent, either of the estate of the defendant, or out of the fund, in which all the creditors are interested, in proportion to their debts. But an allowance of the plea, can in no event be productive of injustice. If the defendant has assets, she must account for them with, and pay them over to the succeeding administrator, And if the estate be solvent, the plaintiff will receive his whole debt; if it be insolvent, he will receive his rateable dividend.

At common law, an executor *de son tort* may discharge himself of all the effects he has appropriated to the exoneration of the rightful administrator. How far in this state he could exonerate himself by paying debts when the estate is insolvent, it is not necessary now to decide. Perhaps so far as his payments had injured other creditors, he would be adjudged to have made them in his wrong.

Considering the manner in which the assets are appropriated by our laws, the plaintiff cannot further prosecute this action against the defendant, and the defendant's plea in bar is good.

195.

ILSLEY, ET AL. V. STUBBS, 5 R. 281.

PARSONS, C. J. Anciently replevin was generally sued out to replevy cattle taken as a pledge; but in fact, replevin lies for him who has the general or special property in chattles, aganist him who has wrongfully taken them. But chattles in the custody of the law cannot, at common law, be replevied, as goods taken by distress, upon a conviction before a justice, or goods taken in execution; and by parity of reason, goods attached by an original writ, as security for the judgment, cannot be replevied. But if they be wrongfully taken by virtue of legal process, the remedy of the owner was by action of trespass or trover against the officer. For the common law would not grant process to take from an officer, chatties, which he had taken by legal process, already issued. But the statute of 1789, c. 26, s. 4. has altered the law in this respect; it provides that this writ may issue against the officer, if the plaintiff in replevin be not the debtor.

196.

BAILEY v. TABER, ET AL. 5 R. 286.

This action was brought to recover the contents of 37 promissory notes, each under $5 payable to bearer, &c. The defendants, the makers of the notes, set up as a defence to the action, the statute of 1804, c. 58, which declares notes of the like description, to be utterly void; and upon consideration the court held it to be competent for the defendants in this action to set up and maintain such defence.

PARKER, J. who declared the unanimous opinion of the whole court, observed: However hard the operation of the statute may appear to be against persons, into whose possession such notes may have come *bona fide*, and for a valuable consideration, it is an hardship created by law, for the public good; and the courts of law are prohibited from granting any relief against it. Nothing but a reluctance to permit a man to avail himself of a falsity in circulating these notes, and afterwards to avoid payment by showing the truth, could have caused a hesitation at the trial. But it is not a novel doctrine, that a person shall be permitted to avoid his contract by alleging his own criminality, provided it consists in some positive statute of the government. Contracts, the consideration of which is money won at play, or loaned at unlawful interest, have always been subject to the same rule, not only against those who participated in the offence, but even against innocent indorsees, when they have claimed the performance of such contracts. And it need not be specially pleaded; for in *assumpsit*, every thing, which destroys the right of action, may be given in evidence under the general issue.

197.

THATCHER v. DINSMORE, 5 R. 299.

This action was brought to recover the amount of two notes, by which the defendant "as guardian to A. L. an insane person," promised the plaintiffs to pay them or order, &c. At the time of giving this note, the defendant was the guardian of A. L. an insane person; and the consideration of the note was the proper debt of A. L. But defendant had been duly discharged from his trust, and that before the commencement of the action: Held, that he was liable.

PARSONS, C. J. The guardian of an insane person cannot make his ward liable to an action as on his own contract, by any promise which the guardian can make. Neither can the defendant be sued in his capacity of guardian, so as to make the estate of his ward liable to be taken in execution; for the judgment is not against the goods and estate of the ward in his hands, but against himself. A creditor may sue the insane person, who shall be defended by his guardian, and in that case judgment being against the insane person, it may be satisfied by his property.

The defendant's description of himself in the notes, cannot vary the the form of the action; but it is for his own benefit, that on the payment of the notes, he may not be precluded from charging the monies paid to the account of his ward. If the defendant, therefore, was ever liable to this suit, he must continue liable, notwithstanding the discharge of the guardianship; for by that the plaintiffs cannot be affected, whose claim is on the defendant personally, and not on his official character.

But the ground of defence, which requires the most attention, is, whether there was a sufficient consideration for the promise; for it may be

said to be a promise to pay the debt of another, which is no good cause of action, although in writing, if there be no sufficient consideration expressed. For the statute of 1788. c. 16, which provides that a man shall not be holden on his promise to pay the debt of another, unless the agreement be in writing, does not render a consideration for such promise when written unnecessary; for a written contract is not a specialty, which from the solemnity of its execution presumes a consideration.

The notes in this case are negotiable, purport to be for value received, and are in fact in consideration of debts then justly due from the ward to the plaintiffs; which debts the defendant was bound to pay, if he had sufficient assets, which it is not denied that he had, when the notes were given. Now a negotiable note, expressed to be for value received, is a promise for a legal consideration; although as between the original parties the promisor may show that there was no value received.

It has long been settled as law in this state, that a negotiable note, given in consideration of a simple contract debt, is a discharge of the simple contract. This was decided before the revolution, in an action commenced by Warren, administrator of Wheelwright. It was found specially, that the defendant had given a negotiable note to the plaintiff's intestate, in consideration of the debt sued by the administrator, and the defendant was discharged. The reason of the decision was, that the defendant might not be held to pay the money twice. For if the administrator could recover, the defendants might afterwards be obliged to pay the note to an indorsee, ignorant of the consideration It was, therefore, determined, that the law will presume a negotiable note as agreed by the parties to the payment of the simple contract. This case does not, indeed decide that the plaintiff may not encounter the presumption. by proving an express agreement, that the note should be received as collateral security.

In the case before us, the ward justly owed the plaintiffs, and the defendant was obliged to the payment of the ward's debts, if he had assets. These notes, therefore, must be considered as a discharge of the ward from his debts due to the plaintiffs as paid by the guardian. And the defendant may lawfully indemnify himself out of the estate of the ward, by action for money paid to his use, in the same manner as if the defendant, instead of giving the notes, had paid the debts with his own money. There is, therefore, a sufficient consideration appearing on the face of the notes, and it appears that in fact there was a legal consideration moving from the defendants, by having their debts against A. L. discharged.

198.

WATERMAN v. ROBINSON, 5 R. 303.

The messenger of the commissioners of a bankrupt delivered goods of the bakrupt to a stranger, taking his obligation to keep them safely; and to redeliver the goods on demand, held that the bailee having neither a general nor a special property in the goods could not maintain replevin.

If the action depends on the bankruptcy of a stranger, the assignee not being plaintiff, the plaintiff must prove the act of bankruptcy, and the regular issuing of the commission.

PARSONS, C. J. Trover may be maintained by him who has the possession; but replevin cannot be maintained, but by him who has the property either general or special. Admitting the commission in bankruptcy, and the proceedings under it to be regular, what property had the plaintiff in the

goods? The general property was in the commissioners until the assignment, and then in the assignee. The messenger, if any person, had the special property, and not the plaintiff, who had no interest in the goods, but merely had the care of them for safe keeping. If his possession was violated, he might maintain trespass or trover, but he had no special property, by which to maintain replevin; in which the question is not of possession, but of property, although possession may be *prima facie* evidence of property. On this ground we are of opinion that the plaintiff cannot maintain this action, he not proving that either the general or special property was in himself.

But in this action of replevin the plaintiff must prove an act of bankruptcy, and that the commission regularly issued on the petition of a creditor of the bankrupt. He must also then prove the debts of the petitioning creditor. To prove these facts at common law, the best evidence which the nature of the case will admit must be produced.

No evidence was given of the act of bankruptcy, and evidence, not the best the nature of the case admitted, was received to prove the debt of the petitioning creditor, being only a copy of the oath annexed to the petition. The plaintiff must on this ground fail, unless the statute of bankruptcy has provided that in a case like the present, these facts may legally be presumed from the evidence offered, or has superseded the necessity of proving them, because the certificate of discharge is proved.

The plaintiff cannot bring himself within any provisions of the statute, and he ought to have produced the regular evidence of an act of bankruptcy, and of the debt of the petitioning creditor. Not having done this, he has on this ground failed.

Conformably to the agreement of the parties, the verdict must be set aside, and the plaintiff must be called.

199.

MOOR v. BOSWELL, 5 R. 306.

Judgment will not be arrested when the defect is not in the title, but in the form of declaring it.

PARSONS, C. J. The action of debt upon the statute of 1795, c. 41, commonly called the fee bill, to recover of the defendant a deputy sheriff of the county of Kennebeck, thirty dollars, being the penalty provided by that statute, for wilfully demanding greater fees for the services mentioned in the statute than are thereby allowed. The defendant pleaded the general issue, and a verdict having been found against him, he now moves to arrest the judgment.

It is a general and a reasonable rule of law, that after a verdict judgment may be arrested, if it appear from the declaration that the plaintiff's title to his action is defective; but judgment will not be arrested when the defect is not in the title, but in the form of declaring it.

Let us now examine the declaration, and discover if there be any defect, and if there is, whether it is in the title to the action, or in the form of setting out the title. The allegation is, that the defendant wilfully and corruptly received two dollars and seventy-nine cents, being greater fee for the service and collection of an execution, which before was described and averred to have been delivered to the defendant, a deputy sheriff. Fees are provided by the statute for serving an execution, and poundage for receiving the money. And it is very clear, that if the fees of two dollars and seventy

nine cents had been wrongfully received for the service of the said execution and for poundage, the penalty would have been incurred.

The objection is, that there is no averment that these fees were received in fact for the execution and for poundage. There is a defect in the declaration in this respect; and upon special demurrer the defendant would have had judgment. But taking together the whole declaration, the title to the action is not defective. It sufficiently appears that the demand for the penalty is for excessive fees for services noticed and provided for in the statute. There is an averment that they were wilfully and corruptly received. And a verdict could not have been found for the plaintiff, unless he had given evidence to the jury, that the defendant did receive the fees complained of for the service of, and for poundage on the execution. The defect in the count is not in showing a defective title, but in showing his title defectively. If the defendant would have availed himself of this defect, he ought to have demurred, and then the plaintiff might have amended the formal omission on payment of costs. The judgment, therefore, is not arrested, but must be rendered on the verdict.

200.

GETCHELL v. CLARK, 5 R. 309.

Attorney's lien for fees.

The court in this case observed, that before judgment, it was very clear that the plaintiff might settle the action, and discharge the defendant, without or against the consent of his attorney, who had no lien on the cause for his fees; that, after judgment, if the plaintiff released the judgment to the defendant, the law had provided no remedy for him, but an action for his fees against his client.

201.

COLBY v. SAMPSON, 5 R. 310.

Every liberty given to a prisoner, not authorized by law, is an escape.

Thus, the execution being against a deputy (gaoler) of the sheriff was properly directed to the coroner, who, having no gaol, committed his prisoner to the county gaol, of which, by law, the sheriff was the keeper, held, that the coroner was guilty of no misfeasance. Executions against sheriffs are against their estates, but not against their bodies, because they cannot be committed. When, therefore, a coroner has arrested on execution, he, like a constable, can only carry the prisoner to the goal, and offer to deliver him with a copy of the precept. If the sheriff refuse to receive and safely keep him, or if the sheriff is not there, nor any keeper appointed by him, to receive and confine the prisoner, the coroner has done his duty; and if afterwards the prisoner go at large, it is the escape of the sheriff. If the sheriff make a prisoner of the gaol keeper, and give him the keys, it is the escape of the sheriff; for having the keys he is not restrained or imprisoned.

202.

MORSE v. HODGSON, ET AL. 5 R. 317.

A bond voluntarily executed by a plaintiff in replevin to the officer, is not void on account of not conforming to the statute.

PARSONS, C. J. As the defendants have not pleaded performance of the condition, nor any excuse for not performing it, the plaintiff must have judgment, unless from the facts disclosed in the plea, or appearing on the face of the bond, it is void in law.

Without a bond in the form directed in the statute, the officer may be sued as a trespasser for taking the goods from the defendant in replevin, if he choose to consider him in that light, because the injunction of the writ is on a condition not performed by the plaintiff in replevin. Or if the plaintiff in replevin tender to the officer a sufficient bond in due form, and the officer refuse to receive it and to execute the writ, he is answerable to the plaintiff in replevin, in an action of the case for damages. But if the plaintiff execute an informal bond voluntarily, and to obtain possession of the goods, and the officer thereupon deliver him the goods, the defendant in replevin may if he please accept the bond, and pursue a remedy at law upon it against the obligors, unless the bond be void of the common law or by statute. Bonds for ease and favor are void here by our common law, which is founded on an English statute, in force before the settlement of this country. But a bond for ease and favor is given to an officer having the custody of the body, to obtain indulgence not authorised by law. This, therefore, is no bond for ease and favor. Bonds given to an officer, to indemnify him for a breach of his duty, are likewise void at law. But this is not a bond within this description. Indeed, we do not recognise any principle of the common law, by which the bond in this case is void at law. If it be void, it must be so in consequence of the statute directing the form of the writ of replevin. True it is, that the condition in this case is variant from the form there directed; but that statute does not prohibit the taking a bond of any form, or declare a bond of any other form void. The defendants were not obliged to give this bond; and if a formal bond had been tendered to the officer, he must have executed the writ, or have been answerable for all the damages sustained by the plaintiff through his negligence or refusal. And besides, as the defendants are by statute entitled to be relieved against the penalty, on payment of the just damages, this bond is not more prejudicial to them, than one with a condition in due form would have been.

203.

NORTH, Libellant, v. NORTH, 5 R. 320; BROWN, Lib. v. BROWN, ibid.

These were cases of libel for a divorce a vinculo for adultery.

By the Court. It must be presumed that the libellant was knowing to the offence, and by her posterior conduct she has in effect pardoned the offender and remitted her claim to a divorce, which upon these facts cannot be decreed.

The paramour was offered as a witness to prove the charge, and the court said he might be sworn; but if it should appear from his testimony that he was the paramour, they should recommend to the attorney for the government to lay the case before the grand jury, that he might be indicted. If a witness, the court added, they should enquire of him with whom the crime was committed.

204.

THE PRESIDENT, DIRECTORS, &c. OF THE LIN. & K. BANK, v. DRUMMOND, 5 R. 321.

If a grantor conveys land upon a condition to be performed by the grantee, and the

grantor continues in possession, the fee remains in him upon condition broken, without a formal entry.

PARSONS, C. J. The action is entry upon disseizin against the tenant as disseizor. On not guilty a verdict was found for him, subject to the opinion of the court upon the report of the judge.

Generally, the grantor of an estate upon condition, must enter for condition broken, to revest the estate in himself. But when he is in possession already, and cannot enter, the estate shall revest in him on the breach of the condition. (Co. Lit. 218, s. 350.) In this case it is found that the tenant always continued in possession, living in the house; he could not therefore enter, and without entry the fee of the estate is in him. He cannot therefore be considered at law as a disseizor and the verdict must stand.

205.

WEBSTER v. LEE, 5 R. 334.

Assumpsit by the indorsee of a note against the makers. The defence was payment before indorsement.

PARSONS, C. J. The defendant, in support of the issue on his part, produced an agreement between the payee of the note and himself, submitting all demands to the determination of referees, acknowledged before a justice, pursuant to the statute; and upon the report of the referees, a judgment of the common pleas was rendered. He there rested his defence, contending that it was incumbent on the plaintiff, to show that he purchased it before the agreement was made. But the judge decided the point against the defendant, and in our opinion very correctly.

In an action by the indorsee of a note against the maker, the law admits the defendant to prove payment before the indorsement, because by such payment the promise is discharged, and the note is absolutely void. But if the maker of the note would set up this defence, it is necessary for him to prove that the payment was made before the indorsement, or his defence will fail him.

The defendant called the payee to prove, that all the time of the reference he held the note, and that he did not assign it to the plaintiff until after the reference. On being cross examined, he also testified that the note was not laid before the referees, nor considered by them; and that he had never been paid. On this evidence, and on the admission by the parties of the execution and indorsement of the note, a verdict was found for the plaintiff. It is true that the payee was an interested witness, and if the plaintiff had produced him, and the defendant had objected, the objection must have prevailed. But a witness may, if he consents, testify against his own interest. In this case, the plaintiff could not object, for the witness was interested that the plaintiff should recover, and as the witness did not object, he was properly admitted. As he was sworn in chief, the defendant having admitted his competency, and having waived all objection to his credit by producing him, the plaintiff might very properly cross examine him as to all matters pertinent to the issue on trial.

Another objection is, that the testimony of the witness on his cross examination contradicts his agreement under the hands of the parties, and acknowledged before the justice. If this be true, it must prevail. The agreement contains a submission of all demands between the parties. Now the testimony of the witness does not contradict the making of that agreement. But either party may prove what demands then existed. That a

promissory note is a demand to certain purposes cannot be denied, because a release of all demands would be a bar to an action upon it. Yet it may well be questioned, whether a submission of all demands to arbitrators includes an acknowledged debt, not in controversy, and concerning which there is no difference or dispute.

If it is a fair construction of such a submission, that it includes all matters in difference, then either may prove that a particular demand was not laid before the arbitrators, and so was not a matter in difference between the parties. But as either might exhibit to the arbitrators, on the submission of all matters in difference, any personal demand he had on the party, the presumption is, that all demands were in fact submitted. But this presumption may be encountered by clear evidence that any particular demand was not laid before the referees. In Golightly v. Jellicoe, 4 Term R. 147, note, the plaintiff sued an action of covenant broken against the defendant, who pleaded that an action for some other matter was brought against him by the plaintiff, that all matters in difference were referred, that the arbitrator awarded several sums of money to be paid, and that the parties should execute mutual releases; that the defendant paid the money, and the releases were given. The plaintiff replied, that these breaches were not before the arbitrator. And on a demurrer to the replication, it was adjudged good. The judgment was on the ground, that a matter not laid before the arbitrator was not a matter in difference.

But without deciding that an agreement to refer all demands, is subject to the same construction as a submission of all matters in difference, it is manifest that an agreement to refer may not be executed, for the arbitrator may decline to take on himself the trust of arbitrating, or a party, where the rule is not *ex parte*, may refuse to appear before the referees. So a party may execute the agreement but in part, by omitting, through accident or mistake, to bring a particular demand, not in fact disputed, before the referees. And although when referees report upon all the demands submitted, the presumption is, that all existing demands were submitted, yet evidence that a particular demand was not before the referees, does not deny the agreement to refer all demands, but only proves the non-execution of that agreement in part.

The last objection to the verdict is, that the report of the referees, having been made to the common pleas, and judgment rendered upon it, no parol testimony was legal, as it contradicted the judgment. Under this objection, it may be necessary to consider the effect of this judgment. At common law, the only remedy, which a party interested in an award could have, was an action on the agreement of submission. Some further remedy being convenient, the Eng. st. of 9 & 10 W. 3 c. 15, enacted that the submission by the parties might be made a rule in any court of record in the state, and that the party disobeying the award should be subject to all the penalties of contemning an award made in any action in which he might be a party.

This statute not having been adopted in this state, no remedy, but an action at common law was given, until the passing of the statute of 1786, c. 21. The remedy given by this statute is peculiar to this state. The agreement of submission is to be signed by the parties, and to be authenticated by an acknowledgement before a justice of the peace; and it is a part of the agreement, that the referees may make their report to the court of common pleas, who may enter a final judgment thereon. On this judgment an execution may issue, as on judgments in actions commenced by writ. The design and effect of this judgment, therefore, is to execute the award, and it is conclusive evidence of the submission and of the award. But it cannot alter the

nature or extent of the agreement to refer, nor exclude any evidence proving what matters were in fact laid before the referees, where such evidence does not contradict a reasonable construction of the terms of the report.

In the case before us a sum of money is reported in full of all demands, which must necessarily be confined to all demands that were submitted to the referees under the agreement to submit. For a report on demands not submitted would be void, as without the authority of the referees. Whether the demand on this note was or was not submitted, is, therefore, a question of fact to be settled, in order to decide on the legal operation of the judgment.

The presumption is, that the demand on this note was submitted, because it was within the agreement of the parties to submit it, and we ought to presume that the parties have executed their agreement. By the evidence in the case, this presumption is encountered; for it appears that as to this note the agreement was not executed, and that the note was not brought before the arbitrators, who of course did not take it into their consideration. The report, therefore, does not include an award on the note, and the judgment cannot bind the parties beyond the award.

That the true ground, on which the judgment was rendered, may be enquired into in some cases, appears from the case of Seddon, *et al.* v. Tutop, 6 Term. 607. The plaintiff's had brought a former action on the note, and for goods sold; but on executing a writ of enquiry after a default, they gave no evidence on the count for goods sold, but damages were assessed to the amount of the note only, through the forgetfulness of the plaintiffs' attorney, as appears from the N. P. report in 1 Esp. R. 401. The plaintiffs afterwards brought another action to recover for the same goods. The defendant pleaded a former recovery of damages, as well for not paying the note as for not paying for the same goods. The replication was, that the promises in this action were not the same for which the plaintiff recovered damages in the former action; and on this averment issue was taken and joined On the trial, the plaintiffs were allowed to prove, that not being prepared with evidence on the count for goods sold, they took damages only on the count upon the note. The plaintiffs had a verdict, and the court held, that this evidence was properly admitted. This case is certainly a very strong one, and the opinion of the court appears to be founded on the very peculiar nature of the issue joined.

In the case at bar, the defence is substantially payment of the note before indorsement; and the agreement to submit all demands, the award, the judgment thereon, and the testimony that the note was then the property of D., are all produced to prove the payment. But by the counter evidence, arising from the cross-examination of D. it is manifest that this note formed no ground for any part of those proceedings, and the payment is sufficiently negatived. The justice of the case is unquestionably with the indorsee, and the law has wisely provided, that the maker of the note shall not in this case, intrench himself behind its forms against an act of substantial justice.

Judgment on the verdict.

206.

POWELL v. HINSDALE, 5 R. 343.

This action was replevin for sundry chattels; and issue being joined upon the property of the plaintiff, when a verdict was found, that part of the chattels were the property of the plaintiff, and part not.

PARSONS, C. J. By the general provision of the statute of 1784, the party prevailing, in all civil actions, shall have costs. In replevin, each party may be an actor. If the plaintiff prevails, he shall have damages for the unlawful caption and detention by the defendant, and also his costs. But if the defendant prevails, he shall have a return of the goods, and damages for the taking of them on the writ, and also his costs. Here, the plaintiff is entitled to damages for the unlawful caption and detention of such of the goods as the jury have found were his property. The defendant must have a return of such of the goods as are found not to be the plaintiff's property, with damages for the taking of them on the writ. As each party has judgment for damages, he is so far a prevailing party, and must also have his costs.

Therefore, let the clerk tax the costs for each party.

207.

HIGBEE v. RICE, 5 R. 344.

Where the legislature grants land to two or more persons, it constitutes an estate in common, except in cases where a different tenure is expressed. And if a tenant enters under a deed duly acknowledged and registered, he acquires a freehold estate in it, either by right or by wrong. If by wrong, it is an actual disseisin.

PARSONS, C. J. A grant by the legislature is a statute conveyance; and the intent of the legislature in passing the resolution, must govern. Most of the public lands which were alienated by the late province, and also by the commonwealth, were passed by virtue of acts or resolutions of the legislature. Generally the lands were granted in large parcels, to a great number of grantees, on condition of settlement, and for the purpose of forming towns to share in the public burthens, when the inhabitants should be of sufficient ability. These legislative grants have invariably and from the early settlement of the country, been considered as vesting in the grantees and their heirs, estates in common. From long uses it has acquired the force of law, and a decision repugnant to it would produce infinite confusion, and effect very may titles to land in the state. We, therefore, consider ourselves bound to decide as a rule of property not to be disturbed, that grants, by virtue of acts or resolutions of the legislature to two or more persons in fee, are to be construed as conveying to the grantees' estates in common; unless a different tenure should be expressed in the grant.

The other point reserved is, whether under any view of this case an actual ouster is necessary to be proved. The mere pernancy of all the profits, by one tenant in common, is not an ouster of another tenant in common. And in *ejectione firmae*, which is an action of trespass against the defendant the plaintiff under the general issue, to recover, must prove an ouster by the defendant. We speak not of the fictitious but of the actual *ejectione firmae*, in which neither the lease, nor the entry, nor ouster is confessed. And the reason is evident, because the ouster is not only charged in the writ, but is by the plea put in issue.

But a writ of entry will lie only against a tenant in the freehold, and if he does not disclaim, or plead non-tenure, he admits himself to be tenant of the freehold by the plea of *nul disseisin*. In this writ the demandants demand of the tenant's seizin of two-eights. If he admitted the demandants title, he might have pleaded that he did not hold the two-eights demanded against him, and this he might well plead, although he claimed to be seised of the remaining six eights, as a tenant in common with the demandants. On

this plea of non-tenure, he might have compelled the demandants to prove an ouster, to entitle themselves to a verdict. But non-tenure cannot be given in evidence under the general issue in this action.

Upon the principles applicable to a writ of entry, it would seem reasonable, that in this case, under the general issue, the demandants were not obliged to prove an actual ouster. For if the demandants have proved their seizin in fee as alleged, and the tenant, by his plea, has alleged, that he has the freehold of the tenements demanded, all that remains for him to show that he entered justly by judgment of law; and if he fail, the issue is with the demandants. But in the present case the demandants proved an actual ouster.

A conveyance by deed, duly acknowledged and registered, is by our statute of enrolments, equivalent to livery of seizin. Under this deed the tenant entered in the whole, and acquired a freehold estate in it, either by right, or by wrong. If by wrong, as appears in this case, it was an actual disseisin; and judgment must be entered on the verdict for the demandants.

208.

HAMMOND v. WADHOMS, 5 R. 353.

In respect to granting new trials.

PARSONS, C. J. We may, and we ought to grant a new trial, when the verdict is against the evidence, or when it is manifestly against the weight of evidence. In such cases, the facts ought to be enquired into by another jury. Whatever may be the inclination of our opinions, as to the conclusions the jury have made from the testimony, it is their province, and not ours, to make those conclusions.

But to grant a new trial, to give further opportunity to discredit a witness, whose testimony was not unexpected, and who had in fact been discredited, would be unprecedented, and productive of mischievious consequences.

209.

POWELL v. CLARK, 5 R. 355.

The words expressing the quantity of land in a deed of conveyance, do not amount to covenant but are merely descriptive.

PARSONS, C. J. In a conveyance of land by deed, in which the land is certainly bounded, it is very immaterial whether any, or what quantity is expressed; for the description by the boundaries is conclusive. And when the quantity is mentioned in addition to a description of the boundary, without any covenant that the land contains that quantity, the whole must be considered as mere description; for the quantity mentioned is an uncertain part of the description, and must yield to the location by certain boundaries, if there is a disagreement, whether the quantity mentioned is more or less than the quantity actually contained within the limits expressed. The covenants declared on in this case do not appear to have been made by the defendant, and the declaration must be adjudged bad.

210.

HUNT, ADM'R. v. ADAMS, 5 R. 358.

At the bottom of the note, (which was in the usual form, except the words "or order"

were not in,) was written thus: "I acknowledge myself holden as surety for the payment of the demand of the abo note. Witness my hand,

BARNABAS ADAMS.

PARSONS, C. J. The defendant objects to the evidence on which the verdict in this case was found, insisting that on his part it is an agreement to the debt of C., the signer of the note, and so is within the statute of 1788, c. 16, s. 1, which is our statute of frands, and that this agreement, containing no consideration in writing, will not take the case out of the statute. To support his objection he relies on the case of Wain v. Warlters.

As our statute of frauds is in this respect similar to the English statute of 29 Car. 2, c. 3, s. 4, that case is in point, if this be a promise to pay the debt of another within the intent of the statute. The decision in that case is of the first impression, and rests upon the legal import of the word *agreement*, as including not only the promise, but also the consideration for which it is made. And if *agreement*, as used in the statute, is to be taken, not in a popular, but in a strictly legal sense, it may be unreasonable to question the decision.

On looking further we find the case of Egerton v. Matthews, 6 East. 307, where it was determined on the 17th section of the statute, (similar to the 2d s. of our statutes,) that a memorandum for the sale of goods, signed by the party to be charged, would take the contract out of the statute, although the consideration of the bargain was not expressed in the memorandum.

These two decisions are not easily to be reconciled. A bargain is a contract or agreement between two parties; the one to sell goods or lands, and the other to buy them. A contract of this sort is void in law, unless made on sufficient consideration. And the consideration of a bargain seems to be as necessary a part of it, as of any other contract or agreement; and there is the same danger of perjury in proving the consideration of a bargain by parol, as of any other agreement. But if the word *agreement* may be understood in the popular sense, as intending the undertaking of the party charged, and as not necessarily including the consideration for it, we may approve of the decision in the latter case, while we may doubt as to the former case.

But the contract before us is not a contract to pay the debt of another within the statute. The defendant is an original party to the note as well as C., the signer. The contract, in its legal construction, is a promise made, as well by the defendant as by C., for value received, to pay ——— to the plaintiff's intestate. To this promise, C. signed as principal, and the defendant as surety. This mode of signing is an accommodation between the promisors, by which the defendant is entitled, if he pay the note, to an indemnity from C.; but as to the intestate, they must be considered as joint and several promisors.

The legal effect of a note in this form is not different from a note in the form of "For value received I promise to pay," &c. and signed by one with the word *principal* annexed to his name, and another with the word *surety* thus annexed. Or if the form of the note had been "For value received I, A. B. as principal, and I, C. D. as surety, promise to pay," &c. This last form is not uncommon, and the promise has always been holden to be made as original promisor. If the note had been made by C. and delivered to the intestate, and afterwards the defendant had been induced to guaranty the payment, it would have been necessary to consider the defendant's objection. But in the present case, the signatures of the promisors were made at the same time, and before the note was delivered to the intestate; and when he received the note, it was the note of both, and also of each; or, in other words, it was their joint and several note.

The consideration to bind the surety is apparent on the face of the note, being the credit given to the principal by the promisee for the value received of him. The case of Marsh v. Ward, in Peake's N. P. 130, is similar in principle. There the note was, "I promise to pay W. M. £—, for value received in fixtures," and it is signed R. B. T. W. W. alone was sued, and it was holden that the note was as well several as joint. In the case at bar, C. as principal, promises payment, and the defendant, as surety, promises payment; and the promise is joint and several.

211.

BOYDEN v. MOORE, ADM'R, 5 R. 365.

In assumpsit on two notes, the defendant paid into court the sum he admitted to be due, with the costs; and the plaintiff took the money out of court, but did not receive it in full satisfaction. It turned out upon the trial that the sum paid was 41 cents less than the amount due: but the jury, under the direction of the court, found a verdict for the defendant, but the court granted a new trial.

PARSONS, C. J. said—As to the ground of misdirection of the judge, it appears from his report that only one note was disputed by the defendant, that she admitted a balance on the second note, for the payment of which the money was brought into court; and that the judge having calculated the balance due on the second note, found that crediting the money brought in, there was still due to the plaintiff fourteen cents and four mills. Thereupon he directed the jury, that if they were satisfied that the defence against the first note was supported, and if on calculation they should find that the money brought in did not fully pay every cent which was due, but a small balance remained due, if that balance appeared to be a mere trifle, that their verdict ought to be for the defendant. This direction is objected to.

The bringing money into court is a practice adopted to relieve the defendant against an unexpected suit for money, which he is willing to pay, but which he has not tendered to the plaintiff before the commencement of the suit. After the defendant has brought in as much money as he thinks proper, and the plaintiff has refused to receive it in satisfaction, the defendant is entitled to have it considered as a payment made on the day on which it was brought in, and he is answerable only for further damages. He then stands on the same ground, as if on tendering money before the action, the plaintiff had refused to receive it, but had commenced his action in which the tender was pleaded.

Now it is a well known rule that the plaintiff must take care and tender enough, and if he does not, and if the plaintiff replies that there is more due than is tendered, which is traversed, the issue will be against the defendant, and it will be the duty of the jury to assess for the plaintiff the sum due on the promise; and if it be not covered by the money tendered, he will have judgment for the balance.

The defendant cannot lawfully withhold from the plaintiff any money due to him, however small the sum; and if the defendant intended to tender as much money as the plaintiff could claim, but made a mistake in her calculation, she must suffer for her own mistake, and not the plaintiff, although the injury to him may be very small, and such as most men would disregard. The deficiency from a more correct calculation than was made in the hurry of the trial appears to amount to about 41 cents. And if at the time the money was brought in, no action had been pending, and the plaintiff had then received and indorsed the payment, he might afterwards have commenced and maintained an action to recover the balance then due.

That the law will not regard trifles is, when properly applied, a correct maxim. But to this point it is not applicable. In calculating interest, there may, and probably must arise fractions not to be expressed in the legal money of account; these fractions are trifles and may be rejected. In making payments, it is sometimes not possible, from the value and divisions of the current coin, to make the exact sum; if the payment be made as nearly as it can conveniently be made, the fractional part of a small coin may be neglected; it is a trifle.

But the present case is not one of these trifles. A man may sue and recover on a note given for forty cents; also on a note given for a larger sum, where forty cents remains unpaid. It is, therefore, our opinion, that the jury ought to have been directed to calculate the interest on the second note, and deducting the payments, if a balance remained unpaid, to find that balance for the plaintiff. If any sum large enough to be discharged in the current coin of the country is a trifle, which althouh due, the jury are not obliged by law to award the plaintiff, the creditor, it will be difficult to draw a line, and say how large a sum must be, not to be a trifle. The law gives us no rule. A dollar between many parties is a trifle.

But whether the court ought to interfere, is another question. In cases where on the merits the plaintiff could recover but a small sum of money, the court have refused to interfere, because the interference would in fact be a prejudice to the plaintiff, the play not being worth the candle. And if in the present case the direction had been correct, but the jury had mistaken the law or the fact, the verdict ought not to be set aside, to relieve the plaintiff against an error of forty cents. When the mistake arises from the misdirection of the judge on a point of law, the court ought in all such cases to relieve the party suffering by it on his motion, although he may be indiscreet in making the motion.

The law is our only criterion of right and wrong in the decision of causes, and if it be mistaken by the court, whose duty it is to declare the law, the consequences of the error may be extensive, reaching beyond the action in which it was committed, and it may affect other legal principles. We have looked with some attention into books, to find some cases where, in a misdirection of the judge, the court have declined to interfere by setting aside the verdict found in consequence of the misdirection. We have not been able to find a single case. Where the jury do not conform to the misdirection, the court will not disturb the verdict; Rex v. Pool, Hard. 36. There is the case of Edmonson v. Mitchell, 2 Term. 4, where the plaintiff obtained a verdict for too large a sum, owing to the direction of the judge; but the court would not enquire whether the direction was not legal, on the plaintiff 's agreeing to equitable terms, so that the defendant suffered no damage by the direction if it was erroneous.

The plaintiff took out this money by the terms of the rule which the defendant moved for, and she cannot complain of the plaintiff for taking out the money by her own consent. She certainly obtained a rule more inconvenient to herself than the court would have insisted on. She might have had a rule in the common form, that of bringing the money into court, and unless the plaintiff would accept the same in full satisfaction, with costs to that time, the money should be struck out of the declaration, and on the trial the plaintiff should not be permitted to give any evidence for that sum. On this rule, if the plaintiff would not have received the money in satisfaction, the defendant had no occasion to bring the costs into court: and if on the trial she obtained a verdict, she would have all her costs taxed. If the plaintiff had proceeded after the money was brought in, but afterwards, and before the trial, had agreed to accept in satisfaction, he would have had his costs

to the time of bringing the money in, and the defendant would have had her costs accruing after that time. In this case we can equitably relieve the defendant from the imprudence of her own rule, without injustice to the plaintiff.

The verdict must be set aside, and a new trial granted, upon the plaintiff returning to the defendant the costs she brought into court; 2 Burr. 943; ib. 1228.

212.

CAMPBELL v. HOWARD, 5 R. 376.

An appeal given by law from a judgment when duly made opens the proceedings, and the judgment becomes wholly inoperative.

PARSONS, C. J. Formerly when the appellant was the original defendant, and after entering his appeal failed to prosecute, he was nonsuited on the appeal, and the appellee recovered only the costs of the appeal, but was obliged to file his complaint for affirmation of the former judgment. The alteration of the practice took place when the currency was paper, perpetually depreciating. To prevent the mischief resulting from the defendant's becoming nonsuit on the appeal, and leaving the plaintiff to his former judgment, the court entered a new judgment on the appeal, if the appellant had appeared on recording his default. Thus, in an action for tort, which sounded only in damages, the plaintiff might have judgment by increasing the damages in proportion to the depreciation; but he was without relief in actions on contracts for the payment of specific sums of money.

From the provisions of our statutes we are satisfied, that when the appeal has been regularly allowed, no further proceedings can be had on the judgment, until through the default of the appellant it be affirmed in this court on the complaint of the appellee; in which case it may be executed by writ issuing from this court, and not from the common pleas. If the appellant prosecute his appeal with effect, a new judgment is entered in this court, according to the justice of the case, as apparent from the proceedings here. If he enter his appeal so that the parties are before the court, and the appellant fail to prosecute, if he be the original plaintiff the court enter judgment for the defendant for the costs of both the courts; but if the appellant be the original defendant, on his failing to prosecute after appearance, his default is recorded, and the plaintiff has judgment according to the justice of his case, without regard to the judgment of the common pleas. But if the appellant does not enter his appeal, the remedy for the appellee is to complain of this neglect, and pray affirmation of his former judgment, with additional damages for the delay and the costs of the complaint.

The judgment of the common pleas, when regularly appealed from, becomes wholly inoperative; is no longer in force, and cannot be the foundation of an action of debt. A judgment appealed from, and not affirmed, is no bar to another action for the same cause.

But where an appeal is given by law, the judgment of the common pleas is final. An appeal in such a case is a mere nullity, and execution may be sued out on the judgment as a judgment in force. This court has no power to affirm judgments below, where the appeal is not lawfully prosecuted.

213.

DENNY v. LINCOLN, ADM'R, 5 R. 385.

Sheriffs cannot protect themselves from damages arising from a breach of official duty, by any collateral stipulation for indemnity.

PARSONS, C. J. An express promise to indemnify a sheriff against the consequences of his own neglect of duty cannot be valid, neither will the law imply a promise on an illegal consideration. It is to be regretted that officers having a plain path before them, will not pursue it. If they deviate from it, it must be at their peril; and they cannot protect themselves against the damages arising from a breach of official duty by any collateral stipulation for an indemnity.

214.

FIELD v. THE 1st MASS. T. CORP. 5 R. 389.

Mistake in the taxation of a bill of costs.

After the execution had been satisfied the plaintiff discovered a mistake of about seventy-one dollars, which was omitted, and he now prays for relief; but the court said they could not interfere, for the remedy was by writ of error, in which the mistake will be assigned. If the error is confessed or proved, the judgment will be reversed and a right judgment entered.

215.

KEYES v. STONE, 5 R. 391.

Assumpsit to recover compensation for work and labor, and the declaration contained a special contract, quantum meruit and indebitatus assumpsit: held, that the plaintiff might recover on the general count, although at the trial he proved a special agreement, but different from that declared on.

PARSONS, C. J. The doctrine that if the plaintiff proves a special contract, but different from the one declared on, he cannot recover, was formerly holden to be the law, and the case of Weaver v. Burroughs, (1 Str. 648,) before Lord Raymond is an authority for that purpose. This, Lord Mansfield says, was the rule when it was the fashion to lay hold of a nonsuit, whenever it could be done. It was first overruled in Harris v. Oke, in 1759, cited at the bar from B. N. P. 139. And it was then his opinion that where the evidence was sufficient to support the action on a general count, supposing no special agreement laid, the plaintiff might recover on such general count, although there were a special agreement laid, whether the plaintiff attempted to prove it or not. Afterwards the case of Payne *et al.* v. Bacon, 6 Doug. 651, came before the whole court Ashhurst, J. adhered to the old rule, and had directed a nonsuit; but it was set aside and a new trial ordered. Certainly it is the least expensive to the parties and most agreeable to the justice of the case, and no inconvenience can result from it. For a judgment on the general count would be a bar to an action on the special agreement. The judgment must be reversed, but as we know not whether the evidence offered by the plaintiff would support the general count, a new trial must be granted, and let it be had at the bar of this court.

Judgment reversed.

216.

FARRAR, AD'M. v. BARTON ET AL. 5 R. 395.

PARSONS, C. J. The sheriff holds an office of great trust and importance.

He is necessary to preserve the peace and execute the laws. He cannot farm his office, but must execute it in person or by his deputies, for the fees established by law. His power is great, and as it operates more immediately upon the suffering or unfortunate part of the people, he has opportunity to cause much oppression and vexation. To demand and receive other and greater fees than those established by law is exaction or extortion. If he demand of his deputies a sum of money in gross, or an unreasonable proportion of the fees they may be entitled to for the services, they will indemnify themselves by oppressing and vexing the people, extorting money to which they have no legal claim.

A wise legislature will always endeavor to guard against the effect, by preventing the existence of the cause. The English statute passed early in the last century prohibited the sheriff from selling the offices within his appointment. Our statute has made a more effectual provision by passing the statute by which their fees are described and regulated.

At the common law, every security given for the payment of money, the payment of which is prohibited by statute, is void as between the parties to it.

The bond in this case is bad on the face of it. This part of the statute is remedial, and ought to have a liberal construction to prevent the mischief guarded against. The sheriff cannot demand and receive more than at the rate of a fourth part of the fees of service and travel. He shall not, therefore, compound with his deputy; but for any services rendered by his deputy he may by the statute demand one fourth part of the fees and no more; and to this proportion he is limited in respect to every other service of his deputy. Now, this is taken to secure the payment of more than a fourth part of the fees for certain services, and is illegal on the face of it.

217.

CALDWELL v. EATON, 5 R. 399.

PARSONS, C. J. At common law, the sheriff, after seizing goods on *fi. fa.* was obliged to sell them; but he might use his own discretion as to the time and manner of the sale, not being obliged to sell at auction. And if either party desired a sale at auction, he must bear the expence of it, which formed no part of the sheriff's account. And the plaintiff was obliged to be at the whole expence of the levy, unless the judgment was on a penalty, when he had a right to recover his whole debt, exclusive of the expences of the execution; (Impey's Sher. 189; 2 Term. 184.

By our statutes, the rights of the parties, and the duty of the sheriff, are very different in executing a *fieri facias*. The debtor must be at the expence of keeping the goods, and of the sale, which the sheriff is obliged to make by public auction. And if the sheriff might keep the goods for any time, at his discretion, the expence of keeping them must be borne by the debtor, which, especially in the case of live cattle, might exceed their value; and thus the execution might remain wholly unsatisfied. The common law therefore is by necessary implication repealed; and the rights of parties and duties of the officer must depend on the provisions of our own statutes. By these, the officer, having goods on a *fi. fa.* is obliged to keep them four days, that the debtor may, if he see cause, redeem them. During this time the goods must be considered as in the nature of a distress; and if the debtor do not satisfy the execution, and the charge of keeping the distress, the officer must at the end of four days, sell the goods at public auction, at the expence of the debtor, and at the time and place of which notice has been gi-

ven. This notice must be given 48 hours before the sale; and it must be posted up 48 hours before the expiration of the four days; so that it is a necessary consequence that the goods must be sold at auction, after they have been kept by the officer four days and no longer.

By neglecting to pursue these directions, he loses his special property acquired by the seizure; and any other creditor may lawfully cause the goods to be seized and sold on his execution. As to the debtor, if the officer advertise and sell after the fourth day, and with the proceeds satisfy the execution, he may be answerable to the debtor for the damages, if any, which he may have suffered from the increased expense of keeping the goods, and from their diminution in value by the delay of the sale; but the satisfaction of the execution shall avail the officer in mitigation of damages. Or if the debtor retake the goods, the officer may again seize them, and proceed to advertise and sell under this new seizure.

218.

WILSON, Plaintiff in Error v. MOWER, 5 R. 407.

Where an action is brought in the name of three persons jointly; and one becomes nonsuit, so that the defendant has judgment for his costs against all; and the execution is satisfied by one of the plaintiffs not a party to the nonsuit, who brings his action for money paid against the former; held that the latter might prove that he had no interest in the suit: and that it was commenced without his consent.

PARSONS, C. J. The judgment is conclusive, as between the plaintiffs and defendant; but it certainly is not among the plaintiffs, so as to conclude either plaintiff from disclosing the truth, when called upon to contribute to the payment of costs incurred without his knowledge or consent, and especially in a suit, in which he claimed no interest. After he had knowledge of the suit, and without any unreasonable delay, he refused to prosecute, and become nonsuit, he very clearly would not be obliged to reimburse the other plaintiffs any part of the costs of the nonsuit.

It has been enquired what remedy a man has, who has a good cause of action, where no severance lies, with another who will not consent to prosecute. It is his folly, saith the law, to be concerned with such a man. But as any one of the parties interested in a personal action may release it; if it was released, the releasor would be accountable to his partners in the contract, for the damages they had sustained. And if one of the parties should unreasonably refuse to join in the prosecution of an action, which might well be maintained, perhaps the other parties might have a remedy by a special action on the case.

But as the direction of the court be low, was erroneous, judgment must be reversed and a new trial ordered. As we have a jury in this court, it is unnecessary to send for the parties to the common pleas for another trial.

Let the new trial be had at the bar of this court.

219.

WATSON, ET AL v. BOYLSTON, 5 R. 411.

Covenant broken.

PARSONS, C. J. Upon looking into the deed, we find that the defendant has covenanted to indemnify the plaintiffs, against all actions, suits and de-

mands, which might afterwards be instituted against the estate of Gov. Gill, and whereby the plaintiffs might be liable for the payment, by reason of their being sureties for the executor. This covenant includes suits instituted by any party, whether it be the defendant, or one claiming under Thomas Boylston, or any other person whatever. The suit therefore, mentioned in the breach is unquestionably included in the covenant of indemnity, considered without any reference to the indentures.

In the recital of the deed, it is stated that the plaintiffs may be liable to satisfy the claims of the creditors to the estate of Gov. Gill. Claims existing against the estate of any person deceased, are understood in our laws as including every personal demand, which might be recovered against the executor or administrator, and which the estate in their hands is bound to satisfy. These claims the plaintiffs are desirous of being indemnified against. They are therefore desirous of being indemnified against the claims of all the creditors, who have demands against the estate of Gov. Gill. The recital proceeds, "for which purpose" the indentures mentioned have been executed.

As the indentures do not contain a covenant of indemnity against the demands of the creditors generally, but only against certain specific demands, it has been agured by the defendant's counsel, that the general words in the deed ought in construction to have the restriction expresed in the indentures. But the natural construction is, that the indentures not effecting those purposes, the deed was executed that the desire of the sureties for a general indemnity might be accomplished.

We are therefore satisfied that the suit mentioned in the assignment of the breach is included in the covenant of indemnity contained in the deed, not only when the deed is considered without reference to the indentures, but also when it is considered in conjunction with them.

220.

Hall v. Brigham, 5 R. 406.

Per Cur. The court observed that they had often declared that error does not lie to remove proceedings of a justice of the peace, upon a complaint for neglect of duty, and to recover a fine imposed by statute; but the remedy for the party aggrieved was by *certiorari.* The writ therefore must be quashed as having issued improvidently. The plaintiff can move the court for a *certiorari.*

221.

Aiken v. Sanford, 5 R. 495.

Bond for a deed of land, conditioned to deliver the deed in 90 days after payment of the money, held, that 90 days after such payment was not a reasonable time for a tender of the deed.

Parsons, C. J. The only question upon the sufficiency of the bar is, whether the deed was tendered in a reasonable time after the notes were paid. The deed was not tendered until more than 90 days after the notes were paid. It is therefore very clear, that this deed was not tendered within a reasonable time.

It was mentioned afterwards that a deed was in fact tendered sooner, but not pleaded through the mistake of the counsel. But it was objected that this

also was not pursuant to the condition, because the land was incumbered by a mortgage.

The court, however, observed that the validity of this objection depends on the condition, which required a conveyance of the land by a good and sufficient deed of warranty. The import of these words is confined to the form of the deed, and its execution, and not to the title. If the deed was of a proper form, and regularly executed, and the grantor was seized, so that the land was conveyed by it, the condition was in this case performed. They did not mean, however, that in no case these words should be considered as applying to the title. If the money was to be paid on receiving the deed, it might be a reasonable construction, that a good and sufficient title should be conveyed; otherwise the purchaser might part with his money, not merely for the land, but for a lawsuit also. In the present case, the money was to be first paid, and the plaintiff might as well sue on the covenant in his deed, as on his bond.

222.

IDE v. IDE, 5 R. 500.

PARSONS, C. J. In construing any devise, if it be made by words, which have long received a particular construction, and thus become a rule of property; that construction ought to be received, or we may unsettle the titles to estates under such a rule. Now it seems to be a settled rule of construction, that an express devise of land in fee simple to one, with a devise over if he die without issue, or without leaving issue, shall be a devise in tail to the first devisee, with a remainder over expectant, on the determination of the estate tail; 1 P. Wms. 667; explained by Fearn ex. dev. 196. Com. R. 373; Cowp. 410.

On this construction, the words *dying without issue*, or *dying without leaving issue*, are understood as indefinite failure of issue, after the death of the first devisee. This construction has arisen from the manifest intent of the testator, to provide in his will for the issue, which intent would be defeated, if the first devisee had an estate in fee simple. But where the manifest intent of the testator is to provide for the devisees over, on the contingency of the first devisee's leaving no issue at his death, the devise over, on the happening of the contingency, shall take effect. And if the first devisee has issue, the provision for them is left at his discretion; and if he has no issue at his death, the devisee over shall take by executory devise. But consistently with this rule of construction, it has been determined, where lands have been devised in fee simple to one, and a devise over on his dying without leaving issue behind him, that such a devise over manifested the same intent, as if the words had been without leaving issue at his death; and consequently the first devise was a qualified fee simple, and the devise over was executory; 3 Term R. 143.

So it has been determined, that after an express devise in fee, a devise over on the first devisee's dying without leaving issue, to a person *in esse* for life, was an executory devise; 7 Term, 589. For it could not be presumed that the testator intended a devise for life to a person *in esse*, to begin after an indefinite failure of issue in the first devisee, which might not happen until long after the death of the devisee for life.

Therefore, a devise to Peleg, a son of the testator, of an estate in fee simple; and also of personal estate, with this clause in the will, "And further it is my will that if my son Peleg shall die, and leave no lawful heirs, what estate he shall leave to be equally divided between my son John and

grandson N. to them and their heirs forever;" was held to be void in respect to the devise over to John and N. as inconsistent with the absolute interest of the first devisee. The estate limited over to John and N. is what Peleg shall leave, not what may be left by any of his issue. It is, therefore, clear that the contingency, on which the devisees over are to take, must happen, if ever, on Peleg's death; and that his dying and leaving no issue must be understood, as leaving no issue at his death, and not as an indefinite failure of issue.

On this construction, the express fee simple, is not restrained to an estate-tail, but is only qualified by the limitation over to John and N. and their heirs, on the contingency of Peleg's leaving no issue at his death. And on this ground the estate will pass to the devisees over, by way of executory devise, which Peleg, by any act in his life time, could not defeat. If this construction is not controled by the manifest intent of the testator, the demandant must recover his moiety.

The limitation over is not of the estate devised Peleg, but of what estate devised to him he shall leave. Whenever it is the clear intention of the testator, that the devisee afterwards dying, his estate remained to his children the demandants who are entitled to recover.

In the writ they demand a fourth part; but as there were five sons, they can recover but one-fifth part, A's fifth part of the remainder, of which he died seized, remained on his death to his father as his heir, and no part of it can be recovered in this action of *formedon in remainder*.

223.

BAKER v. WHEATON, 5 R. 509.

Effect of a discharge under the insolvent law of another state.

PARSONS, C. J. When the contract in this case was originally made, the parties were both citizens and inhabitants of Rhode-Island, and the contract was there made and there to be performed. The laws of R. J., therefore, gave effect to the contract, and by those law must the legal operation of it be determined. When, therefore, the defendant was discharged from this contract, *lege loci*, the promisee was bound by that discharge, as he was a party to the laws of that state, and assenting to their operation. But if, when the contract was made, the promisee had not been a citizen of R. I. he would not have been bound by the laws of it in any other state; and holding this note at the time of the discharge, he might afterwards maintain an action upon it in the courts of this state.

The case before us supposes the transfer of a contract after it was made, but pursuant to the terms of it. When the note was indorsed to the plaintiff, the defendant, if the contract passed by the indorsement, became a debtor of the plaintiff, who then became a party to the contract, having all the rights of the indorser. Therefore, if the note had been transferred to the plaintiff, a citizen of this state, while it remained due, and undischarged by the insolvent laws of R. I. those laws could not affect his rights in the courts of law in this state, because he is not bound by them.

But on the admission, that the note was discharged pursuant to the laws of Rhode Island, while it was the property of a citizen of that state, who was bound by the operation of those laws, the contract then no longer exists; and a subsequent indorsement of the note is void, because there is nothing to pass by the assignment, whether the indorsee be, or be not privy to the discharge. A note *functus officio* cannot be negotiated. Thus, if the promisor has *bona fide* paid a note to the promisee, while it was his property, and

unassigned, if the promisee should afterwards, fraudulently indorse it to an innocent purchaser for a valuable consideration; yet the promisor might defend himself by proving a payment prior to the transfer, because by the payment the note is *ipso facto* discharged, and there was no subsisting contract to assign.

If the law were not so, the maker of a negotiable note might often be injured. He cannot demand a delivery of the note as a previous condition of payment; but he must pay the money due, and if a delivery is then refused, his remedy is by proving payment, which will avail himself against a subsequent indorsee.

For these reasons, a regular discharge of the defendant from this note pursuant to the laws of Rhode Island, where the contract was made, the parties interested in the contract being then citizens, and bound by the law of that state, is a good bar to an action brought here, by a citizen of this, by virtue of the indorsement of the note, made after the discharge thus duly obtained.

If the discharge had been alleged to have been obtained by fraud, and the allegation had been admitted, the case would have come before us with a different aspect.

224.

SMITH v. DREW, 5 R. 514.

In respect to a statute remedy.

PARSONS, C. J. By statute, a person convicted of larceny in addition to the fine, &c. "he should be sentenced to forfeit to the owner treble value of the goods stolen. The right claimed by the plaintiff to receive the treble damges, is given by the statute, which also prescribes the remedy. And when a statute creates a new right, and has also prescribed a remedy for the enjoyment of the right, he who claims the right, must pursue the statute remedy. The right of the owner is an incidental part of the sentence, and must be executed agreeably to the provisions of the statute, and not in any other way.

225.

SHAW, ET AL. v. HEARSEY, 5 R. 521.

Husband and wife take as jointenants.

PARSONS C. J. By statute of 1785, c. 62, s. 4, it is enacted that all conveyances and devises, which have been, or shall be made to two or more persons, shall be adjudged to be tenancies in common, unless it manifestly appears to have been the intent of the parties to the instrument that jointenants were intended.

Jointenants, where the tenants are not man and wife, may be severed, and the right of survivorship be defeated at the will of either tenant; either by partition, or by alienation of his purparty, which shall be holden by the purchaser as a tenant in common. For two jointenants generally hold by moieties, and not by entireties. But this construction of the statute cannot reasonably be extended to a conveyance to husband and wife. Here a severance of the tenancy cannot be had at the will of either of the husband or the

wife. They do not take by moieties, but by entireties; and the alienation of the husband of a moiety will not defeat the wife's title to that moiety, if she survive him. A conveyance to husband and wife is, in legal construction, a conveyance but to one person. For if an estate be conveyed expressly in jointenancy to husband and wife and to a stranger, the latter shall take one moiety, and the husband and wife, as one person, shall take the other moiety. Therefore, the husband took the whole estate by survivorship, and the petitioners have no right under his wife.

Nonsuit.

226.

Dinglay et al. v. Dingley, 5 R. 335.

Parsons, C. J. The question arising on the facts is, whether Joseph D., born after the making of the will, but during the testator's life, and dying before the tenant for life, was entitled under the will to the remainder of any undivided part of the lands, so that the same descended to the demandants, his heirs. If he was, they must recover; otherwise the tenant most prevail.

For the tenant it has been argued, that the sons, who can take in remainder, must be the sons of Abner living when the will was made: they only being *in esse*, and in the contemplation of the testator. But if sons born after making of the will may be admitted to take, then it is contended that the remainder is contingent and not vested, and can belong only to the sons living at the death of the tenant for life.

This question must depend on the construction of the will, in order to ascertain the intention of the testator. For it is very clear, if the remainder had been devised to all the sons of the tenant for life then born and afterwards to be born, that this remainder would have vested on the death of the testator in the sons then living, and would have opened and let in any sons that might afterwards be born. And if by this will the testator intended all the sons then and afterwards to be born, then Joseph, the father of the demandants, although born after making of the will, will take his share in the remainder, which being vested, descended on his death to the demandants. And it is our opinion that the testator did not intend to confine the remainder to the sons then living. The expression in the will is general, to be divided among and between his, viz. Abner's sons; which includes all his sons. If he had meant to confine his bounty to his grand-children then living, he would have so limited it, either expressly or by naming them, or in some other way. And no reason has been assigned why he should make any distinction among his grand-sons. But it is contended that as the testator had provided, that on the death of the tenant for life, the estate should be equally divided among his sons, he must have intended those sons living at his death, and therefore that the remainder is contingent; and as Joseph was then dead, the contingency on which he was to take never happened, and so his children have no title. This argument would have great weight in the devise of money or chattels for life, and a devise over to be equally divided among the sons on the death of the first devisee. For of a chattel there can be no remainder, which may vest and afterwards open to let in after born children; and the interest in it must be contingent, until the time provided for the distribution of it, in order that they may take.

But a different construction arises on a similar devise of lands. For it is a rule of law that a remainder is not to be considered as contingent, when it may be construed consistently with the testator's intention to be vested.

And as a vested remainder of lands may open to let in after-born devisees, there is no reason why this remainder should be contingent in favor of any sons who might be born after the testator's death, or after the making of the will. We are satisfied that the remainder in the present case vested on the death of the testator. And as all the sons were then born, there was no occasion for it afterwards to open to let in any other sons.

Upon these principles, on the death of the testator, Abner his son was seized as tenant for life, with a vested remainder to his five sons; and Joseph shall have an absolute property in the estate devised; a limitation over must be void, because it is inconsistent with the absolute property supposed in the first devisee. And a right in the first devisee to dispose of the estate devised at his pleasure, and not a mere power of specifying who may take, amounts to an unqualified gift, In the case at bar, there is first an express fee simple devised to Peleg; in consequence of which, if not afterwards qualified, he might dispose of the land at his pleasure. But the limitation over is only of what estate he should leave at his death; which is descriptive only of the estate, of which he should then be in possession. The implication is therefore necessary, that the testator intended that Peleg might dispose of any or all of the estate devised, and leave nothing at his death. The absolute unqualified interest in the estate devised was therefore given to Peleg, which is inconsistent with the limitation to John and N., and consequently this limitation is void: Here also the limitation over is as well of personal as real estate, and from the nature of personal estate, making no distinction between the real and personal estate; and the latter the testator must have considered liable to the disposition of Peleg.

227.

SMITH v. CROCKER ET AL. 5 R. 539.

What alteration of a bond after execution will avoid the bond.

PARSONS, C. J. Cr. being obliged to give a bond with surety for the performance of the duties of his office as collector, before he could receive his tax-bill and warrant, procured a draft of a bond; but as he had not provided a surety, a blank space was left in the penal part of the bond for the insertion of the name of the surety. Cu. then agreed to be his surety, and executed the bond, the blank space not having been filled up, and delivered it to Cr., who then carried it to one of the assessors, when the blank was filled with the name of the surety in his absence, and then Cr executed it. And whether or not the filling up of the blank avoids the bond as to Cu. is the question.

It is a general rule that any material alteration of a bond after execution, by the obligee, or even by a stranger without his privity, will avoid the bond; Pigott's case, 11 [illegible] 27. But to this rule there are exceptions; as when the alteration is made by the consent of the parties after the execution; Zouch v. Claze, 2 Lev. 35. Or a blank space is left, and the party executing the bond agrees that it be afterwards filled up; Moor, 547; Cro. Eliz. 626 S. C. And the party executing the bond, knowing that there are blanks in it to be filled up by inserting particular names or things, must be considered as agreeing that the blanks may be thus filled after he has executed the bond. A practice to this point is mentioned in 1 Vent. 185, where the case of Zouch v. Claze is also reported. It is there said to be the common practice of sheriffs, in taking bonds for appearance, to leave blanks for the names of the sureties, when the principal has executed the bond, and to fill up the

blanks with the name of the sureties when they are procured. To this point also may be cited the case of Pagot v. Pagot, 2 Co. R. 187, in chancery, where a deed of revocation, in which a new settlement was made was held good, although after the execution blanks were filled up, and the deed was not again read to the party nor re-executed by him. The purpose for which the blanks were left is not stated, but probably for a more accurate description of persons or things, contemplated by the deed. Therefore, in the case at bar, notwithstanding this insertion, the bond is his deed, and the verdict must stand.

There is another view of the subject, on which the verdict may be supported. An alteration by erasure or addition, made by the obligee or a stranger, which will avoid a bond, must be in some material part. In this case it is very clear that Cu. would be holden as an obligor, on his executing the bond, if the blank had never been filled up with his name. By filling up the blank, neither the rights or interests, duties or obligations, of either of the parties, are in any manner affected or changed, but remain the same as if the blank had continued. The filling up the blank then, is not a material alteration; and on this ground also the verdict must stand.

Judgment as agreed.

228.

CHURCHILL v. PERKINS, ET AL. 5 R. 541.

SEWALL, J. It is manifest upon the pleadings that the plaintiff demands the fruits of an obligation taken *colore officii*, and to maintain his action, it must be shown, that the demand has arisen in the course of the legal duties, or is justified by some authority of his office; for otherwise it is a means of extortion, and being against sound policy, is void by the principles of the common law. And if the plaintiff has no legal title to the bond declared on, in exercising the office, by which it was obtained, and the same is void.

229.

WILSON v. HOLMES, 5 R. 543.

The effect of an endorsement of a bill thus: "pay T. W. or order for our use, value received in account. B. A. & B.

PARSONS, C. J. Upon this endorsement, had there been no acknowledgment of value received in account, the plaintiff would have had no property in the bill, general or special, and he could not recover upon it in his own name. But admitting that by the acknowledgment "value received in account," it is the usage of merchants to consider the bill as transferred to the indorsee, as the factor of the indorser, who may sue it, either in his own name, or in the name of the indorser, of which admission we give no opinion; yet the same facts may be given in evidence against the factor as against the principal.

In Carver v. Warren, 5 ib. 546, PARSONS, C. J. said, It is true that a promise to pay the debt of another, is void, unless made on a sufficient consideration. But this principle is not applicable to the case before us. As this case is presented by the pleadings, C. and the defendant each assumes, for value received, to pay the plaintiff the same sum, C.'s promise being on one side of the paper, and the defendant's on the other; the defendant's promise not importing any guarantee or collateral stipulation. If, as has been

suggested, the defendant indorsed his name as a guarantor, and the present indorsement was afterwards made without his consent, or any authority from him, he might have availed himself of this defence under the general issue. But by demurring to the declaration, he has confessed it.

230.

HOLMES, Plaintiff in error v. WOOD, 6 R. I.

The action of replevin is not within the statute of 1733, c. 42, s. 7, which authorises a defendant in actions triable before a justice of the peace to give a special justification or excuse in evidence under the general issue; but the pleadings, verdict and judgment must pursue the rules of the common law.

PARSONS, C. J. At common law this judgment is undoubtedly erroneous, as the issue in fact, which was joined and tried, was found against the defendant, for whom notwithstanding the court below gave judgment for the damages, but not for a return of the cattle.

By the statute of 1783, c. 42 s. 7, it is enacted that in all civil actions triable before a justice of the peace, except in trespass where the title to real estate may come in question, the defendant shall be entitled to all evidence under the general issue, which he might by law avail himself of under a special plea in excuse or justificaion. And it may be truly said, that replevin is a civil action, in which the general issue is *non cepit*, and that the cattle being damage-feasant when taken, is a legal justification of the caption.

After full consideration we are satisfied, that on a reasonable construction of this statute, the judgment cannot be supported. It is not the intention of the statute to alter the common law as to the form of the verdict. If the issue joined be material, the verdict ought to find the issue either for or against the party tendering it, and on the verdict as found must the judgment be rendered, But the intention of the statute is to authorize the defendant to produce evidence to maintain the general issue on his part, which was inadmissible under that issue at common law. Thus in trespass for an assault and battery, sued before a justice of the peace, on the general issue the defendant may give in evidence a special justification, and if it be sufficiently proved, the issue is maintained on his part; and the justice, or the jury, on an appeal to the common pleas, should find him not guilty. And if replevin be within this section of the statute, the defendant, on his proving his justification, would have been entitled to a verdict of *non cepit*. But the jury have found that he did take the cattle. which by his plea he had denied, and on this verdict he cannot have judgment.

We are, however, satisfied that replevin is not a civil action, within a reasonable construction of this section. Cases within the section must be those where a verdict finding the general issue, and a judgment on the verdict, will do justice to the parties. Now in replevin, if the defendant has a legal justification or excuse for taking the chattels, his defence is directly repugnant to a denial of the taking; for he admits the caption complained of, and claims a return to him of the chattels replevied, with his damages. But on the plea of *non cepit* he cannot have a return, nor damages, if the issue joined on that plea be for him. Such, therefore, is the legal effect of this plea, that if the defendant has a good justification, he cannot have justice, if he plead the general issue; and in this action, where the defendant claimed damages for the injury done him by the plaintiff's cattle, had the verdict found the issue in favour of the defendant, no damages could have been assessed for him

upon his plea of *non cepit*, and he would have been remediless. The action of replevin is not, therefore, within this section; but the pleadings, the verdict, and the judgment must pursue the rules of the common law.

Judgment reversed.

231.

JARVIS, Plaintiff in error v. BLANCHARD, 6 R. 4.

The errors assigned are, 1. That the court, upon the defendants being defaulted, entered judgment for the whole damage laid in the writ, without any enquiry into the damage sustained; and that the plaintiff did not move to have a jury to enquire into the damage, before judgment was entered.—And, 2. The general error. The question was submitted without argument, and the opinion of the court afterwards delivered by

PARSONS, C. J. The attention of the court has been called by the counsel for the plaintiff in error, to the first exception only in the assignment of errors. And in this we do not think that the court below have erred.

By the statute of 1784, c. 28, s. 7, it is enacted, that when process is duly served and returned, if the defendant do not appear by himself or his attorney, his default shall be recorded, and the charge in the declaration shall be deemed to be true; and the court shall thereupon give such damage as they shall find upon inquiry that the plaintiff has sustained; unless the plaintiff shall move for an enquiry into the damages of a jury; and a default of the defendant, after an appearance, has always been holden to be within this provision.

Here the court are authorised to assess the damages, unless the plaintiff shall move for a jury. It does not appear that the plaintiff in this case moved for a jury, and it cannot be presumed. The record of the judgment does not explicitly state by whom the damages were assessed, but only "it is considered by the court that the plaintiff recover the sum of two hundred dollars." The damages must, therefore, have been assessed by the court, for which they were legally competent, an enquiry by a jury not being moved for by the plaintiff. The judgment is entered in the ancient and usual form; and to reverse it, because it is not expressly stated that the court enquired into the damages, would be to overturn all our judgments on default, where a jury have not assessed the damages.

This supposed error we have considered for the sake of the practice; but in this case error does not lie, as the plaintiff in error might have had remedy by appeal. He appeared the first term, and his default must be considered as voluntary, after having been served with a process. In Savage v. Gulliver, 4 Mass. Rep. 171, this subject was considered, and it was the opinion of the court, that the remedy of any party aggreived at a judgment, from which an appeal was given, must be pursued by appeal, unless in cases where, without any laches on his part, he had no opportunity of claiming an appeal. The writ must, therefore, be quashed, as having improvidently issued.

The Court observed, that they should have awarded costs, if they had affirmed the judgment; but that they had never granted them where the writ of error was quashed. So Ward took nothing by his motion.

232.

MARTIN v. WOODS, 6 R. 6.

This was a writ of *entry sur disseisin*, in which the demandant counts on his own seisin, and on a disseisin by the tenant.

The tenant, under a leave grated him to plead double, pleaded, 1. The the general issue of *nul disseisin*, which was joined by the demandant. And 2, in bar that the demandant was never seized of the demanded premises, in manner and form as he in his declaration has alleged. To the second plea the demandant demurred, and showed for cause, that nothing is contained in it but what is involved in the general issue which was before pleaded and joined. The tenant joined in demurrer.

PARSONS, C. J. We are satisfied that this plea is bad, as it traverses an allegation in the count, which is put in issue by the first plea, on which an issue to the country is joined. The demandant cannot maintain the first issue, without proving to the satisfaction of the jury his seizin, as alleged in his count. The second plea is, therefore, not only informal, but unnecessary for the tenant's defence; and ought not to be considered as within the rule to plead double, which is not to be extended to pleas, which a e useless, and without any benefit to the party obtaining the rule.

The leave to plead double, does not generally in our practice describe the several pleas, which the defendant may plead. They are stated by parole only the party; but he must be held to those stated. Indeed, the practice had better be altered, and the several pleas moved for, be mentioned in the motion and rule.

Let the second plea be adjudged bad, and the cause may proceed to trial on the general issue.

233.

SIMONDS v. CENTER, 6 R. 18.

A joint and several promise is not within the statute of 1784, c.28, s. 12, but the creditor may bring an action against each of the promisors at the same term, and have judgment for his costs as well as his damages against them all.

PARSONS, C. J. We are on consideration, satisfied that the common pleas erred in refusing to tax costs for the plaintiff in this action. To a case of this sort, the provision of the statute is not applicable, but to cases only, where the same plaintiff has at the same term, sued the same defendant in several actions, on demands which might have been joined in one action.

By this note, the plaintiff had a joint demand against all the promisors, and he also had a several demand against each of them. He could not in one action join the several demands; if he sued in one action all the promisors, he could not sue them on the several demands, but must have sued them on the joint promise.

A different construction is not only against the manifest intent of the section cited, but might also be mischievous. The plaintiff, on a joint and several note, can have but one satisfaction of his damages; but he may have satisfaction of his recovered against each promisor. But when judgment is rendered, it may be very uncertain, in which action he may be able to obtain his satisfaction, either of the damages or costs. And if he tax costs against one of the promisors only, that promisor may be without any property, which may be seised on the execution. If, therefore, this section be extended to joint and several promises in a note of hand, the plaintiff must waive the advantage of suing at the same term on the several promises, or run the hazard of loosing his costs of suit.

The advantage of considering the promise as several was manifest when this statute was passed, for at that time the satisfaction of a joint judgment, if either of the debtors afterwards died, could be demanded only against the survivors who might be insolvent.

This principle of the common law has been since wisely altered by the statute of 1799, c. 57.—But this alteration cannot affect the construction of an existing statute.

The section relied on by the defendant is a revision of the temporary act of 18 G. 2. c. 1. In this provincial act, no doubt could arise, for it is expressly confined to several actions sued at the same term against the same person or persons. But the principle of the revising section and of the temporary statute is the same, and there is no ground to presume that the latter was intended to be altered by the former.

Let the plaintiff have judgment, as well for his legal costs, as for his damages.

234.

Prescott v. Wright, 6 R. 20.

Parsons, C. J. Executions may by our law be sued and tested out of term, and by the statute of 1783, c. 57, s. 1, executions issued from the courts of common pleas, shall be made returnable in three month, unless within that time a court of common pleas shall be holden, in which case the execution must be made returnable to the next court of common pleas. Agreeably to this provision, the execution mentioned in the case agreed, was returnable to the next common pleas, expressing the time and place of holding it.

After the time when an execution is to be returned, it cannot be executed by taking the body, goods or estate of the debtor; and if it is unsatisfied, the officer ought to return it, that the creditor may sue out an *alias* execution. When an execution is returnable in three months, it is executable at any time on the last day of the three months. But when it is returnable to a court to be holden at a certain day and place, it may be executed at any time on that day, while the court is sitting, but after the court is adjourned to the next day, it cannot then be executed, the authority of the officer to execute it being determined; and it is his duty to return it to the court while sitting. And upon the return the creditor may sue out an *alias*. But if the officer has begun to execute the execution at any time before it is returnable, he may complete the service after it is returnable, and retain the execution, to endorse the service thereon; the whole of which shall have relation to the time when it commenced.

This authority in the officer results from the forms of our executions. If he take the body of the debtor, he is not directed to have him before the justices, but to commit him. If he seize goods, he must proceed to sell the same at auction after due notice, and indorse the sale on the execution; and he is not to bring the money into court, but to pay it to the creditor. So, if he levy the execution on land, he must complete the extent and deliver seizin to the creditor; all which proceedings he must indorse on the execution, as a part of his return; and in this last case, the execution and return are to be recorded in the county registry. And we cannot presume, that the law, by directing these proceedings of the sheriff to be indorsed on the execution, intended to render the execution inexecutable as many days before the return day, as these proceedings might require.

Now it appears from the facts agreed, that the execution in this case was made returnable to the court, that the court having sat on the return day had adjourned to the next day, that at the time of the adjournment the defendant had not began to execute the writ, and that afterwards he could not return the writ to the court on the return day. The execution, according to the

rule stated by Lord Holt, in the case of Perkins v. Woolaston, cited at the bar, was, therefore, no longer executable after the adjournment; and consequently the seizure by the defendant of the plaintiff's chattels, being without legal authority, was a conversion, for which he is answerable in this action. But as the defendant paid a debt due from the plaintiff out of the proceeds, this fact may mitigate the damages, to assess which let the cause go to a jury.

235.

MARSHALL v. FISK, 6 R. 24.

The cancelling of such a deed by the grantor, with the consent of the grantee, and a second conveyance to a third person having knowledge of the previous conveyance, shall not defeat an intermediate attachment made by a creditor of the first grantee.

PARSONS, C. J. Two objections have been made to the direction of the judge, before whom this cause was tried. That the deed from Adams to Spaulding and Foster, not having been acknowledged nor recorded, no estate passed by it: and if any estate passed, it must have been by way of use, which was determined by the cancelling of the deed by the grantor on its redelivery to him.

The first objection was endeavoured to be supported by the fourth section of the statute of 1783, c. 37, section 4. By this section it is enacted, "that all conveyances of land signed and sealed by the grantor, having right to convey, acknowledged by him before a justice of the peace, and recorded in the registry of the country where the land lies, shall be valid to pass the same, without any other act or ceremony in the law whatever. And that no conveyance of a freehold in, or lease for a longer term than seven years of any land, shall be good and effectual in the law to hold such land against any person but the grantor and his heirs, unless the deed of conveyance be acknowledged and recorded as aforesaid."

Hence, it has been argued, that the defendant's title by execution depending on Adams' deed to the debtors, he cannot be in a better situation than those debtors; and that their deed from Adams not being recorded, although they might hold the land against him, yet they cannot hold it against Prescott who is a purchaser under Adams.

The effect of this argument must depend on the construction of our statute of enrolments, above referred to. A conveyance by deed of feoffment, at common law, must be followed by the ceremony of livery of seizin, as an act of notoriety to the freeholders of the county. To give more effectual public notice of the sale of land by deed, our statute requires the deed to be recorded, and as evidence to the register that the conveyance, as the deed of the party, is entitled to be registered, a justice of the peace generally must certify the acknowledgement of the grantor.

But the notice by the registry is not in all cases indispensible, where it appears, or may be presumed, that the second purchaser had knowledge of the prior conveyance. This rule has been established to prevent fraud, and as applying to cases not within the intent of the statute. Thus if a second purchaser has had notice of the prior conveyance, notice to him by recording the deed is unnecessary, and the second conveyance is fraudulent. So, if the first purchaser enter under his deed not recorded, and while he is in the actual and open possession, the second conveyance is executed, his open and notorious possession is such presumptive evidence of his prior conveyance, that he shall hold against the second purchaser, whose deed shall be deemed

fraudulent. And upon this principle, the statute provides, that a purchaser by a deed not recorded, shall hold against the grantor and his heirs; because the grantor must be conusant of his own deed, and his heirs are bound by this act of their ancestor.

Upon this view of the statute, it is manifest that the estate described in the instrument of conveyance passes on the execution of the deed, and does not remain in the grantor, until the deed be registered. The evidence of notoriety resulting from the enrolment, which is substituted in the place of livery of seizin, is not required against either the grantor or his heirs, or against a second purchaser having actual or presumptive notice of the former conveyance, but against him who has no such notice.

Now from the report it appears that Prescott, Adams and Foster, had knowledge of the conveyance by Adams to the judgment debtor, and of the attachment of Foster's moiety by Williams; the attempt, therefore, to defeat this attachment, by delivering up the deed to Adams, and procuring from him a deed directly to Prescott, was a fraud on the attaching creditor, and as to him the second deed was also fraudulent and void; as upon a sound analogy the attachment must be considered as having the effect of a prior purchase, of which Prescott had notice previously to the conveyance to him.

The second objection to the judge's direction is, that the estate, which passed by Adams' deed to Spaulding and Foster, was determined by the cancelling that deed, as the estate passed by way of use.

It does not appear to be material, whether the estate passed directly, as the effect of a feoffment, or by way of use, to which the possession was transferred; if in fact the estate was vested in Spaulding and Foster, upon their actually entering under Adams' deed to them, as we are satisfied it was.

The statute of uses being in force in England, when our ancestors came here, they brought it with them, as an existing modification of the common law, and it has always been considered a part of our law. Conveyances of lands deriving their effect from the provisions of that statute are consequently legal in this state, as well as conveyances at common law. But by force of the statute of 1784, c. 37, conveyances by deed acknowledged and recorded, made by grantors having good right to convey, may have the effect of feoffments, without an actual entry of the grantee; and every other species of conveyance must by that statute be acknowledged and recorded, to entitle the grantee to hold the estate conveyed, against any person not having actual or presumptive notice of the conveyance, or not being an heir of the grantor.

A conveyance of land by deed may here be considered as any species of conveyance necessary to effect the intent of the parties to the deed, and not repugnant to the terms of it. As by the statute of uses a use cannot be limited on a use, so an estate cannot by bargain and sale be conveyed to one person to the use of another, for only a use passes to the grantee; but in this state, a deed purporting to be a bargain and sale to A. and his heirs, to the use of B. and his heirs, has been holden, in the case of Thatcher v. Gill, to be a feoffment, by which A. took the estate directly, and not by way of use, and that the estate passed to B. by way of use, by virtue of the statute of uses.

So in this case, the conveyance by Adams to Spaulding and Foster, and their entry under it, may well be considered as having the effect of a feoffment, with respect to the grantor and his heirs, and to all persons having notice of the conveyance.

But in whatever way the estate passed from Adams, it was a vested estate

in Spalding and Forster, and could not be divested by cancelling the deed from Adams. Foster, therefore, contiued seized of his moiety, when it was taken on the execution of Williams against him; because the second conveyance by Adams to Prescott, being fraudulent, is void as to the attaching creditors, and because the cancelling of Adams' first deed did not divest Foster of his moiety conveyed by it. By the extent of the execution the attaching creditors became seized, and the defendant might well justify his entry by their command.

We are, therefore, satisfied, that the direction of the judge was right; and the defendant must have judgment on the verdict.

236.

THE ANDOVER AND MEDFORD TURNPIKE CORPORATION v. ABRAHAM GOULD, 6 R. 40.

When the members of a turnpike corporation, have expressly agreed to pay the assessments that may be made by the corporation, an actions lies for the corporation to recover the assessments but if there be no such agreement, the sole remedy for the corporation is by the sale of the shares of the delinquent members.

PARSONS, C. J. The question submitted to us in this case is, whether the direction of the judge to the jury, was or was not legal.

Where no express agreement has been made by the corporators to pay their assessments, it has not been determined that the corporation can maintain an action to recover them, upon an implied *assumpsit* arising from their being voluntarily members of the corporation. That point is now before us, and if this should be decided against the plaintiffs, another point is made that the subscription signed by the defendant upon a fair construction of it, is evidence of an express agreement with the plaintiffs to pay the assessments.

If the plaintiffs can maintain this action, as upon an implied promise, it must be on the principle that the defendant is obliged by law to pay his assessments. For although a moral obligation is a sufficient consideration to support an action on an express promise, there must be a legal obligation, to raise a sufficient consideration for an implied promise.

Let us now consider, whether the defendant is in law bound to pay his assessments. If he is, this obligation must result from the powers of the corporation, and the due execution of those powers. The statute creating it, refers for its powers and duties to the statute of 1804, c. 125. All the powers and duties of the plaintiffs result from this statute, or are incident to it at common law. But very clearly a corporation has not power, as incident to it at common law, to assess for its own use a sum of money on the corporators, and compel them by action at law to the payment of it. To authorize this assessment, the power must be derived from the general statutes In the twelfth section, power is expressly given to choose the necessary officers, and to establish rules and regulations for the well ordering of the affairs of the corporation.

The power to make assessments on the shares of the corporators, for the use of the corporation, is not in that act expressly given; but it impliedly results from the construction of the tenth section. It is there enacted, that whenever any proprietor shall neglect or refuse to pay a tax or assessment agreed on by the corporation to their treasurer, in sixty days after the time set for payment, the treasurer may sell the share of the delinquent proprietor, at public auction, for the payment to the tax and the charges for sale. From

this section we must conclude that the corporation have power to agree on a tax on the shares of the proprietors.

But it is a rule founded in sound reason, that when a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it no other way. When we find a power in the plaintiffs to make the assessments, they can enforce the payment in the method directed by the statute and not otherwise; and that method is by the sale of the delinquent's shares. This rule applies to all taxes public and private. No action can be maintained to compel the payment of state, county or town taxes; except in the particular cases, in which an action is expressly given by the statute of 1789, c. 4. The same rule applies to taxes assessed by parishes, and also by statute of 1785, c. 53, s. 3, by the proprietors of general fields.

It may be said, that in these cases the warrant to collect is an execution, and the right of action is generally unnecessary. This is granted; but the right of action, if it existed at common law, is not taken away. And the taxes assessed by proprietors of lands holden in common, are not collected by any warrrant of distress; but the statute remedy is a sale of the delinquent proprietor's share, and not by an action against him to recover the assessment.

This rule of law is, in cases like the present, reasonable. Persons not interested in having the turnpike, either from their situation or private property, may be requested to associate and become corporators. They may not be able to judge of the proble expenses or profits. But if they know, that if the assessments become grievious, they may abandon the enterprise by suffering their shares to be sold, they may on this principle join the association. And it may be observed that it must be presumed that the legislature considered the sale of the shares as an adequate remedy to recover the assessments; for it is not to be supposed that corporate powers were applied for, to subject the adventures to a probable loss.

As we are of opinion that the plaintiff's cannot maintain this action on an implied promise, we shall now consider whether the subscription paper, upon a fair construction, is evidence of an express promise.

The agreement there expressed is, that the subscribers will take in the said road, the number of shares set against their names, and will be proprietors therein. These words certainly cannot amount, upon any reasonable construction, to a promise to pay the assessments, that shall be made on their shares.

But the plaintiffs rely on the motives, expressed by the subscribers, of their taking shares and becoming proprietors. The words are, "we the subscribers, desirous of having the said turnpike road completed as soon as possible, agree," &c. Now perhaps no man ever associated in a turnpike corporation without some hope of profit; and if so, he must be desirous of having the road completed as soon as possible, that he may be in the reception of the supposed profits. Whether this motive to make the agreement is, or is not expressed, it can have no effect in the construction of the contract.

We are, therefore, satisfied, that the terms of the association do not in law amount to an agreement to pay the assessments, that may be made on the shares.

In fine, our opinion is, that when the corporators expressly agree to pay the assessments, to induce the corporation to make the road, an action can be maintained on that agreement; that if there be no such agreement, the remedy for the corporation is by the sale of the delinquent's shares, pursuant to the statute; and that in the present case, the subscription paper is not

evidence of such express agreement. The conclusion is, that the direction of the judge was right, and that the defendant have judgment on the verdict.

237.

LARNED v. BRUCE, AND OTHERS, 6 R. 57.

This was an action of debt upon a replevin bond, in which the defendant Bruce was principal, and Joel Cranston and Daniel Stephens, jr. the other defendants, were sureties.

The defendants prayed oyer of the bond, and of the condition, from which it appears that the defendant Bruce, having sued a writ of replevin of a horse against the plaintiff, gave this bond with the sureties, as required by the statute of 1789, c. 26, that his writ might be executed.—The defendants then plead a general performance of the conditions of the bond. The plaintiff, in his replication, alleges that Bruce prosecuted his action to final judgment, which was rendered for Larned, the now plaintiff, that he recover his damages and costs, and also that he have a return of the horse. He then assigns, as a breach of the condition, that Bruce has never returned the horse.—The defendants, in their rejoinder, allege, that Bruce reviewed the action; that on the review, Larned had judgment and execution for damages; and that on the execution, and to satisfy the same, the officer, to whom it was directed, seized and sold the horse.—To this rejoinder, the plaintiff demurs specially, and among other causes of demurrer, assigns for cause that the rejoinder is a departure from the plea in bar. The defendants join in demurrer.

No argument was had; and the action being continued *nisi* for advisement, the opinion of the court was delivered at the next March term in Boston, by

PARSONS, C. J. The issue in law in this case is, whether the rejoinder is or is not a sfficient answer to the replication. And we are of opinion that the rejoinder is bad, as being a departure from the bar. The bad alleges a performance of all the conditions contained in the bond, among which was a condition to return to Larned the horse, if he should have judgment for a return. The replication alleges such a judgment. The rejoinder does not traverse the judgment for a return, nor does it allege any return; but the defendants would confess and avoid the breach, assigned in the plaintiff's replication by a collateral fact, which is clearly a departure from the bar.

It, therefore, appears to us, that the rejoinder is bad, and insufficient in law. The plaintiff may recover the penalty of the bond, unless on a hearing in equity, pursuant to the statute of 1785, c. 22, the defendants should be entitled to relief against the forfeiture.

Rejoinder adjudged bad.

The defendants were afterwards heard in equity, and were relieved by the court; judgment being entered only for the damages, the plaintiff had sustained by the breach of the condition of the bond.

238.

FORSTER v. FULLER, 6 R. 58.

Where one gives a promissory note as guardian, he is liable personally for the payment of it.

Assumpsit on a promissory note, subscribed by the defendant, of the following tenor, viz:

"Cambridge, Nov. 2, 1803. For value received I, Timothy Fuller, as guardian of Edward Scott of Cambridge, in the county of Middlesex, promise Joseph Forster to pay him two hundred and three dollars and seventy-two cents in six months and interest. Timothy Fuller, guardian."

The cause was submitted to the decision of the court upon an agreed statement of facts,

from which it appears, that one Edward Scott was originally a debtor of the plaintiff by note, on which he had recovered a judgment and execution, upon which Scott was arrested and committed. The defendant having been appointed guardian to Scott, for the purpose of procuring his enlargement, made the note to the plaintiff, declared on in this action, whereupon the plaintiff fully discharged his execution against Scott, who was thereupon enlarged, and before the day of payment of the note arrived, died insolvent, and the defendant has been appointed administrator of his estate.

The action stood continued *nisi*, and at the next March term in Suffolk, the opinion of the court was delivered by

PARSONS, C. J. The plaintiff's right to recover upon the facts agreed, is the point submitted to the court in this action. Two objections are made by the defendant: that the note is without a sufficient consideration; and that by force of it, Scott or his estate are only chargeable.

As to the first objection, it is true that the defendant has received no consideration for signing the note; but it is equally true that the plaintiff, by discharging Scott from prison, has no remedy on his judgment; which is a sufficient consideration for the defendant's promise. For a damage to the promisee, as well as benefit to the promisor, is a sufficient consideration to support a promise.

The other objection is, that the defendant is not personally bound, as he contracted only as guardian of Scott. As an administrator cannot by his promise bind the estate of the intestate, so neither can the guardian by his contract bind the person or estate of his ward. Unless, therefore, the defendant is liable to pay this note, the plaintiff has no remedy. But we are satisfied that the defendant is liable. It is his promise, made on a sufficient consideration; and although in the note he states, that he promises as guardian, yet he is personally bound; his trust being inserted only to entitle himself to indemnity from his ward; with which the plaintiff has no concern. According to the agreement of the parties, the defendant must be called; Thatcher, *et al.* v. Dinsmore, 5 Mass R. 299.

239.

COMMONWEALTH v. AMOS WARREN, 6 R. 72.

Where one by lying only, without using any false weights, measures or tokens, defrauds another of his property, the injury is a civil one, and an indictment cannot be supported as for a public offence.

PARSONS, C. J. At common law it is an indictable offence, to cheat any man of his money, goods, or chattles, by using false weights or false measures; and by the English statute of 33 H. 8. c. 1, passed before the settlement of this country, and considered here as a part of our common law, cheating by false tokens is made an indictable offence. The object of the law is to protect persons, who in their dealings use due diligence and precaution, and not persons, who suffer through their own credulity, carelessness or negligence. But as prudent persons may be overreached by means of false weights, measures or tokens, or by a conspiracy, where two or more persons confederate to cheat, frauds effected in either of these ways are punishable by indictment. And by an English statute of 30 G. 2, c. 24, which is not in force in this state, the same prosecution has been extended to cheating by false pretences.

But if a man will give credit to the false affirmation of another, and thereby suffer himself to be cheated, he may pursue a civil remedy for the

injury, but he cannot prosecute by indictment; *Vide* Hawk. P. C. b. 1. c. 71. s. 2—Rex v. Wheatly, 2 Burr. 1125.

If, therefore, Adams was cheated out of his shoes by the defendant, without using false weights, measures or tokens, and by no conspiracy, but only by his credulity in believing the lies of the defendant, although he may have an action against the defendant to recover his damages, yet this indictment cannot be maintained, whatever false pretences the defendant may have wickedly used.

And it appears that Adams was imposed on by the gross lies of the defendant. He pretended and affirmed, that his name was William Waterman, and that he was a grocer in good credit in Salem. Adams unfortunately believing him, sold and delivered him the shoes on credit; and when the defendant gave his note as security, he used his false name.

We see here no conspiracy, for the defendant was alone in the fraud; and no false tokens to induce a credit, and as for false weights or measures, there is no pretence. We cannot, therefore, consider the facts stated in the indictment (however injurious they were to Adams) as constituting a public indictable offence; Rex v. Lara, 6 D. & E. 565.

Judgment arrested.

240.

COMMONWEALTH v. AMOS WARREN AND CLARK JOHNSON, 6 R. 74.

Of the evidence necessary to support an indictment for a conspiracy.

PARSONS, C. J. The gist of the offence is the conspiracy to cheat Putnam of his shoes, and the defendants might lawfully have been convicted, if the jury were satisfied on legal evidence, that they were guilty of the confederacy charged, although no act done in pursance of it had been proved; Commonwealth v. Judd, *et al.* 2 Mass. R. 329.

But Warren's intent to defraud Putnam is not denied, and the question is, whether the jury could lawfully infer that Johnson was an associate and confederate in the same fraudulent design.—He went with Warren, he was with him in the shop when he received the shoes, and when he gave the fictitious securities. If Johnson gave no evidence to explain his connection with Warren, whence the jury might infer that it was innocent, they might infer that he was privy to Warren's want of credit, and that he had obtained the shoes fraudulently. If the evidence had rested here, the jury might have pressed it too far; but when it was proved that he received a hundred pair of shoes, and sold them under a fictitions name, the jury might well infer that as he had his share in the plunder, he was an associate in the villany by which it was obtained. We cannot, therefore, say, that the verdict as to Johnson is against evidence; but the presumption against him is so strong, that the jury were well warranted to infer his guilt in the conspiracy charged.

Judgment must be entered on the verdict.

241.

COMMONWEALTH v. KNOX, 6 R. 76.

It is not an indictable offence for the carrier of the mail, who is under contract with the post master general, to carry the same each day of the week, to travel with the mail on the Lord's day.

Parsons, C. J. This indictment is founded on the second section of our statute of 1791, c. 58, in which it is enacted, that no traveller, drover, waggoner, teamster, or any of their servants, shall travel on the Lord's day, or on any part thereof, except from necessity or charity. The defendant contends that Paine's contract with the post master general was lawful, and that the fulfilment of it cannot, therefore, be an offence.

By the constitution of the United States, congress is expressly authorised to establish post offices and post roads: and by an act of congress, passed May 8th, 1794, this authority is executed. By the first section, a post road from Portland through Newburyport to Boston, is established. By the second section, the postmaster general is empowered to contract for the carriage of the mail on any road, on which a stage waggon, or other stage carriage shall be established.

Pursuant to this act, the postmaster general had contracted with Paine, having lawful authority to make such contract; and on Paine's part he was under a legal obligation to execute this contract, either by himself or his servants.

By the federal constitution, laws made in pursuance thereof are declared to be the supreme laws of the land, and to be binding on the judges in every state of the union. And if a statute of any state should contain provisions prohibitory to the execution of powers authorised by a constitutional act of congress, such provisions will not have the force of law. Therefore, if the the second session of our statute would, upon a necessary construction of it, create the offence charged in the indictment, that section would not be legally binding on us, as judges of this court.

But travelling, when from necessity, is not prohibited by that section. By necessity there, cannot be understood physical necessity; for a case in which any man is physically obliged to travel, can hardly be imagined. But a moral fitness or propriety of travelling under the circumstances of any particular case, may be deemed necessity within this section; and *a fortiori*, when the travelling is necessary to execute a lawful contract, it cannot be considered as unnecessary travelling against the prohibition of the statute.

It may be said, that the postmaster general is not obliged by law to contract with any person to carry the mail on the Lord's day. This is true, but he has authority to make such contract; and there may be times, as in case of war or insurrection, when this authority should be exercised. And at all times it is within his discretion, whether to exercise it or not.

We are, therefore, of opinion, that the facts stated do not maintain the indictment.

But let it be remembered, that our opinion does not protect travellers in the stage coach, or the carrier of the mail in driving about any town to discharge or to receive passengers; and much less in blowing his horn, to the disturbance of serious people, either at public worship, or in their own houses. The carrier may proceed with the mail on the Lord's day to the post-office; he may go to any public house, to refresh himself and his horses; and he may take the mail from the post office, and proceed on his route. Any other liberties on the Lord's day our opinion does not warrant.

After this opinion was given, the attorney general entered a *nolle prosequi*.

242.

Baker v. Lovett, 6 R. 78.

This was an action of trespass for an assault and battery, committed on the plaintiff.

who being an infant, sues by his next friend) by the defendant, also an infant, who defends by his guardian appointed by the court. It appears from the record, that the original writ was purchased, as well against James Dennis as the defendant, but Dennis not being served with process, was at the plaintiff's motion, with leave of the court, struck out of the writ.

The defendant pleads in bar, that the trespass charged was committed jointly by him and Dennis, and that pending the suit there had been an accord and satisfaction between the plaintiff and Dennis, the latter having paid the former fifty dollars in full satisfaction.

The plaintiff, protesting that he did not accept the said sum of fifty dollars in satisfaction of the trespass, replies, that at the time of the supposed satisfaction he was an infant, of eighteen years of age and no more.

To this replication, the defendant demurs generally, and the plaintiff joins in demurrer

PARSONS, C. J. Where one trespass has been committed by several persons jointly, the party injured may sue any or all the trespassers, but he cannot recover but one satisfaction for the same injury. As it is confessed by the pleadings in this case, that the trespass was committed jointly by Dennis and the defendant, and that Dennis has made full satisfaction, the plea in bar is sufficient, unless the plaintiff can by law avoid the accord made between him and Dennis.

This right in the plaintiff is insisted on by his counsel, on the general principle, that an infant may avoid all contracts made by him with the exception of contracts for necessaries.

Infants are supposed to be destitute of sufficient understanding to contract. The law, therefore, protects their weakness and imbecility, so far as to allow them to avoid all their contracts, by which they may be injured. But in favor of infants, they are bound by all reasonable contracts for their maintenance and education, and also by all acts which they are obliged by law to do. Upon this principle, they may avoid the sale of their chattels or lands, or any contract or agreement to surrender or release their rights, for which they are entitled to an equivalent; because it is a presumption of law, that infants have not sufficient discretion to put a just value on their property or rights.

But an injury done to an infant, by assaulting and beating him, vests in him a right of action, to recover adequate damages. He is not, however, supposed to have a capacity to ascertain the damages, and, therefore, if he release them, he may avoid the release. On the same ground, if he submit his rights to arbitration, he will not be bound by the award, from a presumed incompetency to choose suitable arbitrators. For the same reason, if he attempt, himself, to ascertain the damages, he cannot be obliged by this act, although he may have received the damages he claims. They may be extremely inadequate to the injury, and the law will protect him, as well against himself as against others.

Where the infant is quite a child, this humane provision of the law is evidently reasonable; but the law has drawn no line between an infant of six years old, and one of twenty years old; for all infants are entitled to equal protection.

The law, however will not admit these principles to be made an engine of fraud and injustice; and in the cases at bar, if the jury on the trial are convinced that the satisfaction received from Dennis, was a compensation for the injury, they will assess for the plaintiff but nominal damages. But if the compensation should be found inadequate, the jury will give such further sum, as the money received from Dennis will amount to a reasonable satisfaction. The law very properly will not trust an infant to fix a value on his own rights, but this power is devolved on a jury, who will do justice to all parties.

The replication is adjudged good, and let a jury enquire of the damages.

243.

RUST v. LOW AND STANWOOD, 6 R. 90.

The tenant of a close is not obliged to fence, but against cattle which are rightfully on the adjoining land.

This country has now been settled long enough to allow of the time necessary to prove a prescription.

PARSONS, C. J. At common law, the tenant of a close was not obliged to fence against an adjoining close, unless by force of prescription; but he was, at his peril, to keep his cattle on his own close, and to prevent them from escaping. And if they escaped they might be taken on whatever land they were found damage feasant; or the owner was liable to an action of trespass by the party injured. And where there was no prescription, but the tenant had made an agreement to fence, yet he could not be compelled to fence, and the party injured by the breach of the agreement had no remedy but by an action on the agreement; (Cro. Eliz. 709, Nowel v. Smith.) In the case of a prescription to fence, he could be obliged to fence by the writ of *curia claudenda*, sued by the tenant of the adjoining close, who might also recover damages by that writ; (Fitz. N. B. 297.)

When our ancestors first settled in this country, they found it uncultivated; and when closes were made by the settlement and cultivation of the lands, there could be no prescription to fence; and therefore the common law authorizing the writ of *curia claudenda*, being inapplicable to the state of the colony was never introduced. Provision respecting fences was early made by the legislature of the colony of Massachusetts Bay, which expired with the repeal of the first charter. Afterwards the obligations to fence were regulated and enforced by laws passed by the legislature of the province of Massachusetts Bay. These laws continued in force until their revision by the legislature of the commonwealth; and the statutes passed by this legislature are the foundation of all the obligations imposed on the citizens by law to make and to repair fences.

By the statute of 1795, c. 52, legal, sufficient fences between adjoining occupied closes may be made and kept in repair, through the whole year, at the will of either tenant, but at the equal expense of the two tenants, each tenant being liable to the charge of making half the fence. What shall be deemed a sufficient fence is defined by the statute; and if the tenants do not agree on the division of the fence, or if either neglects sufficiently to make or maintain his part, a remedy is expressly provided. Each town is to choose annually two or more fence-viewers, to be sworn to the faithful discharge of the duties of the office. And any two of these officers are authorised, at the request of either tenant, to divide the fence or the line on which the fence is to be made, and to assign to each tenant his part, which he and the succeeding tenants are to make and maintain; and also, at the request of either tenant, to decide whether the fence of the other is sufficient or not. And if either tenant after such division and assignment duly made in writing, and recorded in the town clerk's office, shall neglect to make or maintain his share so assigned, the other tenant may do it; and may recover at law against the negligent tenant double the expense, as ascertained by the fence-viewers; with twelve per cent interest, if on notice and request it be not paid. This statute does not make void any written agreement respecting the making and repairing of fences.

The legal obligations of the tenants of adjoining lands to make and maintain partition fences, where no written agreement has been made, rest on

this statute. But in this position are not included adjoining lands, which are not both occupied by their respective owners, nor lands inclosed in a general field or common pasture, nor a close adjoining to a highway. These cases may be governed by different rules.

An assignment pursuant to the statute imposes the same duty as would result from a prescription; and instead of a *curiæ claudenda*, one tenant may make and repair the fence belonging to the other on his neglect, and recover of him double the expense with double interest. And instead of averring in pleading, that the tenant has used by prescription to make or repair, in the technical form; it is sufficient to allege that he is obliged by law to make and repair, and give the assignment in evidence.

When there has been no assignment, but only a written agreement executed by the tenants of the adjoining closes, it may be a question whether such agreement shall have the force of an assignment; and if not, whether the tenant, whose cattle have escaped, can plead such agreement in bar of an action of trespass, or must have his remedy by an action on the agreement. It is true that a *curia claudenda* does not lie, but against a tenant, who is obliged by prescription to repair. And by analogy an agreement between the tenants, making a division of the fence, each one mutually undertaking to repair his part, would not authorise one tenant, who had made or repaired the fence of the other, on his refusal, to recover of him double the expense.

But there appears to be no good reason, after an actual division by such agreement, if the cattle of one tenant escape into the close of the other tenant, through the defect of the fence, which the other had agreed to make and repair, why the owner of the cattle might not aver, that the party complaining had bound himself by his agreement to make and maintain the fence, and that the cattle escaped through his default. For if he had agreed to make and repair the fence, he ought by law to fulfil his agreement.

Prescription to fence is allowed at common law, as resulting from an original grant or agreement, the evidence of which is lost by lapse of time; and it is reasonable that the agreement produced should be as effectual as a presumption, that it once existed, but is lost, arising from ancient usage. The country has now been settled long enough, to allow of the time necessary to prove a prescription; and ancient assignment by fence-viewers, made under the late provincial laws, and also ancient agreements made by the parties, may have once existed, and be now lost by the lapse of time. It seems then that the owner of the cattle may aver, that the party complaining ought by law to make and maintain the fence, in which case he must produce the assignment by fence-viewers, or show that he is bound by agreement to make and repair the fence, which agreement he ought in pleading to set out; or that he is bound by prescription, when he should regularly plead the prescription, and may prove it by ancient usage. [See the very sensible and rational opinion of Popham, C. J., against that of the other judges in the case of Nowell v. Smith before cited.]

Every person then may distrain cattle doing damage on his close, or maintain trespass against the owner of the cattle, unless the owner can protect himself by the provisions of the statute, or by a written agreement, to which the parties to the suit are parties or privies, or by prescription.

As no agreement or prescription is pleaded or alleged in this case, it is unnecessary to consider the extent of these provisions; whether they oblige a tenant, liable to make the partition fence, or a certain part of it, to fence against the cattle of strangers, or only against such cattle as are rightfully on the adjoining land. And we are perfectly satisfied, that he is obliged to fence only as in the case of prescription at common law. The manifest object of the statute was to establish the rights and obligations of tenants of

adjoining occupied closes, respecting the making and maintaining partition fences; and the rights of persons not having any interest in either of the adjoining closes, remain unaffected by the statute, and are to be defined and protected by the common law. With this view it is provided, that after the assignment, neither of the tenants of contiguous closes are obliged to maintain the partition fence through the year, if they otherwise agree. And it cannot be admitted that strangers to this agreement can lawfully claim any benefit from it.

But in opposition to this reasoning, it is said that by the third section of the statute of 1788, c. 65, no person injured in his land by the cattle of another, is authorised to maintain trespass *quare clausum fregit*, or to distrain the cattle damage feasant, unless his own land is sufficiently fenced. And from this section it is argued, that if the close of the party injured is not sufficiently fenced, he can distrain damage feasant neither the cattle of the tenant of the adjoining close, whence they escaped, nor the cattle of a stranger.

But we do not consider that this section is liable to this construction; but that all the provisions of it, so far as they extend are merely in affirmance of the common law. By this section a man injured in his close, which is sufficiently fenced, by sheep, swine, horses or neat cattle, may have his action against the owner; or may distrain them damage feasant. But it cannot be supposed, when goats, asses or mules trespass upon his land, which is sufficiently fenced, that all remedy is taken away. It is evident that this section is merely affirmative of remedies existing at common law, from a consideration of the fifth section. By this it is enacted, that in trespass or replevin the party injured shall recover his damages, if the beasts escaped into his close through a part of his fence that was sufficient, although a part of his fence was insufficient.

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; 10 E. 4, 7, 8; 22 E. 4; Fitz. Abr. *curia claudenda*, 2; Jenk. 4, Cent. ca. 5. But the owner of cattle may avail himself of the insufficiency of the fence of the close injured, if he has an interest in the adjoining close, to authorise him to put his cattle there, as a right of way, an highway, a license, a lease, or a right of common; Fitz. N. B. 298, note.

Against this position the plaintiff has cited Fitz. Abr. 298, note 6, where it is said, that if A. be bound to fence against B., and B. against C., and beasts escape out of the land of C. into the land of B. and thence into the land of A., A. shall not maintain trespass against C. But if A. be bound to fence against B. and the beasts of B. escape into the lands of A. and thence into the lands of D. a stranger, D. may maintain trespass against B. who shall be left to his *curia claudenda* against A. By calling D. a stranger I suppose is meant, that neither A. nor D. is bound to fence against each other. For this distinction is cited 10 E. 4, 7 and 36; H. 6. Fitz. Abr. Cur. Claud. Bar. 168.

As this distinction is not supported, but opposed by other cases, we have looked into the authorities cited. The 10 E. 4, 7, clearly proves that D. may maintain his action. It is thus laid down by Coke, J., "If I have a close between the close of A. on one side, and the close of B. on the other side, which I ought to fence; and through defect of fence A's cattle escape into my close, I can have no action, for it is through my own default. But if they pass through my close into the close of B. he may have an action against A. who shall be put to his writ *de curia claudenda* against me." The case of 36 H. 6, is not reported in the year books, but there is a short

statement of it in Fitz. Abr. Bar. 168. And I believe this distinction arose from a mistake of the case. It is thus, "Note, that it was adjudged by the court, if my beasts go into the close of another [*de autre*] which is adjoining to my close, for the defect of the close of the other, [*de l' autre*] and further go into another [*autre*] close of the other, [*de l' autre*] that I shall not be punished, because I do not retake them, and put them again into my close, until reparation be made of the other close, because they would go again," &c. Now by mistaking the third close for a close of a third person, who, because of the defect of his own fence, could maintain no action against the owner of the cattle, the distinction arose, but it is not well founded. That I have given the true translation appears from Jenk. 4 Cent. ca. 5. The rule as there laid down is, if A. has *green acre*, abjoining to his own close *white acre*, which adjoins to B's close *black acre*, which A. ought to fence against. If B's cattle go from his *black acre* to A's *white acre*, and thence to A's *green acre*, this is no trespass, because A. did not fence his *white acre* against B's *black acre*. This seems to be the same case of 36 H. 6, stated in Fitz. Bar. 168.

We therefore consider it settled at common law, that the tenant of any close is not obliged to fence, but against cattle which are rightfully on the adjoining land. And accordingly in the entries, where defect of inclosure is pleaded, the party pleading it claims some right or interest in the adjoining close, whence the escape was made, or justifies under those who have such right or interest; Rust. Ent. 620, b. 622; 6 Inst. Cler. 677, 680, and the entries there cited.

Let us now examine the bar in the case before us. It is therein averred, that the plaintiff and Trask are jointly and equally bound by law to make and maintain the partition fence between their closes.

But we know of no such obligation imposed by law. The respective occupiers of two closes adjoining are bound, each one to make and maintain half the partition fence; but unless the fence, or the line on which it is to be made, has been divided by a written agreement between the parties, or assigned pursuant to the statute, or by prescription, neither party is obliged to make or maintain any part of the partition fence.

Indeed if there existed a joint obligation to make the fence, no legal effect would flow from it; for then each party would be bound equally to make every part; and if the fence was defective, each party would be chargeable with the deficiency; and upon the escape of cattle from either close to the other, through a defect in any part of the fence, the owner of the cattle could not allege the escape to be from the deficiency of the other's fence.

However, it appears to us very immaterial whether there was, or was not a sufficient fence between the plaintiff's close and the *locus in quo*; for the cattle did not escape that way. They escaped from the plaintiff's close into Low's close. And it is not averred that Low's partition fence was insufficient, but that the plaintiff and Low were jointly bound to maintain it, and that it was out of repair. The fence was therefore as much the plaintiff's as Low's, and the plaintiff is as much in default, on account of the deficiency as Low. It does not appear that this fence had ever been divided, and therefore each party at his peril was bound to keep his cattle on his own land.

But we conceive it immaterial, whether the cattle escaped into Low's close through his default or not. The cattle thence escaped into Riggs' close, through want of any fence. And it does not appear that Low and Riggs were obliged to make a partition fence. If the cattle were rightfully on Low's close, he was bound at his peril to prevent their escape into Riggs' close; and when they did escape, a trespass was committed. Trask had

not fenced her close against Riggs, and the cattle were by wrong on Riggs, close; the owner of the cattle having no interest in that close, or any right to put his cattle there. And Trask was not obliged to fence against any cattle that had escaped from Low's close to Riggs' close. When the cattle escaped into her close from Riggs', it was a trespass, and her bailiff might lawfully distrain them damage feasant.

The bar is therefore bad, and no sufficient answer to the conusance of the defendants.

If in fact the cattle had escaped from the plaintiff's close into Low's, through the defect of Low's fence, yet the plaintiff must fail in his replevin against the defendants, and may have his remedy against Low by an action of the case. *Vide* Cro. Jac. 665, Holbach v. Warner; 1 Salk. 335, Star v. Rooksby.

By the court. Plea in bar adjudged bad.

244.

RICHARDSON AND ANOTHER v. THE MAINE FIRE AND MARINE INSURANCE COMPANY, 6 R. 102.

In a policy of insurance, restraints and detainments of princes have the same meaning.
Information by a belligerant to a neutral vessel, that her port of destination is blockaded, and a warning not to proceed thither, do not amount to a restraint or detention.

PARSONS, C. J. delivered the opinion of the court.

After reciting the facts in the case, and observing that it might not be necessary to state the arrest, the rescue, and the subsequent embargo, which occurred after the master had discontinued his voyage to Malaga, and was returning to Salem, his honor proceeded—

A principal question in the case is, whether on these facts, the plaintiffs can recover a total loss, arising from the restraint and detention of princes insured against, it being admitted that after the notice and warning, the vessel and her cargo would have been exposed to great danger of capture and condemnation, by pursuing her voyage to Malaga.

From the facts it is manifest that the privateer, by coming on board the barque, and by giving the notice, warning and advice stated, did not capture her. A capture is a seizure as prize, with the intent or expectation of obtaining a condemnation. In this case there does not appear to be any actual seizure. The barque was brought to, and examined by the privateer, as was lawful for her commander. From this examination the vessel appears to be neutral, and bound to a port declared by his sovereign to be blockaded, of which the master had not received notice. The privateer does not then proceed to seize her as prize, but after giving the master notice of the blockade, dismisses her.

Neither from these facts, can the privateer be considered as having arrested, restrained or detained the barque, so as to entitle the owner to abandon, within the intent of the policy. For in this instrument I know of no difference between the import of restraint and detention. They are respectively the effect of superior force, operating directly on the vessel. So long as a ship is under restraint, so long she is detained; and whenever she is detained, she is under restraint. Neither have I found a book or case, relating to insurances, in which a different construction has been given to these words.

Now it was lawful for the commander of a privateer to detain the barque as a neutral vessel, for the purpose of search; and after the search she was

discharged from this restraint. And indeed in considering the conduct of the privateer, as amounting either to capture, arrest, detention or restraint within the policy, during the search, the plaintiffs cannot prevail for that cause, as on the termination of the search, and after the notice, warning and advice, the barque was abandoned by the privateer to the master, who immediately had the exclusive possession of her.

It has been argued that the notice and warning, given by the privateer, is a restraint or detention of a prince, within the meaning of the policy; because the barque could not afterwards proceed to her destined port, without great danger of capture and condemnation.

But it cannot be admitted, that information at sea to a master of a neutral vessel, that her port of destination is blockaded, is of itself a restraint or detention of the vessel; for this information may as well be received from another neutral vessel, as from a privateer belonging to subjects of the blockading sovereign. And as to the warning not to proceed to the blockaded port, it cannot be material in this question; for the future danger of capture was not in any degree caused by the warning, but wholly by the knowledge of the blockade; for after this knowledge the barque, continuing her voyage to the blockaded port, would have been equally liable to capture and condemnation, as she would have been, had the notice only been given, and the warning to discontinue her voyage been omitted.

If therefore it can be concluded from these facts, that the barque has been detained or restrained by a prince, within the intention of the policy, so as to entitle the owners to abandon, that conclusion must result from the blockade of the port of her destination, by one of the belligerent sovereigns, by which she was prohibited from attempting to enter that port, on penalty of condemnation as prize of war, if captured in the attempt.

In deciding on this point, it is not necessary to enquire, whether the blockade was actual, or only constructive, or whether the orders in council were, or were not an interruption of the lawful rights of neutral commerce. These are questions which may be discussed and settled by the neutral and belligerent sovereigns. But as between the parties to a contract of insurance the effect is the same, whether the blockade is, or is not authorized by the laws of war; because the danger to the assured is the same, and arises from the same cause, the act of one of the powers at war.

Every species of neutral merchandize bound to a port known to be blockaded, are goods contraband of war; and the blockading power, on seizing them, will condemn them as prize of war, on the ground that the neutral owner has forfeited his neutral rights, by a breach of his neutral duty. If therefore the master of the barque, after the knowledge of the blockade of Malaga, had continued his voyage, and been captured by any British armed ship, she would have been condemned, with her cargo, as prize of war, for this supposed breach of neutrality.

To avoid this danger, which was great, the master discontinued his voyage, and returned to Salem. The voyage being thus wholly lost, the assured, on seasonably offering to abandon, claim a total loss. This claim is resisted by the assurers, on the ground that the voyage was not lost by any of the perils insured against; that the insurance did not cover a voyage to a blockaded port; and that if they had insured a cargo on such a voyage, the voyage would have been illegal, and the policy would have been void.

Several points are involved in this defence, which deserve attention; we will first consider the supposed nullity of a policy, arising as it is said from insuring goods on illicit voyages.

Illicit voyages may be ranked in several classes, some of which we will mention.

When the sovereign of the country to which the ship belongs, shall prohibit his subjects from trading with a foreign country or port, whether the prohibition be a consequence of his declaring war against the foreign country, or be made by an express ordinance for any cause at the will of the sovereign, a voyage to that country for the purpose of trade is illicit, and all insurances on such voyages by his subjects are void, whether the assurers had or had not knowledge of the prohibition. For the law will not allow any effect to a contract made to protect a traffic, which it has prohibited. A prohibition of this kind is considered by Emerigon, c. 12. s. 31. 1. vol. 542. under the head of "Interdiction of commerce."

Another class of illicit voyages are those, which are prohibited by the trade laws of a foreign state, whether those laws wholly exclude the merchant ships of other states from its ports, or only prohibit the importation or exportation of particular species of goods. Because the municipal laws of any state have not the force of laws without its jurisdiction; voyages prohibited in one state are not in any other state deemed for that reason to be illegal. These voyages may therefore be the subjects of insurance in any state in which they are not prohibited. And if the assurer will expressly insure against seizure for illicit trade, or if with a full knowledge of the nature of the voyage, he will insure it without making any exception, he will be bound to indemnify the assured for the losses arising from the breaches of the trade laws of the foreign state. But although he may not take upon himself those losses, and thus be irresponsible for them, yet he is answerable for any other losses insured against, because the policy is not void.

The last class we shall mention, is the transportation by a neutral of goods contraband of war to the country of either of the belligerent powers. And here, it is said, that those voyages are prohibited by the law of nations, which forms a part of the municipal law of every state; and consequently that an insurance on such voyages, made in a neutral state, is prohibited by the laws of that state; and therefore, as in the case of an insurance on interdicted commerce, is void.

That there are certain laws, which form a part of the municipal laws of all civilized states, regulating their mutual intercourse and duties, and thence called the law of nations, must be admitted; as for instance, the law of nations affecting the rights and the security of ambassadors. But we do not consider the law of nations, ascertaining what voyages or merchandize are contraband of war, as having the same extent and effect. It is agreed by every civilized state, that if the subject of a neutral power shall attempt to furnish either of the belligerent sovereigns with goods contraband of war, the other may rightfully seize and condemn them as prize. But we do not know of any rule, established by the law of nations, that the neutral shipper of goods contraband of war, is an offender against his own sovereign, and liable to be punished by the municipal laws of his own country.

When a neutral sovereign is notified of a declaration of war, he may, and usually does notify his subjects of it, with orders to decline all contraband trade with the nations at war, declaring that if they are taken in it, he cannot protect them, but not announcing the trade as a violation of his own laws. Should their sovereign offer to protect them, his conduct would be incompatible with his neutrality. And as on the one hand, he cannot complain of the confiscation of his subjects' goods, so on the other, the power at war does not impute to him these practices of his subjects. A neutral merchant is not obliged to regard the state of war between other nations; but if he ships goods prohibited *jure belli*, they may be rightfully seized and condemned. It is one of the cases, where two conflicting rights may exist, which either party may exercise, without charging the other with doing wrong. As the

transportation is not prohibited by the laws of the neutral sovereign, his subject may lawfully be concerned in it; and as the right of war authorizes a belligerent power to seize and condemn the goods, he may rightfully do it.

We will mention one other case. A neutral ship may lawfully be laden with the property of one of the hostile powers; but the other may seize her, carry her into port, and lawfully take from the ship his enemy's goods. Here are conflicting rights, which are admitted by the power who shall seize; for he will pay the neutral his freight, when he acts fairly, attempting no improper concealment.

But we know of no case, where the neutral merchant has been punished by his own sovereign for his contraband shipments. If he will adventure on the trade, and his effects are seized and condemned as prize; to this penalty he must submit, for his sovereign will not interfere, because the capture was lawful. And it may be further observed, that if the exportation of contraband goods, from a neutral country to a port of either of the powers at war, is a trade, which from its nature is prohibited by the laws of the neutral sovereign, then the policy on such goods would be void, and the assurer would be exempted from any loss or damage arising even from the danger of the sea. But an exemption of this kind is not founded on any sound principle, nor is it supported by any usage.

We do not therefore discover any just distinction between an interloping trade in a foreign port, illicit *loco loci*, and a trade in transporting contraband goods, which is illicit *jure belli*; so far as either may be an object of insurance by neutrals in a neutral country. And we are satisfied that an insurance, effected in the country of a neutral prince, by his subjects, against capture and condemnation of their goods, because they are contraband of war, is not prohibited by his laws, merely because the capture and condemnation are justified by the laws of war. But if goods contraband of war are on cargo, the assurer is not responsible for their capture and condemnation on that account, unless either with a full knowledge of the nature of the goods, and of the voyage, or by an express undertaking, he shall insure them against such capture. So an insurer is not answerable for a seizure and confiscation of goods, for the violation of the trade laws of a foreign port, unless with a full knowledge of the trade, or by an express undertaking, he shall insure them against such seizure. But in both cases, where no such special insurance is made, the policy is not void because the ship is bound on an interloping or contraband voyage, but the assurer will be answerable for the other risks, against which he has insured.

Goods contraband of war are of two descriptions: munitions of war, the property of a neutral, bound from a neutral port to the territory of either of the belligerents, after the existence of the war is known: and every species of neutral goods, bound from a neutral port to a port belonging to either of the powers at war, and known to be blockaded by the other power. The principle therefore, on which a belligerent will capture and condemn as prize the goods of a neutral, bound to a port known by him to be blockaded, arises from the consideration, that all such goods are contraband of war.

We will consider the first description of contraband goods. If after the war is known to exist, a ship laden wholly or in part, with munitions of war, is insured to the country of one of the powers at war, and the assurer has not assured against capture for contraband trade, the policy would not be void, but the assurer would not be holden for a loss by condemnation on account of the contraband goods. So if the country, to which the ship was destined, engaged in war after the commencement of the voyage, the policy would not be void; but if the master after notice of hostilities, continued his voyage, and was condemned for being bound to a port of one of the bel-

ligerent nations, with munitions of war on board, the assurer would not be liable, because he did not insure against a capture for that cause. This case is not distinguishable from a voyage prohibited by the trade laws of a foreign port. If new regulations, made during the voyage, should render the trade illicit, and the master on his arrival, should violate those regulations, and for that cause the property insured should be confiscated, the assurer will not be answerable, unless he had insured against seizure for illicit trade. But if he had, he would be holden for the loss, whether the trade became illicit before or after the commencement of the voyage.

It has, however, been supposed, that there is a difference between the cases; for the loss in the former case, arose by condemnation *jure belli*; and it is a rule, that a declaration of war, or a treaty of peace, made after the commencement of the risk, does not vary the rights or the obligations of the parties to the policy.

This position is generally true, although it is not correct when a war should happen between the nation to which the ship belongs, and the nation to whose port the voyage is insured; for on this event being known to the parties, the voyage becomes illegal, being interdicted by the laws of the country to which the ship belongs.

But it is unnecessary now to discuss the nature and extent of this exception.

The effect of the rule, when it is applicable, is that each party is bound by the contract, whether the perils insured against become greater or less, by war or peace. The rule, therefore, extends only to the degree of hazard, but not the nature of the peril. For by the breaking out of the war, the assurer becomes liable for no perils, which he had not insured against, although the perils insured against, may have become much greater by this event.

The other description of goods contraband of war, includes all neutral merchandize, bound to a port known to be blockaded. If before the commencement of the risk, the port is known to be blockaded, and the assurer does not insure against condemnation for contraband trade, the policy is good as to all the risks insured against; but the assurer is not responsible for any loss arising from such condemnation. So if the port is not known to be blockaded, until the ship is on her passage, the assurer is not answerable for such condemnation, if after notice, the ship continues her voyage, and is captured. But if the assurer has insured against a condemnation for contraband trade, the policy is good, and he must answer for any loss arising from a condemnation for that cause, whether the trade be contraband, because the goods are munitions of war, or because they are destined or bound to a port known to be blockaded. For the law is the same, because the reason is the same. And in the case of contraband trade, the master on discovering great danger in pursuing his voyage, as by learning that the port is blockaded, may, as in the case of pirates in the way, depart from his voyage, seek an asylum in the nearest safe port, or even, if more convenient, return to his original port and wait until the blockade be raised, or the blockading fleet be dispersed, and then may continue his voyage, without being chargeable with deviation. But if the master, knowing the inevitable danger of capture, if he proceed on his voyage, should notwithstanding continue it, and expose the vessel to certain seizure, this will be a loss not arising from the perils insured against, but from a criminal breach of the duty he owes to his owners which is barratry; Earle *et al.* v. Rowcroft, 8 E. 126. If, however, on learning his danger, the master abandon the voyage insured, and either return home, or proceed on another voyage, this will be a deviation, by which the assurer is discharged. These positions appear to me to result necessarily

from the established principles of maritime law applicable to the contract of insurance.

As the case before us is of much importance, we have endeavoured to ascertain the practice in Europe in similar cases, but without much success. Emerigon, c. 8, s. 5. 1 Vol. 210, notices policies on voyages, illicit by the laws of the country to which the ship is destined; and unless the insurance is made with a full knowledge of the trade, the assurer is not holden for a loss arising from the illicit trade. But no distinction is made, whether the trade, become unlawful before or after the commencement of the risk. Valin also notices the right to condemn goods, contraband of war; Lib. 3 tit. 9, art. 11; but we do not find either in him, or in Emerigon, any principles stated, as expressly applying to the insurance by a neutral on goods of this description. But Emerigon, c. 12. s. 31, 1 Vol. 542, particularly considers the cases of an interdiction of commerce with any country or port, by the sovereign of the country to which the ship belongs, whether the interdiction is a consequence of declaring war, or arises from the express will of the prince. If the interdiction happen before the commencement of the voyage, the charter party is void; but if after the commencement of the risk, the insurance is not void, for the assurer shall be entitled to his premium. If the interdiction happen while the ship is on her passage, and she is obliged to return home, she shall be entitled to her outward freight from the shippers, who may recover it as an average from the assurers on the cargo; and the assurers on the ship shall be answerable for the wages and provisions of the seamen home, having the benefit of the freight out.

Our law in this respect is different. For the ship cannot demand freight but on delivering the goods, or by virtue of some express provisions of the charter-party. And an insurer on the ship is not answerable for the wages and provisions of the seamen, except when they are a general average.

But the blockade of a port by an enemy's fleet is not a case within the ordinance providing in cases of interdiction of commerce; Val. Lib. 3 tit. 1, art. 8. This is considered as a temporary interruption, and the master may wait until the port be opened, without prejudice to the policy.

In the English books the right to insure illicit trade seems to be well settled; 1 Marsh 54, Doug. 238, Planche v. Fletcher; but there is no adjudged case determining whether insurance by a neutral of goods contraband of war, is, or is not prohibited.

There are three insurance causes, where the ships were prevented from entering their destined ports.

The first is the case of Hadkinson v. Robinson, 3 Bos. & Pul. 388. The action was on a policy upon a cargo of Pilchards, on board the ship Pescaro, at and from Mount Bay, to Naples; and the policy contained the usual memorandum, including fish. In the outward passage the port of Naples was, by the government of the country, shut against all English vessels on pain of confiscation. The master having information of this fact, put into Port Mahon for further intelligence. There the report being confirmed, he sold the fish at a low price; and on information received by the owners, they offered to abandon, on the ground that the voyage was wholly lost. But it was adjudged, that although the loss of the voyage insured is good cause of abandonment, if it arise from the perils insured against; yet in that case, the voyage was not lost by one of those perils, because the detention of the cargo at a neutral port, in consequence of the danger of entering the destined port, was not a peril insured against.

It has been argued that this decision was founded on the memorandum relating to the perishable nature of the cargo. But we cannot be of the

opinion; for a cargo of fish may as well be abondoned by a loss of the voyage, as a cargo of any other description of merchandise.

The second case is that of Lubbock v. Rowcroft, 5 Esp. Rep. 50. The insurance was on twenty bags of pepper on board the ship Nelly, at and from London to Messina. The ship having arrived at Minorca, it was found that Messina was in the hands of, or blockaded by the French; in consequence of which the plaintiff offered to abandon to the defendant, and demanded a total loss. But Lord Ellenborough was of opinion that the abandonment was from an apprehension of capture by the enemy, and not from any loss within the policy.

The last is the case of Barker v. Blakes, 9 East. 283. In this case it was determined, that when a neutral ship bound from America to Havre, was taken and carried into England, and was there detained until Havre was declared to be in a state of blockade, by which the further prosecution of the voyage was prohibited, such detention, so prolonged was a total loss within the policy.

From the two first of these cases it appears that when the port of destination, after the commencement of the voyage, became hostile, a fear to enter it, because of the danger of capture, is not a loss of the voyage, within any peril insured against. And in the third case, the declaring of Havre to be blockaded is not considered as a loss of the voyage insured, because of the danger of attempting to enter it; but a detention, continued until the blockade, was considered as a loss of the voyage, which authorised an abandonment, the detention being a peril insured against.

There remains for consideration one other point, arising out of the defence. It is made a question, whether a well grounded fear that a total loss will arise from one of the perils insured against, if the voyage be pursued, is itself a peril within the policy, which will authorize the assured to abandon, as for a total loss. The question is stated on the supposition, that the peril, from which the loss is feared, is insured against by the policy. And on the best consideration we can give this question we are satisfied that this fear of loss thus stated is not a peril within the policy. It is not within the terms of the policy, on any reasonable construction that can be given to them. To admit it to be a peril insured against would be productive of much uncertainty, would open a door to frauds on the assurer, and would be repugnant to the principles recognized in the cases of Hadkinson v. Robinson, and of Lubbock v. Rowcroft.

We will now consider how far the several positions we have endeavored to establish are applicable to the present case. When the ship sailed for Malaga, that port had been declared to be in a state of blockade; but as the parties had then no knowledge of this fact, we consider that port as to them open. On the voyage the master received correct information of the blockade. From that time, if he afterwards continued his voyage to the blockaded port, the cargo insured became contraband of war, which exposed him on that account to capture and condemnation. A loss by capture and condemnation for that cause was not insured against; although it was competent for the assurers to have taken that risk on themselves. But the policy was not discharged. And if the master had continued his voyage, the assurers would have remained answerable for such risks as they had insured against, but for no others.

If the defendants had insured against capture for having on board goods contraband of war, and the master had proceeded on his voyage, and had been captured for that cause, they would have been liable. Or the master, to avoid manifest danger of capture, might in this case have gone to some safe port, or even have returned, if more convenient, to his original port,

to wait until the danger was removed, and he might afterwards have pursued his voyage without prejudice to his insurance. But if, instead of avoiding the danger that was manifest, the master had voluntarily thrown himself in the way of the blockading fleet, and had been thereby captured, the loss would have been by his barratry.

In the case before us, the master through fear of capture discontinued his voyage and returned home. But the fear of a capture, when the capture is insured against, cannot amount to a total loss, for which the owner may lawfully abandon; and *a fortiori* of such a capture as is not insured against.

The conclusion is, that although a just fear of capture occasioned the loss of the voyage insured, yet that loss did not arise from any of the perils insured against by the defendants, and the plaintiffs cannot recover a total loss.

When the master discontinued his voyage, by which is understood an abandonment of it, with an intention in him no further to pursue it, and sailed for his original port; from that time the policy was discharged. For all sea damage happening before, the plaintiffs can recover, if it exceed seven per cent. The losses happening after the voyage insured was discontinued, and on the voyage home, are not to be borne by the defendants, because such losses did not happen in the voyage they had insured. Although losses insured against, which happen after a departure from the usual course of the voyage described in the policy for good cause, may be a charge upon the assurer; yet when that voyage is once determined, we can substitute no new voyage in the place of it, and hold the assurer answerable for any loss that may happen in the course of it. For this reason it is not thought necessary to remark on the subsequent capture, rescue and embargo, which are stated in the case.

Pursuant to the agreement of the parties, the verdict must be set aside and a new trial granted. And if the jury, on the new trial, shall assess the sea damage, happening before the discontinuance of the voyage, at more than seven per cent, then a verdict is to be found for such damages, otherwise a verdict is to be taken for the defendants.

245.

PERHAM v. WEAD, 6 R. 131.

Where the boundaries of land as mentioned in a conveyance are fixed, known and unquestionable monuments, although neither the courses, nor distances, nor the computed contents, as described in the conveyance, correspond therewith, the monuments will govern.

PARSONS, C. J. Upon considering the facts in this case, we have no doubt as to the motion. It must prevail and a new trial be granted. When the facts were agreed by the parties, or proved at the trial, the result was a mere conclusion of law. And on these points the law has been long settled.

When the boundaries of land are fixed, known and unquestionable monuments, although neither courses nor distances, nor the computed contents correspond, the monuments must govern. With respect to courses, from errors in surveying instruments, variation of the needle, and other causes, different surveyors often disagree. The same observations apply to distances, arising from the inaccuracy of measures, or of the party measuring; and computations are often erroneous. But fixed monuments remain, about them there is no dispute or uncertainty; and what may be uncertain must be governed by monuments, about which there is no dispute.

In the present case, Sanborn and Collins' land on one side, and Fletcher's on the other, are fixed monuments. The land is bounded on them, and must extend in width from one to the other. If the contents had proved less than thirteen rods, yet the tenant could claim only to those monuments; and where the contents are found to be greater, he still shall hold to the same monuments. The jury therefore mistook the law; and the cause must be sent to another jury to correct the mistake.

New trial ordered.

246.

Commonwealth v. Thompson, 6 M. 134.

If one assuming the character of a physician, through ignorance administer medicine to his patient with an honest intention and expectation of a cure, but which causes the death of the patient, he is not guilty of felonious homicide.

The chief justice charged the jury; and the substance of his direction, and of several observations, which fell from the court during the trial, are for greater convenience here thrown together.

As the testimony of the witnesses was not contradicted, nor their credit impeached; that testimony might be considered as containing the necessary facts, on which the issue must be found.

That the deceased lost his life by the unskilful treatment of the prisoner, did not seem to admit of any reasonable doubt; but of this point the jury were to judge. Before the Monday evening preceding the death of Lovett, he had by profuse sweats, and by often repeated doses of the emetic powder been reduced very low. In this state, on that evening, other doses of this Indian tobacco were administered. When the second portion did not operate, probably because the tone of his stomach was destroyed, the repetition of them, that they might operate as a cathartic, was followed by convulsion fits, loss of reason, and death.

But whether this treatment, by which the deceased lost his life, is or is not a felonious homicide, was the great question before the jury.

To constitute the crime of murder, with which the prisoner is charged, the killing must have been with malice, either express or implied. There was no evidence to induce a belief that the prisoner, by his treatment, intended to kill or injure the deceased; and the ground of express malice must fail. It has been said, that implied malice may be inferred from the rash and presumptuous conduct of the prisoner, in administering such violent medicines. Before implied malice can be inferred, the jury must be satisfied that the prisoner, by his treatment of his patient, was wilfully regardless of his social duty, being determined on mischief. But there is no part of the evidence, which proves that the prisoner intended by his practice any harm to the deceased. On the contrary, it appears that his intention was to cure him. The jury would consider whether the charge of murder was, on these principles, satisfactorily supported.

But though innocent of the crime of murder, the prisoner may, on this indictment be convicted of manslaughter, if the evidence be sufficient. And the solicitor general strongly urged, that the prisoner was guilty of manslaughter, because he rashly and presumptuously administered to the deceased a deleterious medicine, which in his hands, by reason of his gross ignorance, became a deadly poison.

The prisoner's ignorance is in this case very apparent. On the other ground consistent with his innocence, it is not easy to conceive, that on the

Monday evening before the death, when the second dose of his very powerful emetic had failed to operate, through the extreme weakness of the deceased, he could expect a repetition of these fatal poisons would prove a cathartic, and relieve the patient; or that he could mistake convulsion fits, symptomatic of approaching death, for an hypochondriac affection.

But on considering this point, the court were all of opinion, notwithstanding this ignorance, that if the prisoner acted with an honest intention and expectation of curing the deceased by this treatment, although death, unexpected by him, was the consequence, he was not guilty of manslaughter.

To constitute manslaughter, the killing must have been a consequence of some unlawful act. Now there is no law which probibits any man from prescribing for a sick person with his consent, if he honestly intends to cure him by his prescription. And it is not felony, if through his ignorance of the quality of the medicine prescribed, or of the nature of the disease, or of both, the patient contrary to his expectation should die. The death of a man, killed by voluntarily following a medical prescription, cannot be adjudged felony in the party prescribing, unless he, however ignorant of medical science in general, had so much knowledge, or probable information of the fatal tendency of the prescription, that it may be reasonably presumed by the jury, to be the effect of obstinate wilful rashness at the least, and not of an honest intention and expectation to cure.

In the present case there is no evidence that the prisoner, either from his own experience, or from the information of others, had any knowledge of the fatal effects of the Indian tobacco, when injudiciously administered; but the only testimony produced to this point, proved that the patient found a cure from the medicine.

The law thus stated, was conformable, not only to the general principles which governed in charges of felonious homicide, but also to the opinion of the learned and excellent lord chief justice Hale. He expressly states, (1 H. H. P. c. 429.) that if a physician, whether licenced or not, gives a person a portion, without any intent of doing him any bodily hurt, but with intent to cure, or to prevent a disease, and contrary to the expectation of the physician, it kills him, he is not guilty of murder or manslaughter.

If in this case it had appeared in evidence, as was stated by the solicitor general, that the prisoner had previously, by administering this Indian tobacco, experienced its injurious effects, in the death or bodily hurt of his patients, and that he afterwards administered it in the same form to the deceased, and he was killed by it, the court would have left it to the serious consideration of the jury, whether they would presume that the prisoner administered it from an honest intention to cure, or from obstinate rashness, and fool-hardy presumption, although he might not have intended any bodily harm to his patient. If the jury should have been of this latter opinion, it would have been reasonable to convict the prisoner of manslaughter at least. For it would not have been lawful for him again to administer a medicine, of which he had such fatal experience.

It is to be exceedingly lamented, that people are so easily persuaded to put confidance in these itinerant quacks, and to trust their lives to strangers without knowledge or experience. If this astonishing infatuation should continue and men are found to yield to the impudent pretentions of ignorant empiricism, there seems to be no adequate remedy by a criminal prosecution, without the interference of the legislature; if the quack, however weak and presumptuous, should prescribe, with honest intentions and expectations of relieving his patients.

The prisoner was acquitted.

247.

Maneely v. M'Gee, M'Conville, Smith and Cassady, 6 R. 143.

Parsons, C. J. At common law, a promissory note given by a debtor to pay to his creditor a subsisting debt, is no discharge of the debt; but the creditor may either have his remedy on the note, or may recover the debt. But in this state, this rule is confined to notes not negotiable. And it has long been settled, that when a debtor shall give to his creditor his negotiable note for a debt due on simple contract, the legal presumption is, that the note was received in payment; *vide* 5 Mass. Rep., Thatcher *et al.* v. Dinsmore. And this presumption arises from the consideration, that the creditor may indorse the note; and if he could compel payment of the original debt, the debtor might afterwards be obliged to pay the note to the endorsee, and thus be twice charged, without any remedy at law. And there is no inconvenience to the creditor; for if he hold the note, he may sue the debtor upon it and recover his debt.

But this presumption, like all others, may be controled by the agreement of the parties. And in this case, if it appears that M'Conville's note was not understood by the parties as received in payment, or if this be not within the reason of the exception to the general rule, the verdict ought to stand. Now the note did not oblige any but the maker. He was authorised by the defendants to pay for them, but not to bind them by his promissory note. M'Conville and the plaintiff made a further settlement, in which the labor for which the note was given was made an item, and considered by the parties as still unpaid for. And all the defendants afterwards considered themselves as holden to pay for this labor.

It is said that at this time they had no knowledge of M'Conville's note. But if they had, they were not obliged to pay it, or to pay M'Conville the amount of it, for he being one of the defendants, was present and made no claim for his note, or as having paid any thing on their account to the plaintiff; and by his certificate he admitted that the labor was not paid for.

From these facts it is manifest, that the reason of the presumption, that the note was taken as absolute payment, does not exist; because in no event were the defendants obliged to pay twice the amount of the plaintiff's demand. And M'Conville, who made the note, confesses this action by his default. The presumption that his note was a payment, is also controled by his certificate, that the labor for which his note was given remained unpaid for.

Let judgment be entered on the verdict.

248.

ANONYMOUS.

Where after the crime of adultery committed by the wife, the husband knowing it, the latter afterwards cohabits with her, he shall be held to have remitted the crime, and shall not afterwards obtain a divorce for that cause.

This was a libel for a divorce a vinculo, brought by the husband against the wife, for her adultery.

The Chief Justice pronounced the decree in the case, and having stated the evidence, and the opinion of the court resulting therefrom, that the crime charged in the libel was sufficiently proved, he proceeded—

But if this crime in the wife, against her husband, has been remitted by him, he shall not afterwards, for this cause, obtain a dissolution of the mar-

riage. For an offence, forgiven by the injured party, cannot afterwards be the foundation of a prosecution for his own benefit. And when the wife has committed adultery, and the husband has knowledge of her guilt, if afterwards he will cohabit with her as his wife, he exhibits conclusive evidence of his forgiveness.

This principle is clearly stated by Dr. Burn, in his ecclesiastical law; Tit. Marriage, sec. 11, Divorce. In this language, "If the party accused shall prove that the accuser, before the commencement of this suit, had probable knowledge of the crime committed, and yet afterwards had carnal intercourse with the accused, in such case the accuser shall not obtain a sentence of divorce; for the crime will be supposed to have been remitted." And to explain what is to be understood by probable knowledge, he adds, "If the husband, suspecting his wife, shall charge her with the offence, and she confesses it; or if he shall have caught her in the act of adultery; or if the witnesses, whom he shall afterwards produce, shall signify to him, before the commencement of the suit, that they can testify of the offence from their own sight and knowledge."

This last illustration of the rule has been strongly urged by the respondent's counsel in this case, (from some particular parts of the testimony, which his honor here recapitulated.) But the true import of this rule, in my opinion is, that the cohabitation of the husband, after the commission of the offence, and after he believes, on probable evidence, the guilt of his wife, is conclusive evidence of the remission. For he cannot be considered as having impliedly forgiven a crime, which he does not believe to have been committed. And without that belief he cannot have knowledge of the crime; for he may have received the information, without giving it credit. But when he believes on reasonable grounds, the guilt of his wife, if he will continue to cohabit with her, he shall never afterwards obtain for this cause a divorce.

The counsel for the libellant made a question, whether this rule was not confined to cases, where the adultery of the wife was a cause only of separation from bed and board; or whether it also remains in force here, where that crime is a cause for dissolving the marriage.

For my part, I am satisfied that it is a rule of law in force, to bind the husband in all cases, where he seeks a remedy against the wife, founded on an offence, which he has remitted.

It is an ancient rule of the ecclesiastical law on the subject of divorces, and existed when, by that law, adultery was a cause of divorce *a vinculo*; for according to Dr. Burn a divorce for adultery was anciently *a vinculo*, and agreeable to the opinion of the church in the beginning of queen Elizabeth's reign. But in the 44th year of that reign, in the case of Rye v. Fuliambe in the star chamber, (Moor, 684,) this opinion was changed; and archbishop Whitgift (in Burn and Salkeld, vol. 3, p. 138, he is called Bancroft, but it is Whitgift in the original report in Moor,) and his divines held, that adultery was a cause of divorce *a mensa et thoro* only.

It is not easy to assign a good reason for this change of opinion. Perhaps it arose from an apprehension, that the crime of adultery would become frequent, if when committed by either party, it was admitted to be a sufficient cause for the dissolution of the marriage. Independent however of any positive authority, the rule ought to be received because it is founded on sound reason and natural equity. And it would be injustice to the wife, and immoral in the husband, to claim and enjoy, as his particular marital rights, the society of his wife, after a knowledge of her offence, and afterwards to cast her off for that same offence.

If therefore a husband, believing his wife's guilt, will afterwards cohabit

with her, whether influenced by his compassion or his affections, or induced by her tears, her penitence or her fascinations, he cannot afterwards avail himself of that offence to obtain a dissolution of the marriage. And he is bound by his remission, although he after repent of his indulgence, from his subsequent reflections, or from the persuasion of his friends, or from the influence of what he may call the public opinion.

A divorce *a vinculo* decreed.

249.

HAYS ET AL. EX'RS. v. JACKSON ET AL. 6 R. 150.

PARSONS, C. J. Henry Jackson made his last will on the 13th of January, 1805, in which he makes the following dispositions of his estate.

First. After all his just debts and funeral charges are paid, he gives to such of his nephews and nieces as may survive him, fifty dollars each. Also he gives to his sister Susanna Gray in fee, certain specific real estate, on condition that she does not demand against his estate her portion of her father's estate remaining in his hands; and his executors are to hold the real estate, thus devised her, upon the same trusts as he held her said portion.

Also, he gives to Mrs. Hepzibah C. Swan in fee, all the remaining part of his estate, real and personal, of which he might die seized, or which might afterwards descend to him, by gift, grant, as heir at law, or otherwise, to be held in trust by his executors, for her sole use and disposal.

And he appoints Judah Hays and Elisha Sigourney his executors.

Mrs. Swan, the residuary legatee, and also the heirs at law are before us.

The testator was seized of other real estate, than that specifically devised to Mrs. Gray, when he made his will; and he afterwards acquired other real estate, which on his death, without a republication of his will, descended to his heirs.

It appears that the personal estate left by the deceased, is insufficient to pay all his debts. The heirs contend that the lands, which would pass by the residuary devise to Mrs. Swan, shall first be applied to the payment of the debts, before the descended lands can be called for. On the other side, Mrs. Swan and the executors, who are her trustees, insist that the descended lands are first to be appropriated to the payment of the debts.

Whether we are authorised, on this petition, to marshal the assets; and if we are, in what manner they are to be marshalled, are the questions before the court.

The case may at first be considered as at common law, and according to the equitable rules established for marshalling assets, where there is a will.

At common law the lands of a testator are not assets in the hands of the heirs, for the payment of any but specialty debts, where the heir is expressly bound by the contract. And his lands are not bound for the payment of any of his debts in the hands of a devisee, unless charged by the testator, either generally or specially, in his will. To prevent the injustice of the testator in devising his lands without charging them with the payment of his debts, the statute of 3 & 4 W. & M. c. 14, was passed, by which the lands in the hands of a devisee are made assets for the payment of debts due on specialties. Since that statute all the lands of the testator, whether they descend or are devised, are charged by law with the payment of creditors by specialty; who may also resort to the personal estate. But creditors by simple contract can avail themselves only of the personal estate, and of such of the lands as are charged in the will with the payment of debts, unless when they take the place of creditors by specialty, who have been

paid out of the personal estate. These rights of the creditors remain uncontroled by any provisions which the testator can make.

But as between legatees and devisees who claim under the will, and the heirs who can take only what the testator has not given away, he may regulate the funds, out of which his debts shall be paid; by which regulations they will be bound.

And the general rule in equity for marshalling assets is thus settled:—1. The personal estate excepting specific bequests, or such of it as is exempted from the payment of debts.—2. The real estate which is appropriated in the will as a fund for the payment.—3. The descended estate, whether the testator was seized of it when the will was made, or it was afterwards acquired.—4. The rents and profits of it, received by the heir after the testator's death.—and 5. The lands specifically devised, although they may be generally charged with the payment of the debts, but not specially appropriated for that purpose. And this rule is executed by a decree in chancery, according to the rights of the parties respectively interested; 2 Brown's case in chancery, 257, Donne v. Lewis; ibid. 259, Davis v. Topp.

The laws of this commonwealth, applicable to this subject may next be considered. And here all the personal estate of the testator, and all the real estate of which he died seized, whether devised or not, are assets for the payment of all his debts, whether due by simple contract or by specialty; (Stat. 1783, c. 32, sec. 1, and 7.) Also by the statute of 1783, c. 24, sec. 10, all estate real or personal, undevised in any will, shall be distributed as if it were intestate, and the executor shall administer upon it as such.

A question has been made, whether the executor must take out administration on such undevised estate, or whether he shall administer it *ex officio* as executor. The usage has been to administer it without a letter of administration; and we are satisfied that this usage is correct. There can be no benefit to any person, from having two accounts opened by the executor in the probate office; and the natural construction of this section supports the usage. For the executor, by the probate of the will, has the administration of the testate estate, according to the will, and on undevised estate he is also directed to administer agreeably to the provisions respecting intestate estate.

According to the strict rules of law, there can be no undevised personal estate in a will, where an executor is appointed; for he has all the personal estate, whether acquired before or after the will in trust,—first to pay the debts and then the legacies; and if any remained, it was his own, unless the testator by his provision for the executor, had excluded him from it; in which case he was trustee of the remainder for the next of kin.

As questions frequently arose, whether the executor was excluded from the residue or not, the section of the statute above cited removed all doubt; and the executor is now in all cases trustee of the undisposed residue for the next of kin.

As to the distribution of undevised lands, this section is merely affirmative of the common law, which gives to the heir all undevised estate. But by the obligation imposed on the executor to administer it as intestate estate, it becomes assets in his hands for the payment of the testator's debts: and it may be sold by the executor, on license for that purpose, or a creditor may take it in execution.

There is another provision applicable to this subject, in the 18th section of this statute; where it is enacted, that whenever a testator in his will, shall give any chattels, or real estate, to any person or persons, and the same shall be applied to satisfy the debts of the testator, all the other legatees, devisees

or heirs, shall refund their proportionable part of such loss, and contribution may be compelled by suit.

From this view of our statute provisions, it is manifest that a testator cannot, by any dispositions in his will, affect the rights of creditors, who may, if their debts are not discharged, enforce satisfaction by the levy of their executions on any estate, which was the testator's at his decease; the whole of it being assets in the hands of the executor. But it is also manifest, that the testator may bind, by his dispositions, his legatees, devisees, and heirs.

Hence results the right and duty of the court, in the due exercise of its jurisdiction, so to marshall the assets, that as little interruption be given to the interests of the claimants under the will, and of the heirs, as may consist with the more perfect right of creditors. This can be done only by a designation in the license of the estate, which the executor may sell for the payment of debts. And when the testator, or the law, has appropriated an adequate fund for the payment of the debts, it would be unreasonable for the court to permit that fund to lie by, and to license an executor to sell a specific devise, and thus drive the specific devisee to his action at law, for relief out of the appropriate fund.

In what manner the assets are in this case to be marshalled, is the next question. And in our opinion, the rule established in equity, in cases where all the debts are due by specialty, is applicable in this case, except as it relates to the rents and profits of the descended estate, received after the testator's death, which we cannot come at. For in those cases, the whole estate personal and real, as well the devised as the descended lands, are assets for the payment of all the debts. So here the whole estate of Jackson, the testator, including the descended real estate, is assets for the payment of all his debts in the hands of his executors. And in both cases the charge on the estate is by operation of law.

In this will there is no specific bequest of any chattel, and no exemption of any part of the personal estate, from the payment of debts. Therefore, the whole of the personal estate, after the payment of the expenses of the last sickness, funeral charges, and of the debts due to the government, (if any,) is first to be applied to discharge the debts. It is also very clear, that the devise of lands to Susanna Gray is a specific devise, not liable, by the terms of it, to any deduction. The descended estate must then be applied to the payment of the debts, before the specific devise can be resorted to. And the same rule must apply to the lands, which Mrs. Swan can claim as residuary legatee, if the devise of those lands can be considered as specific within the intention of the rule.

Jackson first provides, that his debts and funeral charges be paid: He next bequeaths legacies to his nephews and neices, and makes a specific devise to his sister Susanna Gray. Then he gives to Mrs. Swan in fee, all the remaining part of his estate real and personal. The just construction of which is, "when my debts, and funeral charges, and the legacies are paid, and the specific devise to my sister is deducted, then what remains, whether real or personal, I devise in fee to Mrs. Swan." If nothing should remain, then nothing is devised to her.

We cannot, therefore, consider this devise of the remainder as specific. It is rather creating a fund for the payment of the debts and legacies with a devise of what remains, if any, to the residuary devisee. If after the personal estate was exhausted by the debts, the unsatisfied creditors should levy their executions on all the devised lands, excepting those specifically devised to Mrs. Gray, Mrs. Swan could not compel contribution by Mrs. Gray and the heirs, under the statute; because a general residuary legatee

cannot have contribution, if nothing remains. For in that case, nothing is given to him, but on a contingency that some estate may remain; and if no estate shall remain, then nothing devised to him is taken from him, to satisfy a creditor of the testator. The debts and legacies, being first to be paid, are to be considered as a deduction from the property contemplated to be given; and if after the deduction, there is no remainder, the contemplated bounty has wholly failed, there being in fact no object, on which it could operate.

Thus, when the testator, after mortgaging lands, devised them, with a clause, that the devisee pay off the mortgage, he can resort to no other part of the estate for relief; but the money secured is considered as a deduction from the property devised; 2 Brown's ch. ca. 257. But the case of King v. King, *et al.* 3 P. Will. 358; ib. 96, Harris v. Ingledew, is in point. There the testator being seized of freehold lands, and of a copyhold, which last he had mortgaged, devised and copyhold to his nephew; and after all his debts were paid, he devised the rest of his estate real and personal to his son, who was his heir. And it was holden that the import of this devise was, that until all the debts were paid, nothing was devised to the son; or that when the debts should be paid, then and then only, he should be entitled to the residue. We cannot, therefore, consider this residuary devise to Mrs. Swan as specific, within the rule of marshalling assets, so that the descended lands shall first be sold.

It has been argued by the counsel for the petitioners, admitting the rule to be generally correct, yet that in this case, it ought not to apply, because in the residuary devise, the testator gives, not only all his real and personal estate, of which he was then seized and possessed; but all of which he might afterwards die seized; and therefore, tha he contemplated after acquired estate; which although it could not pass by his will, yet was evidently intended to pass; and that this intent ought to be so far executed, as to cause it to cause it be sold for the payment of debts, before the residuary devise should be applied for that purpose.

This argument, however ingenious, is not solid. For the testator cannot, in his will, charge with the payment of his debts after purchased lands, any more than he can devise them. And if in this case he intended it, the intent was void. And an intent against law, cannot effect this rule or principle of law. Otherwise the rights of the heirs would be implicated by a testamentary disposition, made before the lands were acquired by the testator. If this case should be allowed as an exception, it would involve most residuary devises; for it is common for the scrivener to include expressly all the residue of the estate, of which the testator may die seized or possessed. We think, therefore, that the rule should be applied in this case, without admitting the exception.

The order of the court was entered as follows.

Ordered that the said executors be, and they hereby are empowered and licensed to raise the sum of by sale at public auction of the houses, lands, or tenements, of which the said Henry Jackson died seized in fee, being devised by him, by his last will and testament; excepting such part thereof as is therein devised in trust for his sister Susanna Gray, and such as may have been held by said Jackson to the use of, or in trust for any other person or persons; the said sum when raised, to be applied to the payment of the debts, aforesaid, with the incidental charges of sale; and if the said sum cannot be raised by such sale, it is further ordered, that the said executors may raise by sale at public auction of so much of the real estate of which the said Jackson died seized, and not having devised the same in and by his last will and testament, such further sum of money, as with the money

raised by the sale first above ordered, will amount in the whole to the said sum of to be applied as aforesaid, giving bond, &c.

250.

GRIMSHAW v. BENDER, AND DANA, Partners under the firm of BENDER & DANA, 6 R. 157.

PARSONS, C. J. The action is *assumpsit* by the plaintiff, as holder of a bill of exchange, drawn by himself, in Manchester, in England, on the defendants, in sterling money, and made payable to his own order in six months against the defendants as acceptors, who on the date of the bill accepted to pay it in London. A verdict was found for the plaintiff on the trial, subject to the opinion of the court upon the case reserved.

On examining the case, there appears to be but one point litigated by the parties, they differing only as to the rule, by which the damages should be assessed.

The defendants insist that the bill is not to be considered as a foreign bill of exchange, but as a mere promise made in England to pay money there in six months; and according to them, the rule for assessing damages is, to reduce the sterling money to the currency of the United States, reckoning the exchange at par. and to add English interest from the time the bill was dishonored, to the time of the verdict.

On the other side the plaintiff has argued, that this contract declared on, is to be considered as a foreign bill of exchange; and that in assessing the damages he is entitled to have the sterling money and the charges of protest reduced to our currency, reckoning the exchange at par with American interest, from the time the bill was dishonered to the time of the verdict; also ten per cent. on the face of the bill, according to the ancient usage in this state, and further the value of re-exchange, which when the bill was refused payment, was five and a quarter per cent. but at the time of the verdict was ten per cent.

The first question is, whether the instrument declared on, is, or is not, to be considered as a foreign bill of exchange?—that the instrument is a bill of exchange, is not disputed; but the defendants contend that it is an inland bill, because it was drawn in England, and accepted to be there paid. It appears that the bill was drawn on a Boston house, one of which was then at Manchester in England, but that his domicil was in Boston; and that the acceptance by him in the name of the firm, was made at Manchester, by which the firm undertook to pay the bill in London in six months. From this statement. it is manifest, that the remedy contemplated by the parties, in the event of the bill being dishonored, must by sought in this state, where the acceptors lived. From this view of the case, the instrument must be considered as a foreign bill, having the same effect as if the payee had sent it to Boston, and it had been accepted payable in London by the house here, in which case the money must be remitted to London to meet the bill, returned to the drawer after acceptance.

The next question concerns the rule, by which damages are assessed in actions upon foreign bills of exchange, sued here against the drawer. According to the law merchant, uncontrolled by any local usage, the holder 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 re-exchange, so that he may purchase another good bill for the remittance of the money, and be indemnified for the damage arising from the

delay of payment. But he cannot claim the ten per cent. of the bill, which it is here the usage to pay.

But the rule of damages, established by the law-merchant, is in our opinion, absolutely controled 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 those sums from the time when the bill should have been paid; and the futher sum of one tenth of the money for which the bill 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 re-exchange whether it is below or at par. This usage is so ancient, that we cannot trace its origin; and it forms a part of the law-merchant of the commonwealth. Courts of law have always recognised it, and juries have been instructed to govern themselves by it in finding their verdicts.

This usage also governs in actions against the endorsers of foreign bills; and by a reasonable analogy must in this case be conformed to, although in form the defendants appear to be acceptors. For in fact the intention of the parties was, that the acceptors, as the original debtors, should in this way be holden to remit the money, which they owed, to London where it was to be paid.

The origin of this usage was probably founded in the convenience of avoiding all disputes about the price of re-exchange, and to induce purchasers to take their bills, by a liberal substitution of ten per cent. instead of a claim for re-exchange. And in the course of exchange between this state and England, that the usage is generally favorable to the holders of dishonored bills, and tends to discourage the drawing of bills by persons who have no funds to meet them.

Conformably to this usage, the plaintiff in this case is entitled to the money mentioned in the bill, reduced to our currency at par, which, together with the expenses of protest, he shall receive with Massachusetts interest, from the time the bill was payable to the present time; and to these items, let there be added one tenth of the bill, with the like interest on it, from the time payment of the bill was demanded of the defendants and refused, to this time.

And let the verdict be reduced by substituting, in the place of the sum there found, the amount of these several items, and on the verdict so amended, let judgment be entered for the plaintiff.

251.

HUSSEY v. JOHN ALLEN, AND JOHN ALLEN, JR. 6. R. 163.

A merchant in a foreign port furnishes necessary supplies to a vessel, which when she left home was owned by A. & B. but before the supplies were furnished, they had parted with all their interest in the vessel, although this fact was not known to the merchant.

It was held in an action brought against A. & B. for those supplies, that they were not liable.

The opinion of the court was delivered by

PARSONS, C. J. The action is sued by the plaintiff against the defendants, to recover of them compensation for supplies furnished by him to Andrew Colman, master of the defendants' sloop Betsey Ann, when on a voyage. The plaintiff's right to recover must depend on the law, arising from the facts stated by arbitrators appointed by the parties, and which are submitted to us.

From these facts a general question arises, whether if necessary supplies are furnished to a vessel abroad on a voyage, after the owners of her, when she sailed, have legally and *bona fide* sold all their interest in her; but of which sale neither the master, nor the merchant furnishing the supplies, have any knowledge, the original owners are liable in law to the merchant for such supplies.

And it is our opinion, that the original owners are not liable to pay for any supplies furnished for the vessel, after they have sold all their interest in the vessel, although neither the master, nor the merchant furnishing the supplies, have any knowledge of the sale. The obligation, imposed on owners of vessels abroad, to pay for the necessary supplies furnished to the master, is founded on the principle, that the master is for this purpose their agent, and is authorised to bind them in this case; because the supplies are for their use and benefit, and without which their vessel cannot proceed on her destined voyage. But when the owners have alienated all their interest in the vessel, the master ceases to be their agent, and the supplies are not furnished for their use.

When, therefore, necessary supplies are to be furnished for a vessel on her voyage, and from home, the merchant may furnish them on the credit of the vessel, by taking an hypothication, or on the credit of the master by his consent, or on the credit of all who are owners at the time the supplies are furnished, because they have the use and benefit of them. But the original owners are exempted from all obligation to pay for such supplies, furnished after the sale, because they are no longer owners, nor interested in the vessel or voyage.

Plaintiff nonsuit.

252.

PENNIMAN AND ANOTHER v. RUGGLES AND ANOTHER, AND JUTAU, THEIR TRUSTEE, 6 R. 166.

An auctioneer selling goods by orders from a sheriff, and receiving the money for them is accountable only to the sheriff, and cannot be held as the trustee of those who may have claims on the sheriff for the proceeds.

PARSONS, C. J. Is Jutau, upon the facts disclosed by him, trustee of the principal defendants? is the question before us.

The plaintiffs have argued that he is, because the agreement between the officer who attached, and the defendants, the debtors, is void as to creditors, and the lien arising from the attachment is discharged by the sale, and consequently that Jutau, being accountable to the defendants for the proceeds, is their trustee.

On the other side, it is admitted that the lien arising from the attachment is no longer in force; but it is insisted that when goods are regularly attached at the suit of *bona fide* creditors, and there is an agreement by all the parties in interest, that the officer shall sell the goods, and hold the proceeds for the payment of the judgments to be recovered by those creditors, he is their trustee, and shall hold the proceeds protected against any other creditors.

As the facts concerning any such agreement are not within the knowledge of the auctioneer, who may not know the attaching creditors, or whether their debts are *bona fide* or not, and who can disclose only the information he may have received, without being able to ascertain its correctness, we do

not conceive that this point is properly before us; and therefore we give no opinion on this question.

But we are satisfied, on another ground, that Jutau cannot be adjudged the trustee of the defendants. It sufficiently appears that Jackson claimed a special property in the goods, as having attached them by writ; that he advertised them for sale; that Jutau was merely his agent to put up the goods at auction, and to receive the money for him; and that there is no privity between the auctioneer and the defendants. He must therefore account with the officer for the proceeds, and the officer is answerable to those who may be injured by his conduct, or who may have any right to the money.

The inconveniences of a different construction are manifest. The auctioneer being a mere agent of the officer, for the sole purpose of selling the goods and receiving and paying over to him the money, may have no knowledge of the rights or interest of the officer or of any other person, and cannot disclose the facts really existing, on which the rights of all persons claiming to be interested are founded. It would therefore be unreasonable that the right of property should be decided on a very partial and incomplete disclosure of the facts, on which such right vested. The plaintiffs in this case should have summoned the officer as a trustee, from whom might be obtained the facts necessary to form a correct judgment.

Trustee discharged.

253.

YOUNG, Plaintiff in Error v. ADAMS, 6 R. 182.

When one in payment of a promissory note made payable in foreign bills paid the amount in such bills, and took up the note, and it was afterwards discovered that one of the bills paid was counterfeit, it was held that the payee might recover the amount of such counterfeit bill in an action for money had and received against the payer.

SEWALL, J. Two principal questions, suggested in the assignment of errors upon the bill of exceptions in this case, have been fully and ingeniously argued; whether the action, in the particular form of it, being for money received to the use of the plaintiff, is supported by the evidence? and whether that evidence proves a case upon which the plaintiff is entitled to recover?

The merits of this cause are said to be with the defendant, because in the currency of bank bills, when they are offered and accepted in payment, without any warranty of their genuineness by the payer, or he is not proveably guilty of knowing them to be false, the receiver takes them at his own risk, and has no remedy for any mistake: and in this case no evidence is given of a warranty by the defendant, or of any fraudulent intention on his part in passing the counterfeit bill.

This doctrine, as applied to a case of counterfeit bills, is in our opinion extremely incorrect. The responsibility of the bank, when the bills paid are true and genuine, is, we believe, the risk of the receiver, in the case supposed; with one further exception perhaps, which may be made respecting the real bills of a bank, when paid after a known failure; if the fact be known or reasonably apprehended by the payer, and he conceal his knowledge from the party accepting the payment, and that is made under circumstances when he may be supposed ignorant of the fact or suspicions, and therefore not knowingly to incur any peculiar risk. And in allowing this immediate risk of the responsibility of banks, we go further in favor of the currency of bank notes or bills, than the authorities carry us, according to the deci-

tions in cases of private notes or bills, or even banker's notes in England, when accepted in payment. And it is to be remembered that bank bills, are, after all, only private contracts, having no public sanction, similar to that which gives operation to the lawful money of the country. It seems however necessary to go thus far, in conformity to the usages, unfortunately prevailing respecting bank bills in their loose and unrestricted currency, dangerous as it is to the welfare of individuals, and of the community. Private notes, that is, of individuals or companies, whether incorporated or not, where, I may add, the currency of them is not regulated by some notorious and peculiar usage, when accepted in payment or discharge of an existing contract, are taken at the risk of the payer; and if, after due diligence to collect them, when found of none or of a doubtful value, they are returned seasonably to the payer without prejudice to his right or remedy, the former demand against him revives; or the receiver becomes entitled to some equivalent remedy for the deficiency of the intended payment discovered by the event.

In the cases cited and relied on for the plaintiff, of Stedman v. Gooch, of Puckford v. Maxwell, of Owenson v. Morse, and of Dimsdale *et al.* v. Lanchester, the decisions were governed by the general principles I have stated, or principles of the same import, and they are explicitly recognized as settled law. In Puckford v. Maxwell, decided in the court of king's bench, lord Kenyon says, in delivering the opinion of the court, "In cases of this kind, if the bill, which is given in payment, do not turn out to be productive, it is not that which it purports to be, and which the party receiving it expects it to be; and therefore he may consider it as a nullity, and not as if no such bill had been given at all."

In the ancient case of Vane and Studley, cited by lord Coke, in reporting Wade's case, as said to have been adjudged, the question arising in the case at bar seems not to have been considered. There payment by the lessee of his rent, accepted by the lessor in money, among which some counterfeit pieces were afterwards found, was determined to be a sufficient payment to prevent the re-entry of the lessor, under a condition of the lease, which secured the payment of the rent at a certain day; for when the lessor had accepted the money, the reporter adds, it was at his peril, and after that allowance he shall not take exception to any part of it. But this must be understood according to the subject-matter, as a saving of the lessee's forfeiture, where both parties had understood the condition to be performed; and it is not to be understood as a decision that the lessor had no remedy for the deficiency in the money paid.

The other case of Price v. Neal, cited in the argument for the defendant, seems to be nearer to his purpose, in supporting the principle, that the risk of the genuineness of a note or bill received in payment, is upon the receiver. The two bills, purporting to have been drawn by Sutton upon Price, the plaintiff, were paid by him to the defendant Neal, to whom the bills had been indorsed for a valuable consideration; one of them having been accepted by the drawee before it came to the hands of Neal. After some interval of time, the bills were discovered to be forged, and before the action bought, one Lee, charged with the forgery, had been convicted and executed. But Price failed in his action, and was adjudged not to be entitled to recover back the money he had paid; because the defendant, being innocent of any fraud, and having paid a full consideration for the bills, might conscientiously retain the money he had received. Another, and in my opinion, a stronger ground for the decision, intended, although not so prominently stated by the reporter, was because the plaintiff's acceptance and payment of these false bills, considering them as drawn upon himself, was his own peculiar negli-

gence, by which the loss had been incurred; and therefore it was not to be thrown back upon the innocent holder of the bills.

But the case at bar differs essentially, we apprehend, from the case of Price v. Neal, which was a question between the parties real or supposed, to the forged bill, the party, who allowed and paid it as a true bill, having been guilty of positive, if not gross negligence, in affording it the credit and currency which it obtained. Here the question is between those who have no concern, as parties nominal or real, in the forged bill, but who were parties in another contract, whether that contract has been discharged and paid in full, by the aid of the counterfeit bill.

Public policy, as well as the principles of fair dealing, obviously require that a mistake of this kind, after the deception has been detected and proved, should not be insisted on by the party, who has the undue advantage, even when gained without any intentions of fraud on his part.

But in considering this payment, upon the original contract between the parties, deficient so far as the counterfeit bill was reckoned in it, and the amount of that bill as remaining due, we come to the other objection, made for the defendant, to the form of the present action; and the question to be decided is, whether an action for money had and received to the use of the plaintiff can be maintained for the balance due upon a promissory note, made for 252 dollars, "payable in foreign bills." For whatever may be the import of the last words, the opinion of this court, in the case of Jones v. Fales, cited at the bar, seems to be a determination, that a note of this tenor is not absolutely and at all events a cash note; in which view only the doubt arose of the negotiability of the note given in evidence of that case.

Respecting the objection, upon which the question now to be decided arises, and which appeared, upon the first suggestion of it, to be attended with some difficulty, it may be observed, that a promissory note or bill of exchange, unquestionably made for the payment of money, if restricted, by any contingency not an inevitable event, or to a particular fund, or to a mode of payment liable to any uncertainty in the amount or value to be paid, is not negotiable by the statute of Anne, or by the custom of merchants, (Chitty. 34. 173. 174.—Bull. N. P. 272. 273.)

The present question does not depend upon the quality of the note, whether negotiable or not, which was evidence of the contract existing between the parties in the case at bar; but whether the note was evidence of a contract respecting money. Now such is the affinity, if I may use the expression, between money and bank bills, by usages, of which we take a judicial notice in considering the operation of the terms "foreign bills," that the alternative between them and dollars, given by the tenor of the note in question, has very little effect to prevent its being estimated as equivalent to a contract for money. Besides, to give it the exclusive construction, contended for in the objection, the term "dollars" seems to be overlooked, or confounded with foreign bank bills, notwithstanding the plain difference there is in the real import, whatever may be their nominal identity. The contract has its legal estimation by the term dollars, and the permission to pay in foreign bills, though a conventional mode of payment, of which the promisor may avail himself, if he can, when the note is demanded, or due; yet if he cannot, or will not, then it is recoverable as a contract for a sum of money, payable according to the promise.

If after a breach, the contract in question was to have its effect as a promise of a sum of money, the difficulty apprehended, and stated in this objection to the form of the present action, is entirely removed. For there can be no doubt, that for a sum of money, which has become due upon a promissory note or bill, an action against the promisor, for money received

to the use of the promisee in the bill, may be maintained. In the case of Dimsdale *et al.* v. Lancester, the plaintiffs, endorsees of a promissory note, recovered in this form of action against the promisor, the demand being for a balance of his note, which became eventually due, in a case very similar to the present. The plaintiffs held by endorsement the note of the defendant for 63*l.* which was sent to her for payment; and a 10*l.* note, received in part, turned out to be forged; for the amount of which the action was brought and maintained.

Upon the whole the balance remaining due, from the mistake discovered in the intended payment, was a sum of money in the hands of the defendant, due according to the note, which had been given up as paid; and that balance is recoverable in this form of action, after his refusal to rectify the mistake, which on the discovery of it he was entitled to do, according to the tenor of the note, by paying a foreign bank bill; and thus far we might conform to the authority of the case cited from lord Coke; but having refused that, the balance of the note became due, and was recoverable in dollars or lawful money. Judgment affirmed.

254.

Gould v. Newman, 6 R. 239.

After an assignment of an estate mortgaged by the mortgagee, the action to foreclose the mortgage must be brought in the name of the assignee.

This was a writ of entry, brought to foreclose a mortgage, given by the defendant to the plaintiff, pursuant the statute of 1785, c. 22. s. 1.

The defendant after oyer, pleads in bar, that since the execution of the mortgage, and before any breach of the condition thereof, the plaintiff, by his deed duly executed, acknowledged and recorded, assigned all his interest, &c. in the demanded premises, to one Thomas Pons, in fee simple, that the premises passed to the said Pons, by the said assignment, and the plaintiff had not, at the time of commencing this action, nor at any time since the making of the said deed of assignment, any cause of action against the defendant, as he in his writ and declaration has alleged and supposed.

The plaintiff replies, that by the same deed of assignment, the said Pons was authorised with full power, in the name of the plaintiff, and for the sole use of the said Pons, to enter into, sue for and recover the demanded premises, and to do all acts necessary to invest him with the right and possession of the premises, in as ample a manner as the plaintiff could himself do: "wherefore he prays judgment that he may recover possession of the demanded premises, to the sole use of the said Pons, for whose use and benefit this action is brought, and for his damages and costs."

To this replication the defendant put in a general demurrer, and the plaintiff joined in demurrer.

Parsons, C. J. [After stating the pleadings.] Under the general issue, it is very clear, that this conveyance by the plaintiff could not be given in evidence; for it is consistent with every allegation in the count, and in fact admits the plaintiff's seizin and the disseisin complained of. The question is, whether it may be well pleaded in bar.

If a mortgage was a chose in action, not assignable at law, but only in equity, the bar would be bad, because the legal estate still remained in the mortgagee. So, when a man not seized of land executes a deed of conveyance, he may afterwards maintain a real action in his own name, if nothing passed by the deed of conveyance. But if a man should execute a conveyance of any kind, by which the estate in fact and in law passed, or his right was extinguished, he could not after maintain an action in his own name to recover seizin, if his conveyance be pleaded in bar. This distinction is to be found in the year books. For if the demandant has no interest in the tene-

ments demanded, he has no cause to question the title of the tenant. But the tenant cannot avail himself of the conveyance of the demandant, made after a disseisin committed, under the general issue; because the evidence of the alienation or extinguishment, does not contradict any allegation in the count. And after the disseisin complained of, the disseisee may have released to the disseisor, who may not be the tenant; in which case he would have no interest or claim remaining.

Now after a mortgage, if the mortgagor remains in possession, it is not a disseisin of the mortgagee, who may convey the lands mortgaged to a third person, who shall thereupon be seized of the legal estate in the lands, subject to the condition in the mortgage. The conveyance is not therefore, an assignment of a chose in action, but an alienation of the legal estate; so that the mortgagee has no longer any right or interest in, or claims to the land mortgaged. And having no legal claim to the lands, he can maintain no action to recover seizin of them, but his alienation may be pleaded in bar.

The making of the assignee of the mortgage an attorney, to sue it for his own use in the name of the assignor, was founded in the mistake of the scrivener, in supposing the legal estate not to have passed by the assignment, but only an equitable interest.

The action in this form cannot be maintained; but Pons may foreclose the mortgage by a suit in his own name. Indeed if the legal estate in lands mortgaged did not pass by the assignment, great inconvenience would follow. For the assignee must then use the name of the assignor, if living, or if dead, of his executor or administrator, and might be embarrassed in obtaining a legal title, after a judgment and execution in the name of the assignor, or of his executor or administrator.

In this case it is said, that the bond, to secure the payment of which this mortgage was given, was also assigned; but being a chose in action, judgment has been recovered on it in the name of the assignor, which is not satisfied. Notwithstanding these proceedings, Pons will be entitled on his action to foreclose the mortgage, to have the conditional judgment entered in his own name, unless the judgment on the bond shall have been before satisfied.

The replication must be adjudged bad, and the plaintiff can take nothing by his writ.

255.

PIERCE v. JACKSON, 6 R. 242.

An attachment of the goods of a partnership, by a creditor of one of the partners, is not valid against an after attachment of the same goods by a partnership creditor.

This was an action of the case against the defendant, a deputy sheriff of this county, for a false return of a writ of execution. It was submitted to the court upon an agreed statement of facts, which were recited by the chief justice in delivering the opinion of the court. An argument was had at the adjourned session in July last, by Channing, for the plaintiff, and Sullivan for the defendant, after which the action was continued for advisement to this term.

PARSONS, C. J. It is stated in the case agreed by the parties, that Chas. F. Kentor, and Gerard Von Harten, were partners in trade, doing business under the firm of Kentor and Von Harten; that the partnership being insolvent, the partnership effects were duly attached by the defendant, at the suit of a creditor of the partnership, on the 28th day of March, 1806; that afterwards on the same day, in the forenoon, the defendant again attached

the same effects at the suit of Messrs. Sheek and Foss, creditors of Von Harten only; that afterwards on the same day, the defendant again attached the effects at the suit of the plaintiff, brought against the partnership for a partnership debt; that judgments were recovered in these suits, and executions issued within thirty days thereafter; that by the execution issued on behalf of the first attaching creditor, the effects were seized and regularly sold; and out of the proceeds that execution was satisfied; that a balance remained in defendant,s hands, claimed both by Sheek and Foss, and also by the plaintiff, but not sufficient to satisfy either of their executions; and that the defendant applied it to the execution sued out by Sheek and Foss, returning the plaintiff's execution in no part satisfied. And whether the defendant did right, or whether he ought to have applied the balance towards the plaintiff's execution, is the first question.

At common law, a partnership stock belongs to the partnership, and one partner has no interest in it, but his share of what is remaining after all the partnership debts are paid, he also accounting for what he may owe to the firm. Consequently all the debts due from the joint fund must first be discharged, before any partner can appropriate any part of it to his own use, or pay any of his private debts; and a creditor to one of the partners cannot claim any interest, but what belongs to his debtor, whether his claim be founded on any contract made with his debtor, or on a seizing of the goods on execution. There are several cases, by which these principle, so reasonable and equitable, are recognised and confirmed; 1 Doug. 650, Eddis v. Davidson—4 Ves. Jr. 296, Field v. Clark in the exchequer.

But it is said, that ourstatutes authorising attachments to be made on original writs, to secure such judgments as may on such suits be recovered, have in this respect altered the common law. Whatever goods are attached must be seized on execution within thirty days after judgment, or the lien arising from the attachment is gone. It seems, therefore, very clear, that chattels, which cannot lawfully be seized on execution, cannot lawfully be attached; and as the right to seize chattels on execution remains as at common law, so must the right to attach by original writ depend on the common law; and therefore, the right of attachment, given to creditors, can have no influence on this question.

When these principles are applied to the facts stated, the result is, that the officer has misapplied the balance in his hands, if the plaintiff be a creditor of the partnership. For it is agreed, that the partnership was insolvent, and that no interest therein remained to either of the partners, after the debts of the company were paid. But the debt of Sheek and Foss was due, not from the firm, but from Von Harten, one of the partners. And the plaintiff's demand was a claim upon the partnership.

The defendant contends that there was no debt due from the company to the plaintiff, and that his judgment was obtained by fraud. On this point, the following facts are agreed in the case, (if on the trial it was competent for the defendant to have given in evidence;)—that the plaintiff's action was on a note made by the company to a third person, but not payable until several days after the plaintiff's writ was sued out, and the attachment by virtue of it was made; that the indorsement to him was a forgery by one of the company, and not made by the promisee; and that after he had recovered judgment against the company, they released to him all errors.

If upon these facts the judgment appears to be fraudulent against creditors, any creditor, on whom it is a fraud, may give them in evidence; and if Sheek and Foss would be defrauded by it, the defendant, whom they have indemnified, may in our opinion give them in evidence.

A suit is sometimes commenced, when the plaintiff well knows that no

cause of action has accrued to him; but his object is to obtain security by attachment, in preference to other creditors, who have causes of action. This attempt is against law, and a fraud on the other creditors, for whom some remedy ought to be provided. The debtor joining in the fraud, either to defend the suit or by releasing errors, cannot defeat the creditor of his legal right to attach. If, therefore, the plaintiff, when he caused the attachment to be made on his writ, had no cause of action, he cannot claim the benefit of his attachment against a creditor, having a good cause of action. And a creditor of one of the firm has a right to attach the partnership effects, against all creditors, whose demand is not upon the company.

But the plaintiff insists, that as the indorsement was a forgery by one of the partners, he immediately had cause of action, for money had and received, against the firm, for the consideration he paid to obtain the indorsement.

This reasoning cannot be admitted. For if he had no demand on the company by virtue of the indorsement, he could have none in consequence of the fraudulent endorsement; because a fraud committed by one of the partners shall not charge the partnership.

Whether, therefore, the return by the defendant is, or is not true, the plaintiff has received no injury from it, and cannot maintain this action against the defendant.

If afterwards, Sheck and Foss should be attached as trustees to Kenfer and Van Harten, at the suit of a partnership creditor, it may then be determined, whether they can hold this balance against a creditor of the company.

Plaintiff nonsuit.

256.

ELLIS AND ELLIS v. WELCH, 6 R. 246.

A covenant in a lease, that the lessee shall hold and occupy the demised premises during the term, amounts to a general covenant for quiet enjoyment during the term.

The location of a town way, over land so leased, is no breach of the said covenant; the lessee having by statute, as owner, a remedy against the town equally with the lessor.

PARSONS, C. J. This action is in a plea of covenant broken, in which the plaintiffs declare on a lease made by the defendant to them of a brick store in State street in Boston, with the appurtenances, for five years from the 8th day of September, 1804, and they aver that the defendant covenanted with them, that they should hold and occupy the demised premises during that term; and that within the term the selectmen of Boston, pursuant to the statute of 1799, c. 31, in widening State street laid a part of that street over the demised premises, by reason of which the public became entitled to an easement in the same as a town way; and so the plaintiffs could not hold and occupy it agreeably to the covenant. In describing the allegation of the breach, I have adopted the legal inference from the facts alleged. The defendant, after having oyer of the lease, demurs generally, and the plaintiffs join in the demurrer.

Two questions are made —Whether the covenant shown in the declaration is contained in the lease;—And if it is, whether the widening of the street by the selectmen of Boston is a breach of this covenant.

After this clause of demise, the words of the lease, so far as they apply to the first question, are, "and the said Welch does agree that the said Jon-

athan Ellis and Luther Ellis shall hold and occupy the same for the term of five years from," &c. These words in our opinion amount to a general covenant for quiet enjoyment during the term, and sufficiently maintain that part of the declaration in which the covenant is alleged.

The next question is, if the widening of State street in this manner is a breach of this covenant. As no authorities in point are cited, the question must be decided on general principles.

All deeds are to be construed agreeably to the intent of the parties; and in a lease or conveyance containing a general covenant for quiet enjoyment, it must be presumed that the parties had in view evictions, entries or disturbances, to be made by virtue only of existing rights, and not of rights afterwards to be acquired; for these, it cannot be presumed from the general words of the covenant were contemplated. Now the interruption complained of is an easement acquired by the public after the execution of the lease. And the authority of the selectmen to locate and establish a town-way when necessary, cannot be considered as an existing incumbrance. Neither can the prerogative of the public to convenient ways on the lands of individuals be deemed an existing right, within the intention of the parties to the lease. For the lessor holds his land subject to this prerogative; and so also do the lessees their term, because it is one of the incidents of the tenure, by which all the lands in the state are holden. A covenant against the exercise of this prerogative would be a covenant, not against any existing right or interest in the land, but against a naked possibility.

To support the presumption that a general covenant for quiet enjoyment extends only to rights then existing, the case of the executors of Grenelife v. W——, in Dyer, 43, b. is applicable. It was there holden by all the judges, that when a man binds himself and his heirs to warranty, they are not bound to warrant against new titles arising through the feoffee, or any other person, after the warranty is made.

Upon this general principle, it appears to us that there is no breach of the general covenant for quiet enjoyment, well and sufficiently assigned. But as the case is new, it has been the subject of our further consideration.

To guard the citizen from any oppressive consequences of the prerogative we have noticed, the tenth article of the declaration of rights provides, "That whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor." In conformity to this just and equitable provision, the statute of 1786, c. 67, s. 1, defining the manner in which town-ways, when necessary, may be located and established, has provided that the owner of the land, covered by the location, may recover of the town where the way is established, a reasonable compensation for the damage, to be estimated by a jury.

Now any person having an interest in the land, either as lessee for years, tennnt for life, or for any greater estate of freehold, as also he in reversion or remainder, is an owner within the provision of this section; because being within the mischief, he is within the remedy. If there was any doubt, the change of phraseology in the fourth section would remove it. For in that section compensation for damage in laying out a public high-way is provided expressly for any person damaged in his property by the location. And for the same reason, the provision made in the statute of 1799, c. 31, for the owner or owners of buildings, must have the same construction; and the lessee, as also his landlord, are each one entitled to compensation, according to the nature and magnitude of the damages he may sustain by the widening of any street.

In this case, therefore, the plaintiffs have no occasion to resort to the de-

fendant for recompense, as the same law by which the easement, of which they complain, is authorised, has provided for them a remedy against the town, and such a construction of the lease as would give the lessees another remedy against the lessor, who is a fellow-sufferer with them, is unnecessary and unreasonable.

This conclusion is supported in principle by the cases deciding that a general covenant in a lease for quiet enjoyment extends only to entries and interruptions by those who have lawful titles, but not by wrong doers; for the tenant has his remedy by action for all tortious entries and disturbances; 3 D. & E. 584; Hob. 24, Tisdale v. Sir W. Essex. Now the reason of this distinction applies with great force to the present case. For the plaintiffs have an adequate remedy for the interruption alleged, against those for whom the easement is acquired. Indeed this case is not to be distinguished in principle from a feoffment in fee of lands, with a general covenant against incumbrances and for quiet enjoyment. And although the feoffor is answerable for existing incumbrances, by ways established at the time of the feoffment; yet it has never been attempted to charge him on his covenant for ways afterwards located, but the feoffee is left to the remedy provided for him by the statutes in such cases provided.

Upon the whole we are satisfied that the declaration before us is bad, because no breach of the covenant is therein legally assigned.

Judgment must be rendered, that the plaintiffs take nothing by their writ, and that the defendant recover his costs.

257.

COMMONWEALTH v. HAMILTON, 6 R. 273.

Where a child had been duly bound as an apprentice in Upper Canada, and the master had removed with the child into this state, the court refused to order her to be delivered to her mother, who had married a second husband, but permitted her to remain with her master, she declaring herself so inclined.

The Chief Justice enquired of the child if she was restrained against her wishes; to which she answered that she was not, but that she was very desirous of continuing in the family, and under the protection of Mr. Hamilton.

By the court. By the return of this writ, it appears that Catharine Cuddy was bound as an apprentice to the defendant, agreeably to the laws of Upper Canada, where the parties then resided. Although it may be true, that on removing into this state, the defendant could not have compelled her to accompany him, yet as she came voluntarily, and as the defendant is under obligation to provide for her; which obligation it is by no means certain that the laws of this commonwealth would not enforce in a case situated like the present; as there is no evidence of any neglect of that duty on his part, but on the contrary, the child appears to have been well treated, and to be attached to the family of the defendant; it would be unreasonable to take her from his care and deliver her to her mother, who by her marriage to her present husband, ceased to have any power of controling her own actions, or of providing for the support and education of her child. Whatever right she might have had as guardian by nurture, they have certainly ceased at the age* of this child; and the husband is under no legal obligations to be at any expense for that object. Let the child be discharged with liberty to remain in the defendant's family, as she has requested; and we further or-

* The child appeared to be about 14 years old.

der that neither the said Margaret, nor any other person or persons, molest, interrupt or disturb her in respect to her residence in the family of the said Hamilton.

258.

Chandler v. Windshir, 6 R. 316.

Where a promissory note was to deliver specific articles of merchandize on demand, and before any demand made the promisor became bankrupt; the proof of the debt before the commissioners was equivalent to a demand on the promisor, and no certificate having been obtained by him, he was held liable in an action upon the note.

Parsons, C. J. The plaintiff contends, that the facts in this case either prove a demand, or render a demand unnecessary; as the assignee must be considered as representing the defendant, and acting as his agent. The defendant has urged that this debt was not proveable under the commission, and therefore that the assignee cannot be considered as the defendant's agent or representative; and if the debt could be proved under the commission, yet the submitting of the claim to the commissioners, and an allowance of it by them, will not dispense with a demand on the bankrupt so as to authorize a suit at law against him.

By the English statutes of bankruptcy it seems to be settled, that no debt can be proved, the amount of which must be ascertained by a jury; for those statutes provide for no jury to decide between a creditor and the assignees.

The consequence of this principle, arising from the provisions of those bankrupt laws, frequently produced hardships to those creditors, whose demands required the intervention of a jury to ascertain the amount; (4 D. & E. 570.

To guard against this inconvenience, our national statute of bankruptcy [s. 58] expressly introduced a jury, to decide in all cases between a creditor and the assignee, if either party required it.

The debt arising from the note in the case at bar is therefore in our opinion, one which might be claimed from the estate of the defendant, and consequently might be received and allowed by the commissioners, or by a jury, if either the plaintiff or the assignee requested it. The debt being therefore within our act, we are satisfied that the claim being submitted to the commissioners, and which might have been resisted by the assignee, who might have required the verdict of a jury to establish it, is equivalent to a demand on the defendant. A demand on him would have been fruitless, as all his property was out of his control, and vested in the assignee, who held the estate in trust, as well for him as his creditors, to pay his debts. The assignee having the fund was the proper person, on whom the demand ought to be made, and the submitting of the claim to the commissioners was the making of the demand on the assignee.

Agreeably to this relaton between the bankrupt and his assignees, it was determined in the case of Jackson v. Fairbank, (2 H. Black. 340,) that when there were two joint promisors of a note, one of which having become bankrupt, and a dividend on the note paid under the commission, this payment took the case out of the statute of limitations, the acknowledgment of the debt by the assignees being considered as an acknowedgment by the bankrupt, one of the promisors.

On these principles the verdict appears to us to be right, and the plaintiff is entitled to judgment upon it.

259.

BILL AND ANOTHER v. MASON, 6 R. 313.

This action was assumpsit upon a policy of insurance upon the plaintiff's brig Ranger, on a voyage from Norfolk to a port or ports in the island of Jamaica, and until moored twenty four hours in safety, against the usual risks, upon which policy the defendant underwrote five hundred dollars. The declaration is for a total loss by the dangers of the sea.

From the statement it appears, that the brig sailed from Norfolk for Anatto Bay in Jamaica, where she arrived on the second day of November, 1807, and in the forenoon of that day was safely anchored by a pilot of the harbor at the usual anchoring place, where vessels commonly lade and unlade; that when the brig entered the bay the wind was northerly, blowing a fresh gale with squalls; that the gale continued to increase until the brig lost both her anchors, and was driven on shore and totally lost; but that she rode at anchor, without receiving any damage, for which the underwriters were answerable, until more than twenty four hours had expired after she was moored.

PARSONS, C. J. The question between the parties is, whether the underwriters are answerable for the loss of the vessel in the manner and at the time stated in the case. The counsel for the plaintiffs has argued, that the brig could not within the intention of the parties, be considered as moored in safety, until the weather was such that she might safely land her cargo. On the other side it is contended, that the brig was in safety, until she received some damage from a cause insured against, for which the assurer was answerable; and consequently that she was in safety after having been moored twenty four hours.

We have considered this point with some attention, and are satisfied that the verdict must be set aside.

The effect of this clause in policies, allowing a vessel after she shall have arrived at her port of destination, and been moored at anchor twenty four hours in safety, is in fact a prolonging of the time for which the assurers have engaged to be liable, without varying the nature of the perils insured against. If without this clause the vessel be insured to her port of destination, the voyage is determined on her arrival and being moored on the usual anchorage ground; but with this clause the policy is further extended twenty four hours. If therefore no loss, for which the underwriters are answerable, shall happen during the voyage, or during twenty four hours after, they are discharged. And the vessel is safe within the terms of the policy, until she suffers a loss insured against.

This construction seems necessary, to give some termination to the risk; for if we adopt the construction of the plaintiff's counsel, that the vessel is not moored in safety while she is in hazard of a loss, she never can be moored in safety; for in the finest weather she may be in danger of fire, lightning, enemies and other perils, if not exposed to any sea risks.

The insurance is not on the cargo; and whether the weather was suitable for unlading the cargo, or not, is no concern of the assurers. They did not stipulate for the safety of the cargo, or for the convenience of landing it. They are answerable only for losses on the vessel, during the voyage and for twenty four hours longer, arising from perils insured against.

Let the verdict be set aside, and according to the agreement of the parties let judgment be entered that the plaintiffs take nothing by their writ, and that the defendant recover his costs.

260.

MUNN v. BALDWIN AND ANOTHER, 6 R. 316.

The putting a letter into the Post Office directed to the endorser of a bill of exchange, and containing notice of its being protested for non payment, was held sufficient, although it did not appear that the letter was ever received. See 5 Johns. Rep. 375, Miller v. Hackley.

PARSONS, C. J. The only question in this action is, whether the defendants had legal notice of the protest for non-payment of a bill of exchange. After taking a little time to advise, we are all of opinion that the notice is *prima facie* sufficient. The holder of the bill made use of the usual mode of conveying notice, by putting the letter containing it into the post office; and a mode to which the endorsers must be considered as assenting; or the negotiating of bills payable at a distance would be greatly embarrassed, if not obstructed. For who would buy a bill, to be presented for payment in a remote part of the United States, if it was to be understood, that if not paid, he must be at the expense of some private messenger, whose accidental sickness or detention on the road would defeat his remedy?

When a letter is put into the regular post office, we presume that it was sent and received agreeably to its direction, unless the contrary is proved. Here there is no evidence on that point; the case only stating that it does not appear that the letter was received by the defendants; and yet they might in fact have received it.

If it was agreed that the letter miscarried, and that the defendants did not receive it, it might be a question at whose risk the letter was sent by the mail; and whether the regular mail being the method of conveyance assented to by the defendants, they must not be answerable for the miscarriage in the same manner as if a letter sent by their private servant had not been delivered by him. On this last point however it is not necessary now to decide. But on the facts stated, we are satisfied that the notice must be considered as sufficient to make the endorsers liable, and that the plaintiff ought to recover.

Therefore, conformably to the agreement of the parties, let the defendants be called.

261.

AMORY & CO. v. JONES, 6 R. 318.

Where a voyage is abandoned from fear of capture, it is not so defeated as to charge under-writers with a total loss.

PARSONS, C. J. On the facts in this case we are called upon to decide whether there was, or was not a total loss of the fish, by any of the perils assigned. And it is very clear there was no actual total loss:—a small part was indeed thrown overboard as a jettison; a moiety perished on board the vessel, either from the water taken in, or from the length of the passage; and the remainder was sold at Gibraltar.

If there was a constructive total loss, it must have arisen either from the capture of the Spanish privateer; which cannot be admitted, as the brig was liberated in forty-eight hours; or from the restraint of princes, by the operation of the French decrees and British orders. The detention of the brig for repairs, until the arrival of intelligence of that decree and those or-

ders, cannot be a total loss of the fish, for a part remained and was afterwards sold.

But it is said the voyage was wholly lost, as the master abandoned it from a well grounded fear of capture. That the abandonment of the voyage might be a prudent measure on the part of the master, is not questioned. It is however our opinion that an abandonment of a voyage, through fear of any peril insured against, is not a loss by any peril for which the assurers are answerable; there being an essential difference between a loss and the mere fear of a loss. This point was very fully considered and decided in the case of Richardson *et al.* v. The Maine Fire and Marine Insurance Company, cited at the bar for the defendant.

The plaintiffs cannot therefore recover as for a total loss. The assurers are not answerable for any partial loss on fish, unless it arise either from the stranding or bilging of the vessel, neither of which has happened in this case. The verdict therefore cannot be amended, as for a partial loss. But on the facts, the plaintiffs are entitled to recover for the loss of the ten quintals of fish which were thrown overboard to preserve the brig and the remainder of the cargo; and the verdict may be so amended, that the plaintiffs may recover this small average loss.

After this opinion was given, the general average was compromised by the parties, and they were called.

262.

ELLIS v. WILD, 6 R. 321.

If A. sells merchandize to B. and agrees to receive certain promissory notes in payment; if the notes are afterwards discovered to be forged, and B. was ignorant of the fact, A. cannot afterwards resort to B. for payment for the merchandize.—Otherwise, if the original bargain was for cash, and the notes were received by the vendor as an accommodation to the vendee.

PARSONS, C. J. The real question in this case is, on which of the parties, both being equally innocent, the loss of the notes shall fall. And it is our opinion, if it was the original intent of the defendant to sell, and of the plaintiff to buy the notes, and to make payment in rum, the defendant has fulfilled his contract, and the plaintiff cannot maintain this action.

But if the plaintiff intended to sell the rum for money, and the defendant intended to buy rum, and the payment by the notes was not a part of the original stipulation, but an accommodation to the defendant; then he has not paid for the rum, and the action is maintainable.

Were we to decide on the intent from the words of the report, we must conclude the intent of the plaintiff to have been to deliver rum in payment for the notes; and therefore the verdict must be set aside. As the plaintiff has contended that the testimony was not delivered in the words of the report, but was given to the jury in a manner, whence they might rightly make a different inference, we do not order a nonsuit; but the defendant consenting, grant a new trial, that a jury may decide on the true intent of the parties in making the bargain.

263.

GARDNER v. HOSMER, 6 R. 325.

In an action against the sheriff for the misfeasance of his deputy, the defendant can

give nothing in evidence, which the deputy could not, were he the defendant. And the deputy could not, either in pleading or by evidence be permitted to falsify or contradict his own return.

PARSONS, C. J. The defendant having pleaded the general issue, at the trial offered to give in evidence, either to maintain the issue on his part, or in mitigation of the damages, that his deputy's return on the original writ was not true. This evidence was objected to by the plaintiff, and was rejected by the judge; and if it ought by law to have been admitted, the verdict is to be set aside, and a new trial granted.

It is our opinion that the sheriff can give nothing in evidence which his deputy could not, were he the defendant; and we are satisfied that the deputy could not be permitted, either in pleading or by evidence to the jury, to falsify his own return.

Although in an action for a false return, the plaintiff may falsify it by evidence, yet the officer making a return, which is, on the return and filing of the writ, a matter of record, cannot be admitted to contradict his own return. If it were allowed, much mischief to parties would result from it; and much uncertainty in judicial proceedings would be the consequence. We are therefore satisfied that a new trial cannot be granted. As to any hardship, the officer may always avoid it by returning the truth; or when the truth is not certainly known, he may make a special return of the facts.

Let judgment be entered on the verdict.

264.

LIENOW v. ELLIS, 6 R. 331.

Where an action of covenant broken is founded on privity of contract between the parties, their executors or administrators, it is transitory; but when it is founded on privity of estate, it is local, and must be sued in the county where the land lies.

PARSONS, C. J. It is the opinion of the court that the exception urged by the counsel for the defendant must prevail. When the action of covenant is founded on privity of contract between the parties, their executors or administrators, it is transitory, and may be sued as a transitory action; but when it is founded on privity of estate, the action is then local, and must be sued in the county where the land lies.—In the case before us, if the plaintiff can maintain an action of covenant, upon the covenant on which he declares, he must maintain it as assignee of Bartlet, by virtue of his conveyance of the land; and his privity is a privity of estate, and not of contract.

After this opinion was delivered, the plaintiff had leave to discontinue, upon payment of costs.

265.

DOANE v. THE BROAD-STREET ASSOCIATION IN BOSTON, 6 R. 332.

Flats may pass as appurtenant to a wharf, notwithstanding the maxim that land cannot pass as appurtenant to land.

This action was entry sur disseizin, in which the demandant demanded a parcel of land in Boston, formerly flats, but now part of India street, counting on his own seizin within thirty years, and on a disseizin by the tenant, who pleaded the general issue. On the trial a verdict was taken for the tenants, subject to the opinion of the court upon a case reserved by the parties.

PARSONS, C. J. It is stated in the case reserved, that Elisha Doane, father of the demandant, died intestate, seized in fee simple of the tenements demanded, and of other real estate situated in Boston, and in the county of Barnstable, of which one undivided sixth part descended to the demandant; that a warrant duly issued from the probate court in Suffolk, directed to commissioners, to make partition of all the real estate of which the intestate died seized, among his heirs; that the commissioners made partition, and returned the same, which was accepted by the probate court; which warrant and partition are made a part of the case.

The demandant contends that no partition was made of the tenements demanded, and that he was in by descent, and seized of his share, until disseized by the tenants. The tenants contend that the tenements demanded were, in the partition, assigned to Hannah Bourne, one of the co-heirs, as a portion of her purparty, whose estate therein they now have. The merits therefore depend on the point, whether the tenements demanded were, or were not included in the partition.

It is further agreed that the intestate's title was by a conveyance in fee from Atherton Hough, who sold a parcel of land, wharf, dock and flats fronting; which flats are the premises in question. Upon examining the partition it appears that the wharf and dock, purchased of Hough, are assigned to Hannah Bourne, with all the privileges and appurtenances to the same belonging. It also appears that the commissioners were authorised to make, and returned that they had made, partition of all the real estate of the intestate among the heirs; and the tenements demanded are not the subject of that partition, unless they pass as flats appurtenant to the said wharf.

But the demandant's counsel have argued with much ingenuity, that these flats cannot be deemed in law to pass as appurtenances to the wharf; because it is an established maxim of law, that land cannot pass as appurtenant to land, although it may pass as appurtenant to a messuage; and although the commissioners might intend to make partition of these flats, yet if in fact they have not, the heirs must continue seized of their several undivided shares in the same.

It is very justly and candedly admitted by the counsel for the demandant, that the commissioners intended to make partition of the whole estate, including the flats. This appears, not only from the warrant, but from their express declaration in their return. And it further appears, that it was their intention that the flats fronting the wharf and dock should pass; for otherwise the owner of the wharf and dock could not cause any vessel to be brought into the dock, without passing over land not belonging to the owner; nor could he lay a vessel at the end of his wharf, without paying dockage to him who owned the flats at that place.

We must suppose the commissioners to have intended a reasonable and equitable partition, by annexing the flats to the wharf and dock, as the intestate had purchased them, and as they must be occupied together. If then there are suitable words in this return, by which that intent may be executed, justice may be done to all the heirs, although the demandant may fail in this action. And it is our opinion, that there are in the return sufficient words for this purpose.

We do not consider a wharf as land, within the construction of the maxim, that land cannot pass as appurtenant to land. A wharf is a structure erected on the shore below high-water mark, and sometimes extending into the channel, for the laying vessels along side to load or unload; and on which stores are often erected for the reception of cargoes. To a structure of this description, and built for such purpose, we are satisfied that flats, necessary for the use of the wharf, and usually occupied with it, may pass

as appurtenant. When the commissioners assigned this wharf and dock with the appurtenances to Hannah Bourne, the flats fronting, by a legal construction of the partition passed with the wharf, as appurtenant to it, without impeaching the maxim relied on by the defendant's counsel.

It is therefore our opinion that the verdict must stand, and that the tenants take their judgment.

266.

JENKINS, ET AL. V. THE NEW ENGLAND MAINE INSURANCE COMPANY, 6 R. 335.

Debt on bond.—The plaintiffs had recovered a judgment against the defendants, and to stay execution they gave bond to the plaintiffs, conditioned to review the action, and to pay to the plaintiffs, if the judgment was affirmed in the whole, the amount thereof, with twelve per cent. interest and double costs. The action was reviewed, and the former judgment affirmed in the whole, the jury in fact finding larger damages, casting interest at six per cent. up to the time of their verdict in the action of review; and the defendants have satisfied the judgment rendered on the review. This action was brought on the bond above mentioned, in order to recover the twelve per cent. interest and the double costs; and the forfeiture being confessed, and the defendants praying to be heard in equity, the judgment of the court was given on the above statement by

PARSONS, C. J. As the penalty of the bond is forfeited in law, the only question before us on the facts is, what equitable relief the defendants shall have. And it is our opinion, that they be relieved on paying six per cent. interest on the damages first assessed, and double costs. We consider the six per cent. interest allowed as damages by the second jury, and which have been paid, as equivalent to the payment of the same sum in part on this bond. Without a rule of this nature, the defendants would have to pay 18 per cent. on the first judgment, when they are holden to pay only twelve per cent. interest.

Let judgment be entered for the plaintiffs, for a sum equal to the amount of six per cent. interest on the original damages, and of double costs; with interest on this amount from the time of the judgment in review, when it ought to have been paid

Note. In the action of James Carter v. Thomas Lewis *et al.* on a review bond, decided this term, the same point arose, and received the same decision.

267.

OTIS V. BLAKE AND BLAKE, 6 R. 336.

In an action upon a bond to save harmless the obligee by reason of his having given a receipt on behalf of the obligors, the defendants pleaded non damnificatus; the plaintiff replied the attachment of his property in the hands of his trustees, and a payment by them of a sum of money in discharge of the said suit; the defendants traverse the payment before the commencement of the action against them; it was held that the replication was not double, and that the rejoinder was bad.

PARSONS, C. J. [After stating the pleadings, delivered the opinion of the court.] The objection to the rejoinder is, that the defendants have not traversed the attachment of the plaintiff's estate by Bell; but have tendered an issue on the traverse of a fact not alleged in the replication. For the plaintiff has not averred therein, that the trustees paid over the 523 dollars

93 cents before the commencement of this action. The defendants in fact appear to give up their rejoinder, but rely on the insufficiency of the replication; because it is double, the plaintiff having as they say, assigned two distinct breaches of the condition.

It is certainly a correct rule in pleading, that to assign two distinct breaches of the condition of a bond, in a replication to a bar in which *omnia performavit* or *non damnificatus* is pleaded, is bad as being double. But duplicity in pleading cannot be taken advantage of on general demurrer, but must be shown for cause on special demurrer. If therefore the replication was double, the defendants cannot now avail themselves of it.

But is it double?—the plaintiff, to show a damnification, alleges the securing of his real property, and also of his personal property in the hands of his trustees, by attachment, and a subsequent appropriation of his personal property attached to discharge Bell's suit against him. The attachment of his estate real and personal was one act, in the service of one writ, and of this act the subsequent appropriation was consequential; and it is alleged, rather as an aggravation of the damages resulting from the attachment, than as a distinct breach of the condition of the bond. And if the defendants had intended to defeat the action by a defence on the merits, they ought to have traversed the damnification resulting from the attachment, by denying the attachment, if the fact was with them. Not having done it, we must consider Bell as having attached the plaintiff's property, and thereby taken it from under his control; and as this was done before the commencement of this action, it is a damnification, which is a breach of the condition of the bond.

Upon the whole of the pleadings, it clearly appears to us that the rejoinder is bad, and not a sufficient answer in law to the plaintiff's replication.

The defendants may however be relieved in equity from paying the penalty, by our awarding judgment for such a sum as will reasonably compensate the plaintiff for his damages.

268.

STEVENS, ET AL. v. BELL, 6 R. 342.

PARSONS, C. J. By our law, as well a debtor as he who is bound to indemnify another against an engagement entered into for his use, and at his request, may without question secure his creditors and his sureties by pledging his property, or by conveying it in trust for their use, with their consent: so that the same be done honestly and fairly; for the existing debt or the engagement by the surety, is a valuable consideration; and such security or trust is repugnant to no principle of public policy. If such security, so pledged or conveyed in trust, be delivered over agreably to the conveyance, and if the security be not manifestly excessive, and greatly more than adequate to the debt or indemnity, no injury is done to other creditors, if there be a stipulation, that the surplus over the debts and indemnities shall enure to the use of the debtors.

For at common law, every man might prefer any creditor, and might pledge his property and convey it in trust, so that no fraud resulted to others; and if he stripped himself of all his property in favor of any one creditor, leaving himself quite destitute, no other creditor had legal cause of complaint, if the transaction was honest, and for a valuable consideration. This right in a debtor is founded on the acknowledged principle, that he may prefer or secure any one creditor, in a way that is not a fraud on another.

But in consequence of statutes authorizing attachments, and of our want of a chancery jurisdiction, it has been several times settled, that a debtor cannot convey his estate in trust for his creditors generally, without their consent given to such conveyance; but to creditors consenting, and parties to the conveyance, he may grant all his estate for the payment of their debts, or to secure them indemnities; if thereby he exercise only his right of preference, and not defraud others.

But when the conveyance is in trust for all the creditors generally, without their assent, a creditor is not bound, but he may proceed by way of attachment; for being no party the conveyance in trust, he can have no remedy upon it at law, and there is no equitable jurisdiction, to which he may apply.

We make no distinction between a conveyance to creditors with their assent, whether it be by way of pledge, or in trust for their use; for we know no reasonable foundation for any such distinction. Goods may be pledged to a creditor, to be redeemed on payment of the debt, and with liberty to the creditor, on failure of redemption, to sell the pledge, pay himself, and account for the surplus to the debtor. When the creditor exercises this liberty, he becomes a trustee; and the debtor may at all times waive his right to redeem, if he is to have the surplus.

The same principle must apply, whether the debtor pledges the goods separately to a single creditor, or jointly to several creditors, with the liberty to sell, pay themselves, and render an account, on failure of redemption, unless the right to redeem be waived. And on similar grounds we make no distinction between a pledge given, or a trust created to secure to sureties an indemnity against their liabilities. For undoubtedly a single surety might be secured by a pledge, with liberty to sell if damnified, accounting to the pledgor for any surplus.

In the application of these principles to the case before us, there appears to be a valuable consideration for the conveyance; and there is no trust, expressed or implied, for the grantors, except the accountability of the grantees for an eventual surplus, which may be secured by attachment, at the suit of any other creditor. Nor are the other creditors delayed or defeated of the recovery of the demands, but as a consequence of the legal right of a debtor to prefer any creditor or creditors at his option.

A debtor may, if he pleases, convey all his effects for the use of any particular creditors; and if the effects are delivered over, such conveyance may be *bona fide*; and when no time is fixed for the grantees to apply the proceeds and render an account, the law requires them to execute the trust in a reasonable time.

When schedules of the effects conveyed, or of the amount of the debts, or of the liabilities to be indemnified against, are not made at the time of the grant; although *prima facie* this may furnish a presumption of fraud, yet this presumption may be removed by the facts attending the transaction.—And the facts agreed in the case at bar, remove this presumption; for a schedule was to be made out as soon as might be, and also, an account of the debts and liabilities, which, if disputed, were to be arbitrated.

Upon a view of all the facts agreed, and of the whole transaction, so far as it has been laid before us, we see no fraud to impeach the conveyance, as against creditors not parties to it. And it is our opinion, that the verdict must be in favor of the plaintiffs; and when amended conformably to the agreement of the parties, will entitle them to judgment upon it.

269.

GREENWOOD v. CURTIS, 6 R. 358.

The letters of a deceased agent were received as evidence of a demand made upon a debtor of his principal on the coast of Africa.

A contract made in a foreign place, valid there and to be there executed, may be enforced in this state, although not valid by our laws, or prohibited to our citizens; except the commonwealth or its citizens may be injured by giving the contract a legal effect here; or the enforcing it in our courts would exhibit to the citizens of the state an example pernicious and detestable.

Where one had purchased a cargo on the coast of Africa, to be paid for in slaves, and having delivered a part of the slaves, settled the account, acknowledging a balance due in cash, and the same day gave a note for the same balance, payable in slaves, it was held that the creditor might recover on the insimul computassent.

PARSONS, C. J. This action is *assumpsit* on a promissory note for the delivery of slaves, and the payment of bars, which are an African currency, and also on an *insimul computassent*. A verdict has been found for the plaintiff, upon a trial on the general issue, subject to the opinion of the court upon a case stated by the parties.

Two objections have been made to the verdict by the counsel for the defendant. That the letters of Hippias were improperly admitted in evidence; and if they were not, that no action can be maintained in this state on a breach of either of the supposed promises.

The note was made at Rio Pongos, on the coast of Africa, for the delivery of slaves there on demand. Hence the defendant very properly argued, that the slaves ought to have been demanded, before he could be discharged in an action on the note; and there was no evidence of this demand, but what arose out of Hippias' letters. If those were properly admitted, and the plaintiff cannot recover upon the *insimul computassent*, the verdict must be set aside. But if the plaintiff, can maintain his action upon the *insimul computassent*, where no previous demand was necessary to entitle him to his action, the admission of Hippias' letters becomes immaterial, and cannot affect the verdict.

When the plaintiff's vessel, of which Hichborn was master and supercargo, arrived in Africa, the master sold the cargo to the defendant, to be paid for by the delivery of one hundred and fifteen slaves. The defendant delivered but a part of the slaves to Delany, who on the death of Hichborn, succeeded him as master, and the vessel returned without the residue. The contract on the part of the defendant was then broken, and the plaintiff, if the contract was lawful, had his remedy at law to recover damages for such breach.

That the contract was not performed, is admitted by defendant. For he has stated an account between himself and the owner of the outward cargo, in which he credits the owner with the value of the cargo, and after having charged him with the slaves delivered, and the advances made to the master, acknowledges a balance in cash of 6056 bars, equal to 4481 dollars 41 cents, due from him. If no further transactions had been had, there can be no doubt, but that the plaintiff, on assenting to this settlement, might have recovered this balance on an *insimul computassent*, and without making a demand of the money previous to the action.

But it appears, that on the same day, before Delaney left Rio Pongos, the defendant also made the note declared on, the balance of the account being the consideration of the note, and the note and accounts being parts of the same transaction. It it manifest then, that the plaintiff cannot recover, both on the note and on the account. If there be no illegality attached to

this transaction, the plaintiff may recover on either, as the note not being negotiable nor accepted in satisfaction of the account, nor of an higher nature, does not merge the account.

Being, therefore, well satisfied, that an action may be maintained on the *insimul computasscnt*, if the settlement was not illegal, without any previous demand, it becomes unnecessary to give any opinion on the admission of Hippias' letters. But having considered this question, it is our opinion that the admission was regular. Hippias was sent to make the demand, in a country where there is no regular civil government, and not having, that we know of, any magistrates or notaries authorised to take and certify affidavits, or regularly to authenticate testimony in any manner; and as no cause was then pending or expected, it cannot be required that he should carry with him a *dedimus protestatum*.

There seems, therefore, to be a commercial necessity to admit evidence of this nature under these circumstances, to enforce contracts made abroad in barbarous or uncivilized countries. This evidence might be controled; and if the defendant had shown, that when Hippias was at Rio Pongos, the slaves were ready to be delivered, probably little credit would have been paid to the letters. But whether this opinion be or be not correct, if an action can be maintained on the *insimul computassent*, the admission was immaterial, and cannot affect the verdict.

The second objection, that no action upon either of the promises alleged can be maintained in this state, is principally relied on by the defendant. The argument of his counsel has been supported with much ingenuity. The slave trade, he has argued, is or has been prohibited by a statute of the commonwealth, in the preamble of which it has been declared to be an unrighteous commerce; and he attempted to show that in itself it was immoral. This objection deserves much consideration.

By the common law, upon principles of national comity, a contract made in a foreign place, and to be there executed, if valid by the laws of that place, may be a legitimate ground of action in the courts of this state; although such contract may not be valid by our laws, or even may be prohibited to our citizens. Thus in states where a greater rate of interest is allowed than by our statute, a contract securing a greater rate of interest, but agreeably to the law of the place, may be sued in our courts, where the plaintiff shall recover the stipulated interest.

This rule is subject to two exceptions. One is, when the commonwealth or its citizens may be injured by giving legal effect to the contract by a judgment in our courts. Thus a contract for the sale and delivery of merchandize in a state where such sale is not prohibited, may be sued in another state where such merchandize cannot lawfully be imported. But if the delivery was to be in a state where the importation was interdicted, there the contract could not be sued in the interdicting state; because the giving of legal effect to such a contract would be repugnant to its rights and interest. Another exception is, when the giving of legal effect to the contract would exhibit to the citizens of the state an example pernicious and detestable. Thus, if a foreign state allows of marriages incestuous by the law of nature, as between parent and child, such marriage could not be allowed to have any validity here. But marriages not naturally unlawful but prohibited by the law of one state and not of another, if celebrated where they are not prohibited, would be holden valid in a state where they are not allowed. As in this state, a marriage between a man and his deceased wife's sister is lawful, but it is not so in some states; such a marriage celebrated here would be held valid in any other state, and the parties entitled to the benefits of the matrimonial contract. Another case may be stated as within the second excep-

tion, in an action on a contract made in a foreign state by a prostitute, to recover the wages of her prostitution. This contract, if lawful where it was made, could not be the legal ground of an action here; for the consideration is confessedly immoral, and a judgment in support of it would be pernicious from its example. And perhaps all cases may be considered as within this exception, which are founded on moral turpitude, in respect either of the consideration or the stipulation.

Before the present case can be compared with this rule, including the exceptions to it, the merits of it must be ascertained.

In South Carolina it was lawful to purchase slaves on the coast of Africa, and to import them as merchandize into that state. And it does not appear that this purchase and importation was unlawful at Rio Pongos. The original contract was made at Rio Pongos, for the purpose of obtaining slaves to transport to Charleston. The account was stated at Rio Pongos, in which the defendant acknowledged a balance due in cash, which was assented to by the plaintiff in Charleston. Whether either of the contracts is to be governed by the law of Rio Pongos or of South Carolina, is immaterial; for in either case it does not appear that either of them was invalid *lege loci*. Either of them, therefore, may be the ground of an action in this state, unless it come within one of the exceptions to the rule, even if a contract of this nature made by the citizens of this state should be void. To maintain the action if it be not within the exceptions, is enjoined on us by the comity we owe another state. And to entitle the defendant to retain in his hands the debt which he justly owes, as between the parties, he ought clearly to show some principle, by which he may defend himself in dishonestly retaining this property.

We do not perceive any injury, that could arise to the rights or interest of this state or its citizens, if either of the contracts had been faithfully executed agreeably to the terms of it. It was made abroad, by persons not citizens of the commonwealth, and to be executed abroad, having no relation in its consequences to our laws.

The defendant, therefore, to establish his defence, must bring this case within the second exception; and show that the action, as considered by the laws of this commonwealth, is a *turpis causa*, furnishing a pernicious precedent, and so not to be countenanced. This upon public principles he is authorised to do, notwithstanding he is a party to all the moral turpitude of the contract.

The argument is, that the transportation of slaves from Africa, is an immoral and vicious practice, and consequently that any contract to purchase slaves for that purpose is base and dishonest, and cannot be the foundation of an action here within the principle of comity adopted by the common law. This objection may apply to the counts on the note, but not to the count on the *insimul computassent*.

Laying the counts on the note out of the case, we shall consider the objection of moral turpitude, so far as it affects the count on the *insimul computassent:* and we are satisfied that the objection does not apply to the contract averred in this count; there being nothing immoral in the consideration on the plaintiff's part, or in the stipulation made by the defendant. If a Charleston merchant should send a cargo of merchandize to Africa, for the purpose of there selling it and with the proceeds to purchase slaves; and if the cargo be accordingly sold, and the purchaser agree to pay for it in slaves; and he afterwards shall refuse or neglect to deliver the slaves, but makes a new agreement with the owner to pay him a sum of money for his cargo, an action can unquestionably, in our opinion, be maintained on this new contract; and the illegal contract being annulled or void, cannot affect it. So

if the purchaser had delivered a part only of the slaves to the merchant, and afterwards agrees with him to pay the balance in cash, we see no objection to an action to recover this balance in cash, if the purchaser refuse to pay it.

In the present case, the defendant having delivered a part only of the slaves, and having become a creditor of the plaintiffs for supplies furnished to his use, states his account, in which after deducting the slaves delivered and the supplies furnished, he acknowledges a balance in cash, and the plaintiff, having assented to the account, demands the balance in this action. We see no legal objection to his recovery. The consideration of the implied promise arising from this settlement is the sale of the cargo, which involves in it no moral turpitude; neither is the performance of the promise by paying the balance in cash immoral. And although on the same day the defendant, in consideration of this balance due in cash, promises by his note to discharge it principally in slaves, and the small remainder in cash; yet this promise is no bar to an action by the plaintiff on the account, even if the promise by the note is here considered as legal, and *a fortiori* if it is considered as void for its immorality. It is true, if the defendant voluntarily discharged the note, the balance of the account could not afterwards be recovered, for the consideration of it was discharged by the payment of the note; nor could the payment of the note be recovered back, for *potior est conditio possidentis*.

In this case, the defendant having acknowledged a balance of cash in his hands, the property of the plaintiff; although it came into his hands from the sale of the merchandize, for which he was to pay in slaves, but did not, this balance as between the parties is justly due the plaintiff; and unless the principles of public policy against the action upon the *insimul computassent* are manifest, we cannot decide that the defendant shall not be held to pay what he justly owes.

In this view of the case, we are satisfied that the action is maintained on the *insimul computassent*, and that the plaintiff may take his verdict on that count, and have judgment entered upon it.

Judgment according to verdict.

270.

BLAKELY v. GRANT, 6 R. 386.

This was an action of a foreign bill of exchange, sued by the plaintiffs as endorsee of the payee, against the defendant as the drawer.

On the trial upon the general issue, at the sittings after the last May term in this county, before Parker, J. a verdict was taken by consent for the plaintiff, subject to the opinion of the court on a case agreed by the parties.

From the case it appears that the bill was drawn by the defendant, whose signature is admitted, on Messrs. John Grant and son, for 900 dollars, payable in sixty days to the order of Dominique Lagus. On the back of the bill was the following endorsement: "Should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay the holder, in addition to the principal, twenty per cent. damages;" signed Dominique Lajus. The signature of the payee was neither proved nor admitted. The bill was duly presented for acceptance, and protested for non acceptance. The drawer having been absent from the state for several years, a written notification of the refusal to accept was left at his last dwelling house, none of his family then residing there; but this notice was in fact received by his wife.

PARSONS, C. J. Several objections are made to the verdict in this case: That the bill does not appear to have been endorsed by the payee, because

the endorsement is not made in blank; and does not direct payment to any person; and because the indorser's signature is not proved.

As the payee, if he made the indorsement, expressly promises to pay the holder twenty per cent. damages, besides the principal, if the bill should be dishonored, we are satisfied that the indoresement is evidence of a transfer of the bill, without naming the indorsee; and in this respect the indorsement may be considered as general, and a *bona fide* holder may fill it up, by inserting above the express stipulation a direction to pay the contents to his order, for value received.

But the second objection is fatal. No person can maintain an action as endorsee of a bill of exchange, against the drawer or acceptor, without proving an assignment of the bill by the payee. The plaintiff's title to recover is as assignee of the payee; and it is necessary that he show the assignment, by proving the signature of the assignor, who is the payee, either by evidence of his hand writing, or by other sufficient evidence.

As to notice of the protest of a foreign bill, a copy of the protest should be given or offered to the drawer, or due dilligence used to furnish him with this notice, before he can be charged, if when the bill was drawn his connection with the drawee was such as gave him a right to draw. As notice is alleged in the declaration to have been actually given, the written notice, with a copy of the protest is left at a former dwelling of the defendant, in which neither he nor his family then resided, is not evidence of the notice stated in the declaration; although the defendant's wife might elsewhere receive it; for it is not stated that she was empowered by her husband to receive notice of the protest of bills drawn by him. But as the defendant had been absent for several years, and had left no known agent to receive notice, had the use of due diligence been averred in the declaration, instead of notice being in fact given, the case would have shown sufficient evidence of such diligence.

On the second point, as the signature of the payee was not admitted nor proved, and as there was no evidence that he had assigned the bill, the verdict must be set aside.

Leave was afterwards given to the plaintiff to discontinue.

271.

JOHN STORER, Administrator of the goods and estate of JOHN STORER, ESQ. deceased, not administered by JOSEPH STORER, ESQ. NOW deceased, v. JOSEPH STORER and CLEMENT STORER, Administrators of the goods and estate of the said JOSEPH STORER, Deceased.

Where a decree of the court of probate had passed, directing administrators to pay a balance to the administrator de bonis non of an estate of which their intestate had been first administrator; and afterwards judgment was recovered for the benefit of the administrator de bonis non, against them upon their administration bond; but the said judgment was not satisfied: it was held that the administrator de bonis non might still maintain an action of debt upon the decree against the administrators declaring against them in that capacity.

PARSONS, C. J. After hearing the parties, it is our opinion that this action is maintainable by the plaintiff. When the decree passed he might have sued this action, if the defendant refused to obey the decree, and unless they had a sufficient reason for not obeying the decree, the plaintiff might have recovered. As a want of assets in their hands was no legal objection to settling the administration account; yet as their intestate might have died insolvent, of this insolvency in some form they might avail themselves. In this

action therefore the defendants might have pleaded no assets, if the fact would have supported them; and by not pleading it, they must be considered as having assets.

The consideration that a want of assets would have been a good plea, sefficiently evinces the legal propriety of this action being sued against the defendants as administrators, notwithstanding the decree is against them. In the same manner, if judgment be recovered against administrators on *cognovit actionem*, which does not confess assets; and action of debt on this judgment must be sued against them as administrators, in which they may plead no assets, or if they have assets, that they may in their administration account, charge the estate with the payment of such judgment.

The judgment upon the administration bond is no bar to this action; being merely a cumulative remedy, by the stipulation of the sureties; and a judgment in a suit, where the action is given as a remedy merely cumulative, is no bar unless such judgment has been satisfied; for although there may be two remedies, there can be but one satisfaction. The plaintiff having formerly sued the bond, has not barred himself of this action, as the bond remains wholly unsatisfied.

There are cases, in which an action on the bond may be the most effectual remedy. The administrator, if living, may have no property; or he may die without leaving any; in either of which cases the surety might be compelled to satisfy any damages arising from a breach of the condition of the bond by his principal.

If satisfaction be obtained on the bond for the injury in not obeying the decree, debt cannot afterwards be maintained on the decree. So after the defendants have obeyed this decree, or satisfied the judgment which may be recovered against them in the present action, the plaintiff cannot maintain *scire facias* on the judgment which has been rendered on the bond, unless for damages otherwise accruing than from refusing to perform the decree. The plea in bar is therefore in our opinion bad, and no answer to the plaintiff's declaration.

After this opinion was given, the court enquired why execution was not awarded in the suit upon the bond; and it was said, that as the sum decreed was to be distributed when recovered; and as the defendants were entitled to a distributive share, execution was suspended, until their proportion might be settled and deducted from the amount of the decree in a new account.

The court then observed that there must have been some mistake or misapprehension; for the present plaintiff ought not to settle another administration account, charging himself with this balance, before he received it; and that the only regular way, in which a distribution could be decreed, was the payment of this balance to the plaintiff, and then a distribution of it, upon his charging himself with it in a new account. But if the parties would agree, it might now be done by the entry of a special judgment. The parties thereupon agreed to a special judgment, which was rendered by consent.

272.

TOWLE, ADMX. v. LOVET. 6 R. 394.

Trover for the conversion of a title deed of lands of the plaintiff's intestate, of which he died seized, alleged to have been committed in the lifetime of the intestate.

The parties agreed on the sum for which judgment should be rendered against the defendant, if the court should be of opinion that the plaintiff, in her capacity of administratrix, is entitled to recover.

PARSONS, C. J. The defendant, although a stranger to the land, having an interest in it, has denied the plaintiff's right to maintain this action be-

cause the charters of inheritance at common law belong to the heir, and not to the administrator; and whether the plaintiff in her capacity of administratrix can or cannot maintain this action, is the question for our decision. And we are satisfied that in this state an administrator can maintain this action.

It is very properly admitted, that for a conversion of the intestate's goods in his lifetime, trover will lie by his administrator; and the party, who took an interest in charters of inheritance, may maintain not only detinue to recover them, but also trover for their conversion against a stranger. In this state, lands are assets in the hands of an administrator, for the payment of debts on a deficiency of personal estate; and in selling them it may be necessary for him to exhibit the title deeds to persons who propose to purchase. So if the intestate has sold the lands with warranty, and after his decease an action is brought to evict the purchaser, by a party claiming under a paramount title; the administrator may be sued in an action of covenant broken, if the purchaser be evicted, and damages recovered; he may therefore have an interest to furnish the purchaser with the title deeds, to defend his title under the purchase. For these reasons, in this state, the administrator has an interest, as against a stranger to the lands, who can have no colour of right to the deeds.

In the case at bar it may be further added, that the conversion was committed in the intestate's lifetime, and while he lived the damages for the conversion accrued to him; which as a chose in action came to the plaintiff as his administratrix, and did not descend to the heir. We are therefore satisfied that this action may be maintained by the plaintiff in her capacity against a stranger.

Whether this action by an administrator could be maintained against an heir for the last reason; and also when in fact the lands are necessarily to be sold for the payment of debts, so that the heir has no interest in them; it is unnecessary to decide.

273.

BARNES v. THE INHABITANTS OF THE FIRST PARISH IN FALMOUTH, 6 R. 401.

PARSONS, C. J. The plaintiff claims to be a public teacher of piety, religion and morality, within the third article of the declaration of rights prefixed to the constitution of this commonwealth; but of a sect of christians different from the inhabitants of the first parish in Falmouth; and publicly instructing several of the said inhabitants, who are of the same sect with himself, who usually attend on his preaching, and who have directed their taxes, paid for supporting public worship in the parish, to be paid over for his support; and he has instituted this suit to recover those taxes of the parish.

Not pretending to be the public teacher of any incorporated religious society obliged by law to maintain a public teacher, to maintain the issue on his part, he offered evidence that in fact he was the teacher of a voluntary society of Universalists, who usually attended on his instruction. This evidence was rejected by the judge, on the ground that no person could maintain this action, but a protestant teacher of piety, religion and morality of some incorporated religious society; and to this rejection the plaintiff excepts.

The legal effect of evidence of this kind, in cases of this nature, has been often a subject of discussion; and among judges there have been different opinions. The subject certainly requires a diligent examination, ex-

empt as far as possible from the influence of any prepossessions, or preconceived opinions. For this purpose we shall consider the motives which induced this people to introduce into the constitution a religious establishment, the nature of the establishment introduced, and the rights and privileges it secured to the people, and to their teachers. If these points shall be clearly and justly explained, it will then be easy to infer the principles by which the present action must be decided.

The object of a free civil government is the promotion and security of the happiness of the citizens. These effects cannot be produced, but by the knowledge and practice of our moral duties, which comprehend all the social and civil obligations of man to man, and of the citizens to the state. If the civil magistrate in any state could procure by his regulations an uniform practice of these duties, the government of that state would be perfect.

To obtain that perfection, it is not enough for the magistrate to define the rights of the several citizens, as they are related to life, liberty, property and reputation, and to punish those by whom they may be invaded. Wise laws, made to this end, and faithfully executed, may leave the people strangers to many of the enjoyments of civil and social life, without which their happiness will be extremely imperfect. Human laws cannot oblige to the performance of the duties of imperfect obligation; as the duties of charity and hospitality, benevolence and good neighborhood; as the duties resulting from the relation of husband and wife, parent and child; of man to man as children of a common parent; and of real patriotism, by influencing every citizen to love his country, and to obey all its laws. These are moral duties, flowing from the disposition of the heart, and not subject to the control of human legislation.

Neither can the laws prevent, by temporal punishment, secret offences, committed without witness, to gratify malice, revenge, or any other passion, by assailing the most important and most estimable rights of others. For human tribunals cannot proceed against any crime, unless ascertained by evidence; and they are destitute of all power to prevent the commission of offence, unless by the feeble examples exhibited in the punishment of those who may be detected.

Civil government therefore, availing itself only of its own powers, is extremely defective; and unless it could derive assistance from some superior power, whose laws extend to the temper and disposition of the human heart, and before whom no offence is secret; wretched indeed would be the state of man under a civil constitution of any form.

This most manifest truth has been felt by legislators in all ages; and as man is born, not only a social, but a religious being, so in the pagan world false and absurd systems of religion were adopted and patronized by the magistrate, to remedy the defects necessarily existing in a government merely civil.

On these principles, tested by the experience of mankind, and by the reflections of reason, the people of Massachusetts, in the frame of their government, adopted and patronized a religion, which, by its benign and energetic influences, might co-operate with human institutions, to promote and secure the happiness of the citizens, so far as might be consistent with the imperfections of man.

In selecting a religion, the people were not exposed to the hazard of choosing a false and defective religious system. Christianity had long been promulgated, its pretensions and excellencies well known, and its divine authority admitted. This religion was found to rest on the basis of immortal truth; to contain a system of morals adapted to man, in all possible ranks and conditions, situations and circumstances, by conforming to which he

would be meliorated and improved in all the relations of human life; and to furnish the most efficacious sanctions, by bringing to light a future state of retribution. And this religion, as understood by protestants, tending by its effects to make every man submitting to its influence, a better husband, parent, child, neighbor, citizen and magistrate, was by the people established as a fundamental and essential part of their constitution.

The manner in which this establishment was made, is liberal, and consistent with the rights of conscience on religious subjects. As religious opinions, and the time and manner of expressing the homage due to the governor of the universe, are points depending on the sincerity and belief of each individual, and do not concern the public interest, care is taken, in the second article of the declaration of rights, to guard these points from the interference of the civil magistrate; and no man can be hurt, molested or restrained in his person, liberty or estate, for worshipping God in the manner and season most agreeable to the dictates of his own conscience, or for his religious profession or sentiment; provided he does not disturb the public peace, or obstruct others in their religious worship; in which case he is punished, not for his religious opinions or worship, but because he interrupts others in the enjoyment of the rights he claims for himself, or because he has broken the public peace.

Having secured liberty of conscience, on the subject of religious opinion and worship, for every man, whether Protestant or Catholic, Jew, Mahometan or Pagan, the constitution then provides for the public teaching of the precepts and maxims of the religion of protestant christians to all the people. And for this purpose it is made the right and the duty of all corporate religious societies, to elect and support a public protestant teacher of piety, religion and morality; and the election and support of the teacher depend exclusively on the will of a majority of each society incorporated for those purposes. As public instruction requires persons who may be taught, every citizen may be enjoined to attend on some one of these teachers, at times and seasons to be stated by law, if there be any on whose instructions he can conscientiously attend.

In the election and support of a teacher, every member of the corporation is bound by the will of the majority; but as the great object of this provision was to secure the election and support of public protestant teachers by corporate societies, and as some members of any corporation might be of a sect or denomination of protestant christians different from the majority of the members, and might choose to unite with other protestant christians of their own sect or denomination, in maintaining a public teacher, who by law was entitled to support, and on whose instructions they usually attended; indulgence was granted, that persons thus situated might have the money they contributed to the support of public worship, and of the public teachers aforesaid, appropriated to the support of the teacher, on whose instructions they should attend.

Several objections have at times been made to this establishment, which may be reduced to three:—That when a man disapproves of any religion, or of any supported doctrines of any religion, to compel him by law to contribute money for public instruction in such religion or doctrine, is an infraction of his liberty of conscience:—That to compel a man to pay for public religious instructions, on which he does not attend, and from which he can therefore derive no benefit, is unreasonable and intolerant:—And that it is antichristian for any state to avail itself of the precepts and maxims of christianity, to support civil government; because the founder of it has declared that his kingdom is not of this world.

These objections go to the authority of the people to make this constitu-

tion, which is not proper nor competent for us to bring into question. And although we are not able, and have no inclination to assume the character of theologians, yet it may not be improper to make a few short observations, to defend our constitution from the charges of persecution, intolerance and impiety.

When it is remembered that no man is compellable to attend on any religious instruction, which he conscientiously disapproves; and that he is absolutely protected in the most perfect freedom of conscience in his religious opinions and worship; the first objection seems to mistake a man's conscience for his money, and to deny the state a right of levying and of appropriating the money of the citizens, at the will of the legislature, in which they all are represented. But as every citizen derives the security of his property, and the fruit of his industry, from the power of the state; so as the price of this protection, he is bound to contribute, in common with his fellow-citizens, for the public use, so much of his property, and for such public uses, as the state shall direct. And if any individual can lawfully withhold his contribution, because he dislikes the appropriation, the authority of the state to levy taxes would be annihilated; and without money it would soon cease to have any authority, But all monies raised and appropriated for public uses, by any corporation, pursuant to powers derived from the state, are raised and appropriated substantially by the authority of the state.— And the people, in their constitution, instead of devolving the support of public teachers on the corporations, by whom they should be elected, might have directed their support to be defrayed out of the public treasury, to be reimbursed by the levying and collection of state taxes. And against this mode of support, the objection of an individual, disapproving of the object of the public taxes, would have the same weight it can have against the mode of public support through the medium of corporate taxation. In either case, it can have no weight to maintain a charge of persecution for conscience sake. The great error lies in not distinguishing between liberty of conscience in religious opinions and worship, and the right of appropriating money by the state. The former is an unalienable right; the latter is surrendered to the state, as the price of protection.

The second objection is, that it is intolerant to compel a man to pay for religious instruction, from which, as he does not hear it, he can derive no benefit. This objection is founded wholly in mistake. The object of public religious instruction is to teach, and to enforce by suitable arguments, the practice of a system of correct morals among the people, and to form and cultivate reasonable and just habits and manners; by which every man's person and property are protected from outrage, and his personal and social enjoyments promoted and multipled. From these effects every man derives the most important benefits, and whether he be, or be not an auditor of any public teacher, he receives more solid and permanent advantages from this public instruction, than the administration of justice in courts of law can give him. The like objection may be made by any man to the support of public schools, if he have no family who attend; and any man, who has no lawsuit may object to the support of judges and jurors on the same ground; when if there were no courts of law, he would unfortunately find that causes for lawsuits would sufficiently abound.

The last objection is founded upon the supposed antichristian conduct of the state, in availing itself of the precepts and maxims of christianity, for the purposes of a more excellent civil government. It is admitted that the founder of this religion did not intend to erect a temporal dominion, agreeably to the prejudices of his countrymen; but to reign in the hearts of men, by subduing their irregular appetites and propensities, and by moulding their

passions to the noblest purposes. And it is one great excellence of his religion, that not pretending to worldly pomp and power, it is calculated and accommodated to meliorate the conduct and condition of man, under any form of civil government.

The objection goes further, and complains that christianity is not left, for its promulgation and support, to the means designed by its author, who requires not the assistance of man to effect his purposes and intentions. Our constitution certainly provides for the punishment of many breaches of the laws of christianity, not for the purpose of propping up the christian religion, but because those breaches are offences against the laws of the state; and it is a civil, as well as a religious duty of the magistrate, not to bear the sword in vain. But there are many precepts of christianity, of which the violation cannot be punished by human laws; and as obedience to them is beneficial to civil society, the state has wisely taken care that they should be taught, and also enforced by explaining their moral and religious sanctions; as they cannot be enforced by temporal punishments. And from the genius and temper of this religion, and from the benevolent character of its author, we must conclude that it is his intention, that man should be benefitted by it in his civil and political relations, as well as in his individual capacity. And it remains for the objector to prove, that the patronage of christianity by the civil magistrate, induced by the tendency of its precepts to form good citizens, is not one of the means, by which the knowledge of its doctrines was intended to be disseminated and preserved among the human race.

The last branch of the objection rests on the very correct position, that the faith and precepts of the christian religion are so interwoven, that they must be taught together; whence it is inferred that the state, by enjoining instruction in its precepts, interferes with its doctrines, and assumes a power not intrusted to any human authority.

If the state claimed the absurd power of directing or controlling the faith of its citizens, there might be some ground for the objection. But no such power is claimed. The authority derived from the constitution extends no further than to submit to the understandings of the people, the evidence of truths deemed of public utility, leaving the weight of the evidence, and the tendency of those truths, to the conscience of every man.

Indeed, this objection must come from a willing objector; for it extends in its consequences, to prohibit the state from providing for public instruction in many branches of useful knowledge, which naturally tend to defeat the arguments of infidelity, to illustrate the doctrines of the christian religion, and to confirm the faith of its professors.

As christianity has the promise, not only of this, but of a future life; it cannot be denied that public instruction in piety, religion and morality, by protestant teachers, may have a beneficial effect beyond the present state of existence. And the people are to be applauded, as well for their benevolence as for their wisdom, that in selecting a religion, whose precepts and sanctions might supply the defects in civil government, necessarily limited in its power, and supported only by temporal penalties, they adopted a religion founded in truth; which in it its tendency will protectour property here, and may secure to us an inheritance in another and a better country.

The objections to our constitution cannot be made by the plaintiff, who having sought his remedy by an action at law, must support it as resting on our religious establishment, or his claim can have no legal foundation.

The last point for our consideration is, whether this establishment, accord-

ing to the true intent and design of its provisions, will or will not enable the plaintiff to maintain his claim to the money he demands.

The objection against his claim is substantially this: That the constitution has not provided in any way for the legal support of any teacher of piety, religion and morality, unless he be a public protestant teacher of some incorporated religious society. It is admitted by the parties, that the plaintiff is a protestant teacher of a voluntary society not incorporated, and which is under no legal obligation to elect or support a teacher. That he and his hearers are of a denomination of christians, different from that of the inhabitants of the first parish in Falmouth, and all other facts necessary to support the action may be presumed.

After a consideration of these facts, we are all of opinion, that the constitution has not authorised any teacher to recover, by action at law, any money assessed pursuant to the third article of the declaration of rights, but a public protestant teacher of some legally incorporated society; and that the objection must prevail. The societies, who may elect and support teachers of this description, are described as "towns, parishes, precincts, or other bodies politic, or religious societies;" which last expression is merely explanatory of the words, *bodies politic*, and confines them to bodies politic, incorporated to act as religious societies. If we are to consider the words *religious societies*, as descriptive of a class of societies, not included in the words *bodies politic*, the consequences would be, that all bodies politic, for whatever purposes incorporated, would be obliged to elect and maintain a teacher of religion; a consequence to absurd to be admitted. Indeed the words *religious societies*, must from the nature of the duty imposed on them, necessarily mean societies having corporate powers; because without those powers the duty cannot be legally performed, a voluntary association having no legal authority to assess money on all the members, or to compel payment, or to elect a teacher by a vote of the greater part.

The plaintiff's claim is endeavoured to be supported by the fourth paragraph of the third article, in which it is declared that "all monies paid by the subject to the support of public worship, and of the public teachers aforesaid, shall, if he require it, be uniformly applied to the support of the teacher of his own religious denomination, on whose instruction he attends." And it is contended, that in this paragraph two descriptions of teachers are included; the first referring to the teachers of incorporated societies, provided for in the first paragraph; and the latter embracing teachers of any voluntary society, who in fact have a teacher, although not obliged to elect and support one. We are however satisfied, that in every part of the third article, but one class of public teachers is contemplated, and which is particularly described in the first paragraph; and that whenever teachers are mentioned, such teachers alone are intended, who by law are entitled to support. For although the constitution contemplates different denominations of protestant christians, yet no religious societies are referred to, unless incorporated; and no teachers are mentioned as existing, who are not entitled to a maintenance.

If the construction, which was contended for, was right, then a Roman Catholic teacher might maintain an action similar to the plaintiff's. But in the case of Matignon v. The inhabitants of Newcastle, in the county of Lincoln, decided some years since by this court in Suffolk, it was determined, that the teacher mentioned in the latter part of the fourth paragraph so far referred to the first paragraph, as that he must be a protestant teacher. And if a reference must be made to any part of the description, we know not why it must not be made to the whole of it, as the article has drawn no line of distinction.

In the latter part of this fourth paragraph, the teachers to whom the mo-

ney may be applied, are described as public teachers. But a public teacher must be a teacher of some public, and not of any private religious society. And what society must be deemed a public society is certainly a question of law, whether it be settled by a judge, or by a jury. When therefore the facts, describing the nature or circumstances of any society, are established by evidence; from those facts the law must conclude, whether the society be, in legal contemplation, public or private. Now if the society be not incorporated, what rules are prescribed by law, by which its character may be defined? Does it depend on the number of the associates, or on the notoriety of the association? If on the former, what number is sufficient? If on the latter, what degree of notoriety is necessary? On these points the law is silent. But there is a legal principle applicable to this subject, and which can at all times be applied with certainty. A public society is a society known in law, formed by the public authority of the state; and a private society is formed by the voluntary association of private persons, the powers of which are derived from the individual consent of each member.

To admit the plaintiff's construction, would render the first paragraph unreasonable and unjust. By that paragraph, a corporate religious society is obliged to support a public teacher; but by his construction, the means of support may be taken from it, without any fault on its own part. Any number of members, whether five or five-hundred, (for a voluntary society may consist of any number, large or small,) may associate together, assume the denomination of protestant christians, and at their own pleasure withdraw their assistance from the corporation whose duty remains, by engaging a teacher upon any or no terms, and whom they are not obliged by law to maintain.

By this last paragraph, a reasonable indulgence is in particular cases granted. When there are teachers of two incorporated religious societies of different denominations, a member of one, who is of the sect, and worships with the other, may direct his parish tax to be paid to the teacher, on whose instructions he attends. This can be attended with little inconvenience, as both the teachers are entitled by law to a support, and the exchange of hearers may be mutual.

But to extend this indulgence to a teacher of an unincorporated society, who is entitled to no support, would be to grant him a remedy where he has no right, and to encourage disaffection and divisions in regular parishes, thereby also lessening or defeating the means they have of supporting a public teacher, to which they are obliged by this very article.

Again it is asked, what relief can a few conscientious men have, who are of religious sect, different from that of the parish in which they live, and have no teacher of any corporate society in their neighborhood, of their own sect or denomination, on whose instructions they can conscientiously attend?

The rights of conscience, in matters of religious opinion and worship, are protected by the second article; and by the third article, they are not obliged to attend on the instructions of any teacher, whom they cannot conscientiously hear. The inconvenience therefore is merely pecuniary, and of no great magnitude. In this case they ought, as good citizens, to submit to those laws, from which they derive protection for their persons and property, and which must regulate the disposition of all assessments made by their authority. When their numbers are large, and they are able and willing to submit to the obligation of electing and supporting a public teacher, the liberality of the legislature will grant them relief, by vesting them with corporate powers; when in consequence of those powers, other corporations will not be disabled from discharging the duties already imposed on them by law. And it seems a mistake, to suppose that the legislature cannot grant any further relief in particular cases, which in its discretion it may consider as

deserving relief. Quakers are not provided for by the third article, because they have no teacher, and they resist the payment of any ministerial taxes. But they were exempted from ministerial assessments by the provisions of a provincial statute now expired, and those provisions are re-enacted by the statute of 1799, c. 87.

But the object of the constitution was to settle general principles, and to secure general rights; and not to legislate in all cases. If particular cases should arise, which might claim relief, consistently with the constitution; those cases were left to the discretion of the legislature, to whom the interests of the citizens are entrusted.

The last paragraph of the third article has also been pressed upon us. It provides that "every denomination of christians, demeaning themselves peaceably, and as good subjects of the commonwealth, shall be equally under the protection of law; and no subordination of one sect or denomination to another shall ever be established by law."

In our opinion, this paragraph has no relation to the subject before us. Its object was to prevent any hierarchy, or ecclesiastical jurisdiction of one sect of christians over any other sect; and the sect of Roman Catholics are as fully entitled to the benefit of this clause, as any society of protestant christians. It was also intended to prevent any religious test, as a qualification for office. Therefore those Catholics, who renounce all obedience and subjection to the Pope, as a foreign prince or prelate, may notwithstanding their religious tenets, hold any civil office, although the constitution has not provided for the support of any public teacher of the popish religion.

If this paragraph can be considered as relating to the provision for public teachers, a catholic teacher a catholic congregation, might maintain an action, to recover the parish taxes of his hearers, as well as a public prostestant teacher of any incorporated religious society.

The only inferiority, created by the third article, is founded on a social principle, essential to the existence of any society, the submission of the minority to the majority. This submission is required, without any regard to the sects or denominations of christians. In the present case, if the plaintiff was of the same sect as the inhabitants of the first parish in Falmouth, and they were of the denomination to which he belongs, the law would be precisely the same.

This construction, which we find ourselves obliged to give to the constitution on this subject, is agreeable to the construction adopted by the legislature, as expressed in the statute of 1799, c. 87, before cited. Thus all citizens except quakers, are obliged to contribute to the support of public teachers; and when any members of any society, but of a different sect, shall request to have his taxes paid to the teacher of his own sect, but of another society, his request cannot prevail, but on his producing a certificate signed by his public teacher, and by a committee of the society, purporting in substance such facts, as entitle him to the obtaining of his request; and the assessors of the society, in which he dwells, may afterwards omit him in their assessments.

This construction is not denied; but it is argued, that the legislature cannot, by any construction, control the constitution. This is true; but where any part of the constitution is of doubtful construction, the opinion of the legislature deserves to be heard, and is entitled to due consideration. And in the present case, their construction appears to us to be correct. Certainly, no conclusion can be drawn from it, that the statute intended to exempt any citizen except quakers, from contributing to the support of some public protestant teacher.

It is our opinion, that the verdict do stand, and that judgment be rendered upon it.

274.

ALEXANDER WALCOT, AND OTHERS v. ELIZABETH KNIGHT, AND OTHERS, & R. 418.

This was a writ of *entry sur disseisin*, in the per, in which the demandants count on the seizin of Samuel Waldo, their ancestor, within fifty years, and on a disseisin by one George Knight, by whom the tenants have their right of entry. The tenants pleaded the general issue, that the said George Knight did not disseize, &c. which was joined by the demandants.

PARSONS, C. J. In a writ of entry, when the general issue is pleaded, the demandant on the trial may give evidence of the seizin, on which he has counted, within the time alleged in his count. Having done this, he must recover unless this evidence is controled by the evidence of the tenant; or unless the tenant can show, that the entry, which is averred to be a disseisin, was just or by judgment of law. These seem to be all the points put in issue by the plea of *nul disseisin*.

But the tenant, besides pleading in abatement to the writ, or falsifying the entry by plea to the action of the writ, may also plead in bar. And although under the general issue he cannot give in evidence a title, under which he does not claim, unless it be to rebut the demandant's evidence of seizin; yet he may plead in bar a conveyance by the demandant to a third person, under whom he does not claim. For if the tenant have no right, yet if the demandant have no right, he cannot in law draw into question the tenant's seizin, whether acquired by right or by wrong.

But notwithstanding an execution by the demandant of a deed, purporting to be a conveyance of his right, no right may in fact pass by such deed; and the demandant may reply to the tenant's bar, that nothing passed by the deed, which may be traversed, and an issue to the country be joined and tried; and if the verdict be for the demandant, he shall have judgment.

It may often happen in this state, where boundaries are not ascertained, that the owner in fee of land may be disseised without knowing it, and may honestly execute a deed of conveyance to an intended purchaser, equally ignorant of the disseisin; in which case it is very clear that nothing would pass by the deed. But the law would be very unreasonable in deciding, because the supposed purchaser cannot maintain an action against the disseisor, because he took nothing by his deed, that the owner, from whom nothing passed, should also be barred of his right of action, against a wrongdoer.

We will now apply these well known principles to the case at bar. The deeds, which were admitted in evidence, were executed long after the grantors had been disseised; so that nothing could pass by those deeds to the grantee, who was not in possession, the tenant then having the freehold, and the general issue was upon trial. Neither of these deeds had any tendency to disprove the seizin of the ancestor of the demandants within the time averred in the writ; or to prove that the entry of George Knight was just or by judgment of law. Under this issue, these deeds could not legally be read in evidence, not having any bearing upon either of the points at issue.

But if the tenants had pleaded these deeds in bar, the demandants might

have replied, that nothing passed by them, which replication in this case, would have been true, and the bar would have been avoided. In no view, in which the case presents itself, could these deeds have defeated the right of action of the demandants. The direction of the judge was incorrect; the verdict must be set aside, and a new trial be granted.

It ought to be observed, that on conversing with the judge, before whom this cause was tried, he declared that his direction was against his own opinion, and was given with much reluctance. But the case of Drinkwater v. Martin, which has been referred to in the argument, was cited at the bar, in which it was said, that the judges, in a real action, upon a trial on the general issue, had decided, that if the demandant had executed deeds, purporting to convey all their right to strangers not in possession, and by which deeds nothing passed, those deeds might be read in evidence, and would in law defeat the demandant's action;—that he did not feel himself at liberty, when sitting alone, to overrule this decision, but reported his direction for the consideration of a full court.

The decision in that case was correctly stated to the judge. It was made in haste during a jury trial, when the judges were denied any means of consulting books, or of deliberation on the point; and it must be overruled, as repugnant to the established rules of evidence, applicable to the trial of actions of entry on the general issue.

It was said by the judges in that case, that the purchase of a dormant title, from a party not seized, by a stranger out of possession, was an offence at law. This is true, when made wittingly to disturb the tenant in his possession. The parties may be punished for the offence, and the conveyance is void; but there is no *scintilla* of law, that a man having a right to recover in a real action, is barred by the execution of a deed, purporting to be a conveyance, but by which his right did not pass, unless by way of estoppel, as between the parties to the deed. And if it was possible to suppose, that a deed of a person having right, and which does not pass his right, shall bar his right as to strangers to the deed; yet this deed could not be given in evidence on the general issue, but should have been specially pleaded, as its effects would be to confess and avoid the count, and not to disprove any of the averments therein contained. However this may be, it is extremely clear, that in the present case, under no form of pleading, can the deeds read in evidence bar the demandants of their right.

Per Curiam unanimously, verdict set aside, and a new trial granted.

275.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE PORTLAND BANK v. PETER STUBBS AND EZRA GIBBS, 6 R. 422.

When a ship at sea is mortgaged, the mortgagee must take possession as soon as may be on her return, before the mortgage is complete.

PARSONS, C. J. From the statements in this case several points arise, to which the facts seemed not to be sufficiently directed. The conveyance by Weeks and Son to the plaintiffs being a mortgage, it is a pledge of a personal chattel. But to such pledge a delivery of the chattel is essential, to give the pawnee a special property in it. And although a ship at sea may be mortgaged, yet the mortgagee must take the possession as soon as may be on her return, before the mortgage is complete. But the case does not state, whether the plaintiffs did or did not take possession of the ship, on her putting into Portland. If it be said, that as the possession of the other moie-

ty remained in Weeks and Son as part owners, that possession shall be deemed the possession of the plaintiffs, it may well be doubted whether the owner of a chattel can pledge an undivided part of it, without delivering the whole to the pawnee. But in this case it is not necessary to decide on this point.

Another point is, admitting the pledge of the moiety to be completed, and that the plaintiffs, by virtue of the special property resulting from it, are entitled to one moiety of the freight on the salt, yet the assignment of the other moiety is an assignment of a chose in action; and the replevin ought to have been sued out in the names of Weeks and Son, jointly with the plaintiffs. This objection would be entitled to much consideration, had it been made by plea in abatement. But as the case is stated we ought to consider all objections to the form of the action as waived.

Another point is, whether the plaintiffs can be admitted to contradict the bill of lading in this case, by proving that no freight had been paid for the salt. To this point the case does not seem to contain all the necessary facts. If Stubbs, the consignee, was a stranger to the shipment, and no party to the bill of lading in making it, it is very clear that as to him the bill of lading cannot be contradicted, by proving that no freight had been paid. As he is one of the shippers, if the acknolwedgment by the master of the payment of freight had been obtained by fraud or mistake, we are satisfied that evidence of such fraud or mistake might be admitted. But if the ship had been consigned in her outward voyage to the shippers, as the correspondents at Liverpool of Weeks and Son, the owners when she arrived there; and after the transfer, but without any knowledge of it, it was lawfully agreed by the master and the shippers, that the latter should credit the owners with the freight, and that the master would, on that agreement, acknowledge the freight to be paid, and under this agreement the salt was put on board; we are satisfied that the plaintiffs would be bound by such agreement of their master, confirmed by his signing a bill of lading, on receiving the salt, acknowledging the freight to have been paid; and that their remedy for the freight would be against Weeks & Son, who had the benefit of it. The plaintiffs would not have been personally answerable for any previous expenses about the ship, but when they purchased a moiety, they must take it subject to all incumbrances on the ship, and to all lawful contracts, which the master had before made, or should afterwards make, respecting the employment of the ship; and whatever contracts he might lawfully make as the master of the ship of Weeks & Son, he might still lawfully make, after the transfer, until he had notice of it. This authority in the master must be considered as acknowledged by every purchaser of a ship abroad, or manifest mischief and injustice might be the consequence.

But it is not necessary to have the case amended, to decide on this point; as the point remaining is sufficient to decide on the merits of this cause. Admitting, therefore, that the master might lawfully retain the salt, until the freight was paid, after he had transported it to the port of delivery; the principal question is, whether he could lawfully refuse to proceed from Portland to Boston, without a new stipulation for the payment of the freight at Boston. And we are satisfied that he could not. No freight was due until the voyage was performed, and the salt ready to be delivered at Boston, because no impediment to the performing of the voyage appears. If a ship on her way is prevented from further proceeding, and the shipper will receive his goods, he shall pay *pro rata* freight; but this is not the case before us. The master here refused to perform his voyage without a new stipulation for the payment of the freight, which he was not authorised to demand. At Boston he might have retained the salt until payment of the freight; or if

he had delivered it to the consignee, he might have recovered the freight money by action. Very clearly no freight was due at Portland; and the master unlawfully refusing to perform the voyage, Stubbs might lawfully demand the salt of him at Portland. When the master refused to deliver the salt, he was answerable to Stubbs in trover, or the latter might take it by replevin. When Stubbs had received the salt on his replevin, he was in the legal possession of it, which the plaintiffs could not lawfully disturb. If the master had no right to retain the salt at Portland against Stubbs, the plaintiffs, his owners, could have no such right; and having no right to retain, they could not lawfully take it by replevin from Stubbs. for the purpose of detaining it until the freight should be paid. In fact, the master refusing to perform his voyage, and transport the salt to the port of delivery, the ship has not earned any freight; and consequently neither the master nor owners have any right to retain the salt. The plaintiffs, therefore, have not maintained their action.

We are at a loss for any just ground, on which this writ was sued, admitting freight to be due; for on the writ sued by Stubbs against the master, the right to retain would have come in question, and the merits of the cause might have been decided. This action was improperly commenced; for if the master had a right to retain, he in the action against him might have had judgment for a return, and the plaintiffs in this action might have judgment to keep the goods irreplevisable; which would be unreasonable, when both causes must be determined on the same facts and principles, and by privies, against the same adversary. And if Stubbs had disclosed these facts by plea in abatement, the writ must have abated. The law is otherwise if Gray and the plaintiffs had each claimed the property in several and distinct rights.

There seems to be no color for making Gibbs, the officer, a defendant. His executing Stubbs' writ of replevin, as was his duty, whether Stubbs could or could not maintain it, cannot make him liable as a wrongdoer. And if he had pleaded the facts here agreed, he must have had judgment.

Per Curiam. The plaintiffs must be non-suit, and judgment be rendered for costs for Gibbs; and for Stubbs, that he have a return, together with his damages and costs.

276.

THURSTON v. M'KOWN, 6 R. 428,

Where a note was obtained by unfair means from the maker, it was held that he was still liable to an endorsee, who had obtained it bona fide, for a full consideration, and without any knowledge of the fraud, and within seven days from its date, the note having been made at Portland, payable on demand and sold to the endorsee in Boston.

PARSONS, C. J. The question upon the merits of this case is, whether the loss shall fall on the *bona fide* purchaser of the note, or on the maker, who was defrauded. And it is settled law, that of two innocent parties, in a case like this, the loss shall fall on the maker of the note. The endorsee gave credit to his name, and on this credit he paid a valuable consideration. The maker suffered himself to be overreached, and by his own inattention or negligence, or undue confidence in the payee, the note has been negotiated, and has honestly and fairly come into the possession of the plaintiff.—On equitable, as well as legal principles, the maker must bear the loss aris-

ing from his own negligence or improper confidence, and not the endorsee, to whom no fault or indiscretion can be imputed by the promisor.

The defendant has urged in this case, that the note was over due, when the plaintiff purchased it, and therefore, that any defence, which might be set up against the payee, ought to be admitted against the endorsee.

It certainly is a correct principle of law, that if the endorsee purchase a note, when from the length of time in which it has been payable, there is reasonable cause to suspect that it has been dishonored, he shall not deprive the maker of any defence, which would avail him against the promisee.

But on the facts agreed, this note is not within that principle. It was payable on demand, and the promisee was not obliged to demand payment immediately; if a demand of payment was not unreasonably neglected, the promisor cannot object to any reasonable delay. The note was given at Portland, on the twenty-second of September, and seven days after was sold in Boston to the plaintiff. This note, therefore, cannot be considered as over due, within the true intent of the principle of law relied on by the plaintiff; as there were no circumstances existing, which ought to have induced, in the mind of the purchaser, a suspicion that the note had been dishonored.

On this point our opinion is founded not only on the usage universally prevailing in this state, to give notes payable to order on demand, when they are intended by the parties as securities for money on a long credit, and not as circulating cash notes; but on an analogy betweeen notes payable on demand; and bills payable at sight, or a certain time after sight; 7 D.& E.423; Boehm, *et al.* v. Sterling, *et al.* 2 H. Black. 565; Mulman, *et al.* v. D'Eguino.

Let the defendant be defaulted.

277.

BARKER v. PRENTISS, 6 M. 430.

In an action by an endorsee against the drawer of a bill of exchange, it is competent for the defendant to prove that the plaintiff holds the bill as the agent of the payees, and that they had requested the drawer not to pay the contents to him.

How far parole evidence is admissible to control a written simple contract.

A bill of exchange was endorsed by the payees to A. B. as the agent of the payees for collection only. A. B. endorsed it to C. D. in trust for the payees, without giving any recourse to him. A. B. was received as a competent witness to prove the trust, in an action by C. D. against the drawer, and his testimony defeated the action.

PARSONS, C. J. The defendant was the drawer of a bill of exchange on Thomas Merrill, jr. payable to F. G. Robinson and Co. or order, and the plaintiff, deriving a title to the bill by the endorsement to him, has sued this action, to recover the contents of the bill against the drawer, the bill having been dishonored.

On the trial on the general issue, the defence set up by the defendant, the drawer, was that the payees had never assigned the bill to Taber & Son, but had sent it to them endorsed generally, to collect the money for their use; that Taber & Son delivered the bill over, with the special endorsement that no recourse was to be had to them, to the plaintiff, as the agent of the payees, to collect money for their use, and to pay it over to them; the plaintiff not being the factor of the payees, nor having any lien upon the contents of the bill, to satisfy any demand he had against them; and that before the commencement of this action, the payees had requested the defendant not to pay the money to the plaintiff. To prove that the plaintiff held the bill merely

as the agent of the payees, Taber was offered as a witness, and although objected to, was admitted as a witneess: and a verdict was found for the defendant, which must be set aside, if Taber was in law incompetent to be a witness for this purpose.

If the defence stated, was regularly proved, it was without doubt a good defence. The plaintiff had no interest in the bill, and held it merely as agent for the payees, who might at their pleasure annul his agency, and deprive him of all authority to receive the money. The law would have been otherwise, if the plaintiff had held the bill as the factor of the payees, with a lien upon it, to discharge any unsatisfied balance of accounts he had against them; for the payees, his debtors, could not defeat his lien by any countermand of payment given to the drawer.

The next objection is, that the endorsement on the bill having been regularly filled up, directing a payment to Taber & Son, or their order, and their endorsement making the bill payable to the plaintiff or order without having recourse to them, parole evidence ought not to have been admitted to control or explain the legal effect of these endorsements.

This objection ought not to prevail. Neither a bill of exchange on its face, nor the endorsements, are within the statute of frauds, nor are they to be considered as specialties. The objection, therefore, is at common law, and at common law a written simple contract must be explained according to the true construction of the terms of it, and not by parol evidence, where there are no latent ambiguties; because the written terms of the contract are better evidence of its intent, than any parole explanation.

But parole evidence may be given to contradict a written simple contract, or to show that the whole of it was not reduced to writing; but that it was made with certain conditions or limitations, expressly agreed upon, but not contained in the written contract, where the action is between the original parties. Thus it is every day's practice, notwithstanding a promissory note is expressed to be for value received, to admit the promisor, in action by the promisee, to prove that there was no consideration.

There are also several cases, in which evidence has been admitted between the parties to the contract, that the written contract did not contain the whole agreement; Vid. 8 D. & E. 379; Rex. v. Inhabitants of Laindon. Peake's Cases, 40; Phethen v. Whitman, 1 Strange, 674. Jeffries v. Austin, Gilb. Rep. 154. Brown v. Marsh, Peake's L. of Evid. c. 2, s. 5.—We are, therefore, satisfied, notwithstanding the terms of the endorsement, that it was regular to prove that the plaintiff, the endorsee, received the bill, not as assignee, but as an agent to collect it for the payees.

The last objection is, to the admission of John Taber, one of the house of Taber & Son, as a witness, to control the effect of his endorsement.

This objection must rest, either on the interest of the witness, or on some principle of legal policy, by which he is excluded. As to his interest, if the plaintiff fails in this action, he cannot have recourse to the witness, because his endorsement specially guards against such recourse. If he has any interest, it is that the plaintiff recover, and his testimony being against the plaintiff, is against his interest. On principles of legal policy, an original party to an usurious or gaming negotiable security, which is void in the hands of an innocent purchaser, shall not be a witness against such a purchaser, because his testimony is to establish the original fraud, by enabling a fraudulent party to raise money on such security, and afterwards to protect him from any liability on his endorsement. But a party to such security, when disinterested, may be a witness to prove any subsequent facts, which admit the legality of the instrument in its original form.

This principle does not apply to the competency of Taber, as a witness. He is not produced to impeach the bill, but to prove that his endorsement, although not limited in terms as to its use, was in fact made for the use of the payees, and as such was received by the plaintiff. Notwithstanding Taber & Son held the bill in trust for the payees, yet if the plaintiff had purchased the bill when ignorant of this trust, he would be entitled to recover the contents, and the payees must suffer for their misplaced confidence in Taber & Son; but when the plaintiff knew of this trust, and received the bill under it, to collect the contents for the payees as their agent, there can be no doubt but that this trust and agency may be proved, to defeat his action founded on injustice, and calculated to defraud the payees.

As we are satisfied that Taber was properly admitted a witness, judgment must be rendered on the verdict.

278.

STORER v. FREEMAN, 6 R. 435.

By the common law of this state, the owner of upland, adjoining the sea, is also owner of the flats to low water mark, if not more than a hundred rods from the upland, if more than that, he owns to one hundred rods.

The shore is that land which is between high water and low water mark.

Parole evidence may be given to explain latent ambiguities in a deed, but patent ambiguities must be removed by a sound construction of the deed itself.

PARSONS, C. J. The first question referred to our consideration in this case, arises upon the construction of the two deeds, whether the flats did or did not pass by them. The plaintiff's construction of the first deed is, that running to the shore is running to low water mark, and running by the shore is running by low water mark; and to support this construction he relies on a maxim of our common law, that the proprietor of land adjoining on the sea or salt water, where the sea ebbs and flows, shall hold to low water mark, where the sea does not ebb more than one hundred rods, which it is agreed by the parties in this case, it does not. The origin of this maxim and the true construction of it first require our consideration.

By the common law of England, which our ancestors brought with them, claiming it as their birth right, the owner of land bounded on a fresh water river, owned the land to the centre of the channel of the river, as of common right; but if his land was bounded on the sea, or on any arm of the sea, where the tide ebbed and flowed, he could not, by such boundary hold any land below the ordinary low water mark; for all the land below belonged of common right to the king. But the subject might claim the land below high water mark against the king, either by grant, or by prescription, which presupposed a grant.

When our ancestors emigrated to this country, their first settlements were on harbors or arms of the sea; and commerce was among the earliest objects of their attention. For the purposes of commerce, wharves erected below high water mark were necessary. But the colony was not able to build them at the public expense. To induce persons to erect them, the common law of England was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark, where the tide does not ebb more than one hundred rods, but not more where the tide ebbs to a greater distance.

This ordinance was annulled with the charter by the authority of which it was made; but from that time to the present an usage has prevailed, which now has force as our common law, that the owner of lands bounded on the

sea or salt water shall hold to low water mark, so that he does not hold more than one hundred rods below high water mark; but the rights of others to convenient ways are saved, agreeably to a provision in the ordinance.

This rule applies only in cases, where the grantor, seized of the upland and flats, in conveying his lands, bounds the land sold on the sea or salt water, or describes other boundaries of equivalent meaning, without any reservation of the flats. But the owner may sell his upland without the flats, or the flats or any part thereof, without the upland.

The present question is, therefore, a question upon the contruction of the deeds of conveyance. The lands are not expressly bounded on the sea or salt water; but they extend to the sea shore and are bounded by it; which as the plaintiff has argued, are expressions of the same import.

What is the sea shore must first be defined. The sea shore must be understood to be the margin of the sea, in its usual and ordinary state. Thus when the tide is out, low water mark is the margin of the sea; and when the sea is full, the margin is high water mark. The sea shore is, therefore, all the ground between the ordinary high water mark and low water mark.—It cannot be considered as including any ground always covered by the sea; for then it would have no definite limit on the sea board. Neither can it include any part of the upland, for the same reason. This definition of the shore seems to result necessarily from its nature and situation.

But we are not left without any authority. This question is largely considered by Lord Hale, in his treatise *De Jure maris et brachiorum ejusdem.* And his definition of the sea shore is, "that ground that is between the ordinary high water mark and low water mark."

We must now return to the first deed; and as it appears from the report of the judge, that the shore mentioned in the deed is not covered with rock, but forms a breach or flats, we shall for shore substitute flats. The land described will then extend to the flats, and be bounded by the flats. On this substitution the construction is manifest. The land conveyed extends to the flats, but not over them; and the flats being a bound of the land conveyed, are not a part of it. Thus by a strict and technical construction of the description of the land conveyed, we are satisfied that no part of the flats passed by the first deed.

The description in the second deed varies in one respect from the description in the former deed. In the first deed the course runs to the shore, and thence by the shore. In the second deed let us substitute flats for shore, and the course will run to a heep of stones by the flats at Elwell's corner, and thence by the flats to the land described in the first deed. Elwell's corner not being located by any evidence or admission, we cannot presume that the first course extended over the flats to that corner; for, especially when being satisfied that by the technical construction of the first deed, the flats were not conveyed, we observe that the boundary line from Elwell's corner runs by the flats to land which passed by that deed. For we cannot presume that this boundary line crossed the flats in its course. Adhering, therefore, to a technical construction of the two deeds, unassisted by any parole testimony to explain latent ambiguities, we are satisfied that the plaintiff has no title to the flats, derived under the two deeds of Abigail Dyer, or under either of them.

Another question reserved was, whether the defendant could, by oral testimony, explain the extent of the grants made in said deeds. In what manner he proposed to explain them is not stated. Unquestionably he could give no parole evidence, either to contradict the deeds, or to explain any latent ambiguities. These ambiguities must be removed by a sound construc-

tion of the words of the deed. But he might give parol evidence to explain any latent ambiguities. Thus he might locate all the land and monuments referred to as boundaries. But upon our construction of the deeds, he had no occasion for any parol explanation.

There is one latent ambiguity, which might possibly be so explained by parol evidence, as would change our opinions upon the construction of the deeds. And we mention it, that the plaintiff, if he should again try this cause, may be prepared for the explanation, if the facts are with him.

In the second deed, a boundary line is described to run to a heap of stones by the shore at Elwell's corner. The shore has two sides, high water mark and low water mark. Elwell's corner is described as a known monument. If it is at low water mark, it is by the shore, as well as if it was at high water mark. Now if it be a fact, that this corner was a known monument at low water mark, the plaintiff might be admitted to prove it by oral testimony. Then the boundary line, running to Elwell's corner, would cross the flats to low mark; and the next boundary line running by the flats must run by the same side of the flats, on which Elwell's corner stands; and thus the flats would be included by the boundaries of the land conveyed by the second deed.—And further, from this fact the first deed would receive a different consideration, as it was executed by the same grantor.—For as the boundary line running from Elwell's corner runs to the land conveyed by the first deed, if that line run by the low water mark, then the land conveyed by the first deed must also extend to low water mark; and we should presume that the word *shore* was used untechnically and without legal accuracy, as importing low water mark.

As the case is now presented to us, the verdict must be set aside, and a new trial be granted.

279.

MEAGHER V. BACHELDER AND TWO OTHERS, 6 R. 444.

Practice.
Where in assumpsit against three defendants, each pleaded to issue severally, they were not allowed to tax costs for each.
Defendants cannot sever in pleading, except in actions for a tort.

In *assumpsit* the defendants severally pleaded the general issue of *non assumpsit* which was joined by the plaintiff.

On a trial before *Parker, J.* during this term, a verdict was returned for the defendants.

Afterwards, when the court was full, Orr moved for a direction to the clerk, to tax costs for each of the defendants, as they had pleaded severally.

But the Court denied the motion, and at the same time observed, that this was a very improper mode of pleading; and that if the plaintiff had demurred, he must have had judgment. Defendants cannot sever in their pleas except in actions founded on a tort. If in this case one defendant only had appeared, he must have pleaded that the three defendants did not promise, &c.

280.

WIDGERY V. MONROE, AND ANOTHER, 6 R. 449.

Where a note is payable at a day certain, with grace, notice to the endorser, of the non payment by the maker, given on the last day of grace is sufficient.

A party to an usurious, negotiable security, cannot be a witness to defeat the security on the ground of usury.

Curia. The first question arising in the case is, whether such notice has, or has not been given to the defendants, as will charge them as endorsers. In the case of Jones v. Fales, (4 Mass. Rep. 251,) it was decided, that notice to the endorsers was a privilege which they might waive, or which they might agree should be given in any particular way different from that to which they would be entitled by law, and that they should be bound by such agreement; and further, that this agreement might be inferred by a jury from the endorser's cognizance of, and conformity to a general usage as to notice. Upon this ground therefore we cannot decide that there was not sufficient notice to charge the defendants. But in this case there is no occasion to resort to the usage, to support the notice; for as the note was payable with grace, on the day when it became due, the maker being then out of the country, the plaintiff was excused from demanding payment of him, and on the same day the defendants had notice that the note was unpaid, and were requested to pay it; they cannot therefore prevail upon this objection for the want of notice.

As to the other point made in the defence,—it has been settled, (4 Mass. R. 156. Churchill v. Suter,) that a party to an usurious negotiable security cannot be a witness to defeat the security on the ground of usury. Cummings' testimony cannot therefore be received. If it were, it would not support the allegations stated; for he relates them only on the information of the broker, who declares that he has no recollection of the transaction whatever; although he believes Cummings to be an honest man. The evidence is therefore hearsay, and could not be admitted.

According to the agreement of the parties, the defendants must be called. Defendants defaulted.

281.

BAYLEY AND ANOTHER v. TABER AND ANOTHER, 6 R. 451.

Where a statute had made void a certain species of promissory notes payable to bearer, issued after a certain day; in an action upon such notes bearing date before such day; it was held incumbent on the defendants to prove that the notes were within the statute, and that the plaintiff was not bound to prove the delivery to himself.

PARSONS, C. J. It is our opinion that the direction of the judge in all the points was right.

When the defendants would avoid their promise by availing themselves of the statute, it is incumbent upon them to prove that the notes are within the statute; and the plaintiffs are not obliged to show that the notes are without the statute. Neither are the plaintiffs bound to prove in what manner they acquired the property of notes payable to bearer, unless the defendants will first show that a former lawful holder of the notes lost them, or that they were unlawfully taken from him; and then the plaintiffs would recover, if they could prove that they acquired them *bona fide*, and for a valuable consideration, in the usual course of negotiation, without notice of the manner in which the former holder lost his possession of them.

Let judgment be entered on the verdict.

282.

PERLEY v. CHANDLER, JUN. 6 R. 454.

Upon the location of an highway the public acquire an easement not lawfully to be interrupted by the owner of the land; but the soil and freehold remain in the owner for every purpose of use or profit consistent with such easement; he may maintain ejectment for it; and he may sink a watercourse below the surface, covering it so that the highway remains safe and convenient for passengers.

If an highway be located over watercourses, either natural or artificial, the public cannot shut them up, but may make the road over them by the aid of bridges.

PARSONS, C. J. [After stating the pleadings and the facts.] There is a defect in the case. It is not alleged that John Chandler was seized of the land covered by the highway, which lies between the two closes; and although this land is expressly levied upon by Amos Perley's execution, yet it is not stated that the watercourse in question was sunk in this land, nor that the way had been previously laid out.

But taking it for granted, as John Chandler owned the closes adjoining on each side of the way, that he also owned the land over which the way passed; that it was the land described in Amos Perley's levy as covered by a way; and that the watercourse was sunk in this land, over which the way passed, we proceed:—

By the location of a way over the land of any person, the public have acquired an easement, which the owner of the land cannot lawfully extinguish or unreasonably interrupt. But the soil and freehold remain in the owner, although incumbered with a way. And every use to which the land may be applied, and all the profits which may be derived from it, consistently with the continuance of the easement, the owner can lawfully claim. He may maintain ejectment for the land, thus incumbered; and if the way be discontinued, he shall hold the land free from the incumbrance.

Upon these principles, there can be no doubt but that the owner of the land can sink a drain, or any watercourse below the surface of his land covered with a way, so as not to deprive the public of their easement. And it is a common practice for the owners of watermills, or of sites for watermills, to sink watercourses for the use of their mills in their own land under highways, care being taken to cover the watercourses sufficiently, so that the highways remain safe and convenient for passengers.

These well known legal principles are now to be applied to the case before us. The point saved is, whether the plaintiff had a right to sink the watercourse in question. And the decision of this point must depend, either on the privilege he had in the soil of another, or on his right to make this use of his own soil.

The plaintiff, being an assignee of Sampson Davis, is entitled to the privilege purchased by Davis of John Chandler, by the first conveyance. But Chandler owning at that time the land under the highway, the privilege to dig a watercourse any where through his land, must include a privilege to dig it under the highway, so that the easement remained to the public. On this ground the plaintiff had a right to dig the watercourse in question. But it further appears, from the extent returned on Amos Perley's execution, that the land under the highway was taken by the execution; and it also appears that Amos Perley conveyed that land to the plaintiff. If therefore the levy by Amos Perley was a disseizin of the right owner, yet he not having since re-entered, the plaintiff has the freehold, subject however to be ousted or evicted by one who has the legal right.

But the defendant sets up no title to the land; and cannot therefore dis-

pute the plaintiff's right to the soil. As to the defendant, the plaintiff must be deemed to be the owner, and as owner he has the right to a watercourse in his own land under the highway; but so as not to deprive the public of the easement. And as the mere right in the plaintiff to the watercourse in question is the only point reserved, the plaintiff having established this right, must have judgment on the verdict.

If the case presented to us a question, whether the owner of the land, over which is a public highway, might open a watercourse under the way, and leave it open at top, to the annoyance of passengers, some further considerations would be necessary.

If a highway be located over watercourses, either natural or artificial, the public cannot shut up these courses, but may make the road over them by the aid of bridges. But when a way has been located over private land, if the owner should afterwards open a watercouse across the way, it will be his duty, at his own expense, to make and keep in repair a way over the watercourse, for the convenience of the public; and if he should neglect to do it, he may be indicted for the nuisance; and upon the conviction, the nuisance may be prostrated by filling up the watercourse, if he shall not make a convenient way over it. This obligation upon the owner arises from the consideration, that when the way was located, the public were to be considered as purchasers of the easement, by the payment to the owner of all damages which he sustained in consequence of the easement. And among other causes of damage might be estimated the inconvenience of opening a watercoure at his own expense.

Judgment on the verdict.

283.

MOODY AND OTHERS v. BLAKE. 6 R. 459.

In this action, which was *assumpsit*, the defendant reserved leave in the court below to waive his plea, and to make any other answer in this court. And now upon the appeal he moved for leave to plead usury and tender his oath under the statute.

The court denied the motion, observing that it had been repeatedly decided, that where the reservation to plead anew was general, the new plea must be a plea to the country; and the plea proposed could not be received.

284.

PAGE v. PATTEE, 6 R. 459.

Where upon a trial, the judge thinking the evidence clear for one of the parties, omits to sum it up to the jury, and they find their verdict for the other party, a new trial is granted of course.

By the Court. It is our opinion, that either party can lawfully claim from a judge trying his cause, the benefit of his instructions to the jury; and when such instructions are not given, on the ground that the case is too clear for one of the parties to render them useful, and the jury find for the other party, a new trial ought to be granted; that the jury may be assisted by the direction of the court.

Whether the verdict is, or is not against the weight of evidence. we do not enquire; as it is our intention to send the cause to another jury, without any prejudice to the evidence given before on either side.

A new trial granted.

285.

BAKER v. JEWELL, 6 R. 460.

This was an action of the case, in which the plaintiff declares that the defendant, being the owner of a certain saw mill and dam, to induce the plaintiff to purchase one eighth part thereof, falsely and fraudulently affirmed and promised to the plaintiff that the said mill and dam were well and substantially built: that the plaintiff thereupon purchased the eighth part: and that in fact the said mill and dam were not well and sufficiently built, but as soon as a head of water was raised against the dam, it gave way and was carried off by the force of the water, whereby the mill became useless to the plaintiff, and he was put to great expense, &c.

The defendant pleaded in abatement, that the promise, if any such was made, was made to the plaintiff jointly with one Brown Baker, who is still living, and not to the plaintiff alone; and because the said Brown Baker is not named in the writ, he prays it may abate.

The plaintiff replied, that the said Brown Baker sued his action against the defendant for the damage aforesaid, sustained by him as owner of one fourth part of the said mill, and thereupon such proceedings were had, that at the term of this court holden here in September, 1806, he recovered judgment against the defendant.

To this replication the defendant demurs generally, and the plaintiff joins in demurrer.

PARSONS, C. J. The question before the court in this case is upon the sufficiency of the plaintiff's replication to the defendant's plea in abatement.

Whether this action arises from a contract or from a tort, we consider the law to be well settled, that if one man is legally answerable in a personal action to two or more persons jointly, if he will settle and adjust the controversy with either of them, so that he has no longer an interest in the dispute, this is a severance of the cause of action, as to any or all of the parties. Upon this principle, when the defendant permitted Brown Baker to proceed alone for his damages, and referred his demand to referees, on whose report Brown Baker had judgment, he in law agreed to a severance of the demand for damages; and cannot now take exception to the plaintiff's writ, because he has sued without joining Brown Baker, who is already satisfied for his damages.

If therefore the plaintiff ought *prima facie* to have joined Brown Baker as a co-plaintiff, yet from the facts disclosed in the replication, it appears to us to be a sufficient answer to the defendant's plea in abatement, and the interlocutory judgment must be entered. [*Vide* 2 Mass. Rep. 405, Austin v. Walsh.]

It may be observed, that if this action be founded on contract, there is another exception to the plea. For the want of the proper plaintiffs in actions on contract, is an exception to the merits, and is to be taken advantage of, either on demurrer, in bar, or on the general issue, but not by plea in abatement. [*Vide* 1 Bos. & Pul. 67, Scott v. Godwin.

The action is however substantially founded on a tort, as the false and fraudulent affirmation is the gist of it; and the two Bakers could not have legally joined in the suit; as this affirmation, although made in the hearing of, and directed to both, yet in its nature is several; as one of the purchasers might have been deceived, and the other not, from his having a knowledge of all the facts attending the building of the mill and dam, or from some other cause. But if the affirmation was part of the contract in the sale, then it must be proved by some memorandum in writing, signed by the defendant or his agent.

Respondeas ouster awarded.

286.

HOWARD v. GAGE, 6 R. 462.

Writs of *mandamus* to admit or restore a person to an office are within the jurisdiction of this court.

The proceedings upon such writs are according to the course of the common law, the English statute regulating them not having been adopted in this state.

The cases therefore, in which such writs for the purposes above mentioned are an adequate remedy, seem to be, where an office is holden for more than a year, or where the return involves only a question of law, so that, the fact being admitted, a peremptory *mandamus* ought to go.

After hearing counsel on each side the court declined to grant a *mandamus*. The chief justice observed, that the court were well satisfied that the granting of such writs in proper cases, as well to admit a man to an office to which he had been lawfully chosen, as to restore a man to an office from which he had been unlawfully removed, was within their jurisdiction. But that the remedy was inadequate, when the officer was annually elected, from the nature of the proceedings on writs of *mandamus* in this court, which was according to the course of the common law; none of the English statutes regulating these proceedings having been adopted in this state.

If the court were to grant the writ in this case, solemnly to try the validity of this election, the command to the justices of the common pleas would be conditional,—to admit Howard to the office of county treasurer, or to show cause why they did not. From the cause which has been shown in arguing the rule, there is little doubt that the justices would, and certainly they might return, that they could not obey the writ, because that Howard was not duly elected to that office. This return, if true would assign a sufficient reason for not obeying the writ; and the truth of it could not be enquired into by the court, either on affidavit or by a jury.

But the court could not grant a peremptory *mandamus*, until the return was falsified. And if it might be granted after the return was falsified by verdict in an action by Howard against the justices, yet such verdict could not in some counties, and probably would not in any county, be found until after the expiration of the year, for which the party complaining was chosen.

The cases therefore, in which the writ of *mandamus* may be an adequate remedy, in admitting or restoring to office, seem to be where the office is holden for a longer term than a year, or where the return to the writ will involve merely a question of law, so that admitting the facts to be true, a peremptory *mandamus* ought to go.

The court gave no opinion of the legality of the election, considering it as unnecessary on this rule; but on the ground stated by the Chief Justice, they ordered the rule to be discharged.

287.

WOOD v. THE LINCOLN AND KENNEBECK INS. CO. 6 R. 479.

The right to abandon is a vested right, which when once exercised, subsequent events cannot take away, without the consent of the assured, expressed or implied.

A ship becomes a wreck, when in consequence of injuries received, she is rendered absolutely innavigable, or unable to pursue her voyage, without repairs exceeding the half of her value; such is a total loss, and the assured may abandon.

In what cases of stranding the owner of a ship may abandon to the insurers.

If a partial loss happen to a ship insured upon time, and afterwards a total loss takes place, the underwriters are held to pay the amount of the partial loss, in addition to the total loss.

PARSONS, C. J. If the plaintiff, when he made the offer to abandon, had a legal right to abandon, the verdict must stand, notwithstanding the subsequent recovery and arrival of the vessel The right to abandon is a vested right, and when legally exercised, the assured is entitled to recover as for a total loss; which subsequent events cannot prevent, unless with his consent, manifested expressly or by reasonable implication from his subsequent conduct; (Lee v. Boardman, 3 Mass. 238; Munson v. N. E. Mar. Ins. Co. 4 Mass. Rep. 88.

The principal question therefore is, whether the plaintiff had a right to abandon, at the time he made the offer. When a ship becomes a wreck, by any of the perils insured against, it is generally a total loss, and the owner may abandon. And a ship becomes a wreck, when in consequence of the injury she has received, she is rendered absolutely innavigable, or unable to pursue her voyage, without repairs exceeding the half of her value. In this last case she is not worth repairing, by reason not of age or natural decay, but by reason of the injury received from some peril. For although the materials, or most of them, may remain; yet such is the disabled state of the ship, which they composed, that she can no longer retain her character of a navigable vessel.

By comparing this definition of a wreck with the facts, it is apparent that the plaintiff's vessel could not be considered as having been wrecked. For although she was driven on rocks near the shore, and oversetting was filled with water and sunk, yet she was very soon after in fact weighed, and being navigable was carried to her port of destination, and made fast to a wharf.

When a ship is stranded, the assured cannot, for that cause merely, immediately abandon. By some fortunate accident, by the exertions of the crew, or by extraneous assistance, the ship may be again floated, and rendered capable of pursuing her voyage. In such case the insurers are only answerable for the expenses occasioned by the stranding; and as liable for a partial loss, they must pay the assured his reasonable charges for getting the ship off, and for repairing the damages she may have received by the stranding; (Marsh. 502.) But undoubtedly when by the stranding the voyage is defeated, the owner may abandon. And the stranding of the ship may prove the destruction of the voyage, either by her afterwards becoming a wreck, before she shall be put afloat, or by circumstances accompanying the accident. A ship may be driven on some of our beaches, without sustaining essential injury, although she may be bilged; but in good wheather she may be easily got off, and repaired so as to prosecute her voyage; but if she be wrecked by a subsequent storm, while she remains stranded, the owner may abandon. Or a ship may be stranded on a part of the coast, where no assistance can be procured to get her afloat, or where there may be no materials or workmen for repairing the damage she may have sustained; and in a case like this the voyage is lost, and the assured may abandon. Or if the ship be stranded in a place, where assistance, materials and workmen may be easily procured, but it may be doubtful whether the attempt to get her off will succeed, while the expense is certain; if the insurer, on having notice, will not engage to pay the expenses of the attempt, and also to repair the vessel, if the attempt should succeed, the assured may abandon. For in this case, as he cannot recover more than a total loss, he shall not be holden to labor for the recovery of the ship, which he must do at his own expense, if he should be unsuccessful.

Another case, in which the owner may abandon in consequence of his ship being stranded, may be stated. If the stranding happen at a place and in a season of the year, when the ship cannot be speedily got off, but the owner must wait so long for a favorable time, that the voyage is defeated, he

is not obliged thus to wait, but may throw the loss on the insurers by an abandonment.

But if the ship be stranded in a place where sufficient assistance can be obtained, and she may be in a short time got off, and repaired for the prosecution of her voyage; as neither the ship nor the voyage is lost, there is no ground on which the owner can abandon his ship, and recover for a total loss. And where the stranding is under such circumstances, that the attempt to recover and repair the ship, in a reasonable time for the prosecution of the voyage, may be hazardous, but not hopeless; if the underwriter will engage to pay all the expenses, whatever may be the event, the owner cannot abandon, until he has used such reasonable endeavours to recover his ship, and has eventually failed. And *a fortiori*, if the underwriter will himself undertake, at his own expense, for the owner, the recovery of his ship, and shall succeed, and offer to restore her to him, so that he may seasonably prosecute his voyage, the owner cannot abandon, for neither the ship nor the voyage is lost.

These principles of the law of insurance are now to be applied to the case at bar.

The vessel insured appears not to have been wrecked, but to have been stranded on some rocks in her passage home, in Sheepscut river, and within less than five miles of her port of destination. On stranding she overset, and was filled with water; and in a day or two after, being disengaged from the rocks, she sunk in deep water, which covered her. It is not stated that she received any essential injury by this accident, or that an attempt to weigh her, and prepare for finishing her voyage, would have been hazardous or very expensive. It does not appear that the plaintiff made any attempt, or offered the defendants to make any, if assured of the reimbursement of his expenses. It is not stated that the vessel was stranded, where no assistance, materials or workmen could be seasonably procured. But it is stated that the plaintiff offered to abandon her on the day after she was stranded, and before she sunk in deep water; that the defendants refused to accept this offer; that they undertook to recover the vessel, succeeded in the attempt, carried her to the termination of her voyage, making her fast to a wharf in Wiscasset, then made considerable repairs upon her, and offered her to the owner.

To entitle the owner to abandon, there must be, at some period during the voyage, a total loss, either real or constructive. But in the present case, no such loss has happened. The vessel has not been lost, nor has the voyage been defeated; but it appears that the voyage has in fact been performed, and that the vessel was in safety at her destined port.

It does not appear from the case, that the vessel was wholly repaired by the defendants; nor is it stated, what degree of injury she sustained by the stranding. We cannot therefore presume that the injury was such, as rendered her not worth repairing. Whatever it was, if the defendants have not repaired it, they are obliged by law to do it, or to reimburse to the plaintiff his expenses of the repairs.

The case of Furneaux v. Bradley, (Marsh. 503,) arose on the stranding of the ship insured by a policy on time. The ship under the policy arrived at Quebec; but the lateness of the season preventing her return, she was removed into the basin for the winter, from whence on the 19th of November she was driven by a field of ice, and damaged by running on the rocks. Her condition could not be examined until April, when the policy had expired. She was then found to be bilged, and much injured, but not irreparably. In the progress of the repairs difficulties arose for want of materials, and the master, after consulting the merchants and agent, sold her. And it was de-

termined, that the ship should be considered as damaged by the stranding, and not as totally lost.

This is a very strong case against the plaintiff; for the ship could not, from the season of the year, be examined and repaired until the expiration of four or five months. But the principle of the decision is certainly correct, that neither the ship nor the voyage was lost by the stranding. If the ship, if not stranded, might have sailed on her return voyage, which was interrupted for a long time by the accident, the voyage in that case would have been lost, and consequently the ship would have been constructively lost, by the stranding. But in that case, if the ship had been safe at her anchors, she could not have proceeded to sea during the season of the ice, and thus her voyage was not delayed.

We observe that the policy in the case at-bar was upon time; and that after the arrival of the vessel at Wiscasset, the policy had continuance for several months. If the plaintiff had afterwards employed her within the policy, and she had incurred a subsequent loss, total or partial, the defendants would have been holden to pay it, in addition to the partial loss, with which they are chargeable by the stranding in question.

As we are of opinion that the loss complained of is not total but partial, the verdict must be set aside, and by the consent of the parties, commissioners are to be appointed, to adjust the partial loss, and a verdict to be entered accordingly upon their report.

288.

WATKINS v. BAIRD, 6 R. 504.

PARSONS, C. J. [After a brief recital of the pleadings, and the judge's report.]

It is a general rule, that imprisonment by order of law, is not duress; but to constitute duress by imprisonment, either the imprisonment, or the duress after must be tortious and unlawful; (2 Inst. 482.) If therefore a man, supposing that he has cause of action against another, by lawful process cause him to be arrested and imprisoned, and the defendant voluntarily execute a deed for his deliverance, he cannot avoid such deed by duress of imprisonment, although in fact the plaintiff had no cause of action; (Vid. Hob. & Lev. ubi. supra.) And although the imprisonment be lawful, yet unless the deed be made freely and voluntarily, it may be avoided by duress; (43. E. 3. 10. b. pl. 32.) And if the imprisonment be originally lawful, yet if the party obtaining the deed detain the prisoner in prison unlawfully, covin with the gaoler, this is a duress which will avoid the deed, (Cro. Jac. 187. Huscombe v. Standing.) But when the imprisonment is unlawful, although by colour of legal process, yet a deed obtained from a prisoner for his deliverance, by him who is a party to the unlawful imprisonment, may be avoided by duress of imprisonment. In Allen, 92. debt was sued on a bond and duress of imprisonment pleaded in bar. The plaintiff had, on charging the defendant with felony in stealing a horse, procured a warrant from a justice, on which the defendant was arrested and imprisoned, and sealed the bond to the plaintiff to obtain his discharge, which was done, the horse appearing to be his own horse. Roll, J. directed the jury, that the proceedings being had to cover the deceit, the bond was obtained by duress.

And in our opinion, it is a sound and correct principle of law, when a man shall falsely, maliciously and without probable cause, sue out a process in form regular and legal, to arrest and imprison another, and shall obtain a deed from a party thus arrested to procure his deliverance, such deed may

be avoided by duress of imprisonment. For such imprisonment is tortious and unlawful as to the party procuring it; and he is answerable in damages for the tort, in an action for a false and malicious prosecution; the suing of legal process being an abuse of the law, and a proceeding to cover the fraud. And although Bridgman, in Lev. 68, 9. is made to say, that imprisonment in custody of law by the king's writ will not be duress to avoid a deed, when the arrest is without cause of action, because the party has his remedy by action for suing a groundless suit, unless the suit be without probable cause, and malicious. And if it be, certainly the imprisonment is wrongful, as to the party who maliciously procured it.

Now on examining the facts reported by the judge in the case at bar, it is apparent that the suit, on which the plaintiff was imprisoned, was without probable cause, there being indeed no colour for it. And the evidence was sufficient for the jury to infer that the suit was also malicious. The plaintiff was wickedly and by false pretences decoyed from his home in the state of New York into this county. Here he was immediately arrested at the defendant's suit, who had no cause of action against him, the present action being then pending. And the object of the release was to bar this action.

Upon the whole, the oppression was gross and flagrant; and it would be a reproach to the law, if it would allow to this release, thus unjustly and fraudulently obtained, any legal effect against the plaintiff, so injuriously and dishonourably treated. The direction of the judge appears to be correct, and in our opinion the plaintiff ought to have judgment.

Let judgment be entered on the verdict.

289.

WOLCOTT v. HALL, 6 R. 514.

Where in an action for slander the defendant pleads the truth of the words spoken in justification, he shall not be permitted to give evidence of common report that the plaintiff had been guilty of the crime which the words import, nor that A. & B. had charged him with the commission of the crime.

PARSONS, C. J. [After reciting the pleadings, and the evidence offered by the defendant at the trial.] This evidence the judge rejected, and in our opinion very properly. The defendant, not content to slander the plaintiff in the country, perseveres in the calumny by putting the slander on record; and would now protect himself from damages, by proving that reports against the plaintiff's character, imputing larceny to him, previously existed. Two of these reports the jury have found to be false; and the general report might have been discredited, if not followed by the slanderous words of the defendant himself.

The plaintiff could have no notice from the pleadings to meet this evidence; and when regularly seeking redress for an injury from the defendant, he might be overwhelmed by particular scandal, which could not be traced to any author; or if it could, might be disproved. The evidence of such reports would therefore be extremely oppressive to the plaintiff, and would encourage slander in the country, by leading people to suppose that they were excuseable in relating scandal, if they were not the authors of it.

Evidence as to the general character of the plaintiff, he may at all times encounter, if untrue; and if his character be generally bad, independent of the slander of which he complains, the jury may consider it. For the worth of a man's general reputation among his fellow-citizens may entitle him to

large damages for an attempt to injure it; which he ought not to obtain, i character is of little or no estimation in society.

But evidence of the plaintiff's general character was not offered; but only an attempt to blast his reputation by particular reports, which he might not have it in his power to silence, but by commencing this prosecution. And if such reports could be given in evidence, the subject of them however innocent, instead of seeking redress from the laws, had better seek privately under the weight of unmerited calumny; lest by attempting his justification, he should give notoriety to slanders, which had before been circulated only in whispers.

This is not like the case of Earned v. Buffington, (3 Mass. Rep. 546.) There evidence of the plaintiff's rank and employment was offered and rejected, and under the circumstances of that case, not injuriously to the defendant. For the damage arising from the defamatory words, instead of being lessened by the plaintiff's employment, ought, if at all affected, to have been aggravated.

Let judgment be entered on the verdict.

290.

HUNT, Administrator of ISAAC BENNETT v. ADAMS, 6 R. 519.

An alteration of a written promise, by the insertion of a word which the law would have supplied, will not annul the contract, although it be interlined by the promisee without consent; and if it be an immaterial alteration, the law will presume the assent of the promisor to the making of it.

Where one adds, at the bottom of the promissory note of another, that he acknowledges himself to be holden as surety for its payment, he is considered as an original joint promisor.

The declaration in this case, which was in assumpsit, contained several counts, but all for the same cause of action. The general issue was pleaded, and a trial being had thereon before Sedgwick, J. at the last May term in this county, a verdict was found for the plaintiff. Whereupon the defendant moved for a new trial upon the judge's report, on the ground that the verdict was against evidence, and against the direction of the judge in a matter of law.

The plaintiff, to maintain the issue on his part, gave in evidence at the trial a note of the following tenor, viz.

"Lec, July 23d, 1804. For value received I promise to pay Isaac Bennett five hundred dollars lawful money of the United States, the twenty-fifth day of Dec. in the [year] of our Lord one thousand eight hundred and five, with interest; pay to be made at Cocksackie, witness my hand—

"Joseph Chaplin."

"I acknowledge myself to be holden as surety for the payment of the above note, witness my hand— "Barnabas Adams."

The signature of the defendant was proved, and that of Chaplin was admitted; but it also appeared, that when the note was executed, the word year was omitted, and had been interlined before it was produced at the trial. Underneath the defendant's subscription, was a certificate signed by Chaplin, that the word year was interlined by him.

The defendant objected to the plaintiff's recovery in the action, that the note had been altered, after his signature, and without his consent.

PARSONS, C J. [After stating the action and its history from the report of the judge who sat in the trial.] As to the alteration it is an old rule, that any alteration, whether material or not, in an instrument, made by the party

to whom it is given, shall avoid it; unless made by the consent of the party who executed it. But this consent may as well be implied from the nature of the alteration, as be expressed. There are several cases to this point. Markham v. Goraston, (Moor. 547.) where blanks were filled up by consent after execution and the deed was held good. In Paget v. Paget, (2 Ch. R. 187.) blanks in a deed of revocation were filled up, and the deed held good and no notice is taken of any assent. To these may be added the case of Zouch v. Clay, (1 Vent. 185.) where a blank was left for the name of a third obligor, two having executed the deed, and the blank was afterwards filled with the name of C. who executed it, and it was holden that the first obligors remained bound. Agreeably to this case it is the practice in the case of custom house bonds, to have a blank, for the duties when ascertained, at the time they are executed; and the blanks are afterwards filled with the amount of the duties, without prejudice to the bond, the obligors being considered as consenting that the blanks shall thus be filled up; See also the case of Smith v. Crooker, *et al.* 5 Mass. Rep. 538.

These are all cases on deeds, arising on the plea of *non est factum* But in a simple contract, which is merely evidence of a promise, an immaterial alteration, however made, not at all affecting the terms of the promise, seems not to be within the same principal of deeds, which from the alteration may not be the deeds of the parties; while a similar alteration in a written simple contract might leave it complete evidence of the same contract.

However this may be, what is an alteration, whether in matter or form, remains a question. And there is no case, even in a deed, which determines that every alteration made by the obligee, whether in completing a letter, or correcting the spelling of a word, would be fatal to the deed. And in all simple contract, an addition by the unnecessary supplying a word, which the law would supply, is not an alteration either in matter or form which would destroy the contract. Such addition has no effect in form or substance. In my opinion it would be unworthy of the wisdom of the law to decide, that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract. Indeed the assent of the party signing such contract, that the omission of a word by a clerical mistake, which the law will supply, might be cured by inserting such word, ought to be presumed, to protect him from the imputation of intentional fraud.

In applying these equitable principles to the case before us, we find in the note the time of payment expressed to be the twenty-fifth day of December, in the——of our Lord, 1805, omitting the word *year*; and this word has been since supplied. Now the law would have supplied this word, and without the insertion of it the note would have supported a count on a promise to pay on the twenty-fifth day of Dec. in the year of our Lord, 1805. We are therefore of opinion that the actual insertion of the word *year*, which the law would clearly have supplied, is no such alteration as will annul the contract, if it was interlined by the promisee without consent; and if it were an immaterial alteration, the law will reasonably presume an assent of the promisors to the making of it. If this opinion is correct, the verdict is right notwithstanding this alteration, let it have been made either by Chaplin or by Bennett, the promisee.

The other objection to the verdict is, that the defendant was answerable only upon the inability of Chaplin, which was not proved.

The note appears to have had the signatures of Chaplin and of the defendant, before it was delivered to Bennett. The defendant therefore is not the guarantor of the performance by Chaplin of a subsisting promise of his to Bennett; but he is an original promisor with Chaplin. By this promise Chaplin and the defendant are both originally liable; and although the one

engages as principal, and the other as surety, yet they are each answerable to the promisee; and the insertion of the characters in which they promise is for the defendant's sake, to give him his remedy against Chaplin.

The construction of this note, upon the face of it, is the same as if the note had expressed a joint and several promise, by Chaplin as principal, and the defendant as surety, to pay the money. Or if without expressing in the body of the note the characters, in which the parties promised, against the signature of Chaplin was subjoined "as principal;" and against that of the defendant was added "as surety." [*Vide* Peake's N. P 130, Marsh v. Ward.] Notes of this kind are to have a similar construction with bonds, in which the obligors are named as principal and sureties, although they are bound jointly and severally.

Upon the construction of this note, upon the face of it, we are satisfied that the defendant is answerable as an original promisor, and not merely on the contingincy of Chaplin's failing to pay.

However, to rebut this construction, it was in evidence, that when the note was delivered to Bennett, he and Chaplin considered the defendant as holden for the payment, on the condition that Chaplin could not pay.

It would require some consideration, before the evidence of this kind was admitted, to control the legal effect of the writing. This evidence does not prove that the whole agreement was not reduced to writing, or that any fact existed to create a latent ambiguity; but is applied merely to give a construction to the note as it is written. We are however satisfied, that in a written simple contract not within the statute of frauds, where the whole contract is reduced to writing, and in which there appears no latent ambiguity parol evidence cannot be admitted to explain such contract; the language used by the parties therein being the best evidence of their intent.

But it is unnecessary to decide on the legal admissibility of this evidence; for it is shown by the plaintiff that Bennet had recovered a judgment on this note against Chaplin, and that the execution sued on it was returned unsatisfied. This is *prima facie* sufficient evidence to charge the surety; and he must be concluded by it, unless he can show fraud or collusion in the transaction.

We are therefore satisfied upon the whole, that the jury have rightly decided the cause; and as the evidence was left to them by the judge, we do not see any repugnance between his direction and the verdict.

Judgment on the verdict.

291.

THE PRESIDENT, DIRECTORS AND COMPANY OF THE BERKSHIRE BANK v. JONES, 6 R. 524.

A waiver of a right to notice, made by the indorser of a promisory note, does not excuse the endorsee from demanding payment of the promisor at the maturity of the note. Yet where the note was made payable at a day and place certain, and the endorsee was ready to receive payment, no further demand on the promisor was necessary to charge the endorsee.

The plaintiffs declare on a promissory note, made by one Amasa Glesen, on the 21st of October, 1807, by which he promised the defendant to pay him or his order, one hundred and twenty five dollars, at the Berkshire Bank in sixty-one days; and on an endorsement by the defendant, he waiving all right to the notice, to which by law or custom he was entitled as ondorser. The plaintiffs also allege a request and refusal by Glesen, the maker, and also notice to the defendant.

The action was tried before Sedgwick, J. who directed a nonsuit, subject to the opinion of the court, whether it was necessary to the support of this action, that previous

to the commencement thereof, the contents of the note declared on should have been demanded of the promisor.

PARSONS, C. J. (After reciting the declaration, and stating the point submitted by the Judge's report.) The defendant has argued, that, although he waived notice of a refusal of payment by the maker, yet he did not thereby dispense with a demand upon him; for he might waive the notice from a confidence that the maker would pay the note on demand.

This construction of the waiver we think correct, and the objection would be conclusive, if the indorsement had not been made to the plaintiffs, at whose office the note was to be demanded and paid. The note was payable on a day and at a place certain; and the place is the Berkshire bank. A demand of payment need not be made at any other place; and if the holder of the note is at the bank on the prescribed day, ready to receive the money if the maker be there, it is enough for him. And if the maker does not come to the bank, or direct the payment there, he has broken his promise, and no other notice to him is necessary.

In the case at bar, as the plaintiffs held this note, we must presume it was in their bank; and there it was made payable. They were not to look up Glesen, or to demand payment of him at any other place. The defendant, by his endorsement, guaranteed that on the day of payment the maker would be at the bank, and pay the note; and if he did not pay it there, he agreed that he would be answerable in a suit at law, without previous notice of the default of the promisor.

Although we are satisfied, that the judge was correct in his construction of the terms of the defendant's waiver of notice, considered in a general view; yet we are of opinion, that from the special tenor of the note declared on, the nonsuit ought to be set aside; and, if on the trial, the plaintiffs can show, that on the day of payment the note was in the bank, and that the servants or officers of the plaintiffs were there during the usual bank hours, to receive payment and give up the note, they will be entitled to recover, as by the terms of the note they were not holden to demand payment but at the bank, which was impracticable through the default of the maker; and by the defendant's waiver he cannot claim notice.

The plaintiffs allege in their declaration, a demand on Glesen, and notice of his refusal to the defendant; and it is said, that if the nonsuit be set aside, the plaintiffs must fail on a new trial, because the facts do not comport with their allegation. Whether this allegation is or is not to be considered as surplusage, it is not necessary now to decide; and the plaintiffs may amend on terms, by striking out the allegation, if they should be so advised.—The reason of the nonsuit being insufficient, the plaintiffs must have a new trial.

292.

MILFORD v. WORCESTER, 7 R. 48.

The mutual engagement of the parties, to take each other for husband and wife, in the room where the justice is present, he not assenting, but refusing to solemnize the marriage, is not a lawful marriage, so that the woman or her issue can derive a derivative settlement from him.

PARSONS, C. J. Marriage is, unquestionably, a civil contract, founded in the social nature of man, and intended to regulate, chasten and refine the intercourse between the sexes; and to multiply, preserve and improve the species. It is an engagement, by which a single man and single woman of suf-

ficient discretion, take each other for husband and wife. From the nature of the contract, it exists during the lives of the two parties, unless dissolved for causes which defeat the object of marriage, or from relations imposing duties repugnant to matrimonial rights and obligations.

Marriage being essential to the peace and harmony, and to the virtues and improvements of civil society, it has been in all well regulated governments, among the first attentions of the civil magistrate, to regulate marriages; by defining the character and relations of parties, who may marry, so as to prevent a conflict of duties, and to preserve the purity of the families; by describing the solemnities, by which the contract shall be executed, so as to guard against fraud, surprise and seduction—by annexing civil rights to the parties and their issue, to encourage marriage, and to discountenance wanton and lacivious cohabitation, which, if not checked, is followed by prostration of morals, and a dissoluteness of manners; and by declaring the causes, and the judicature for rescinding the contract, when the conduct of either party, and the interest of the state, authorise a dissolution. A marriage contracted by parties authorised by law to contract, and solemnised in the manner prescribed by law, is a lawful marriage; and to no other marriage are incident the rights and privileges secured to husband and wife, and to the issue of the marriage.

When our ancestors left England, and ever since, it is well known that a lawful marriage there must be celebrated before a clergyman in orders, and that all questions of marriage, divorce and allimony, regularly belong to the ordinary. When our ancestors first settled here, smarting under the arbitrary censures of the ecclesiastical courts, they were not disposed to invest their own clergy with any civil powers whatever; but to leave them wholly to their pastoral functions. With this impression, in 1646, by an ordinance for the due solemnization of marriages, no person is authorised to join together in marriage any persons, but a magistrate, or some other person to be appointed in such places where no magistrate was near. And all persons were forbidden to join themselves in marriage, but before some magistrate, or other person authorised as aforesaid. Neither was the magistrate authorised to permit the parties to contract marriage in his presence, unless the intention of marriage had been previously published. Thus stood the law, until the repeal of the first charter.

(After reciting the provisions of the provincial statutes of 4 Wm. and Mary, c. 10, and 7 Wm 3, c. 6, be proceeded.) No form of words is established for the solemnization of a marriage. The usage is for the justice or minister to require of the parties respectively, an assent to a mutual agreement to take each other for husband and wife. But the statute would be substantially conformed to, if the parties were to make the mutual agreement in the presence of the justice or minister, with his assent, he undertaking to act on that occasion in his official character. But without such assent, and undertaking of the justice or minister, notwithstanding their personal presence, the marriage, I am well satisfied, will not be solemnized pursuant to, nor be a lawful marriage within the statute.

When a justice or minister shall solemnize a marriage between parties, who may lawfully marry, although without publication of the banns of marriage, and without the consent of the parents or guardians (which the statute requires) such marriage would unquestionably be lawful, although the officer would incur the penalty of fifty pounds for a breach of his duty.

But it has been argued, that the marriage, although not solemnized pursuant to the statute, is yet a la vful marriage, had between parties competent to contract marriage, and not declared void by any statute. This ground deserves consideration. When civil government has established regulations

for the due celebration of marriages, it is the duty, as well as the interest of all the citizens to conform to such regulations. A deviation from them may tend to introduce fraud and surprise in the contract; or by a celebration without witnesses, the vilest seduction may be practised under the pretext of matrimony. When, therefore, the statute enacts that no person but a justice or a minister shall solemnize a marriage, and that only in certain cases, the parties are themselves prohibited from solemnizing their own marriages by any form of engagement, or in the presence of any witnesses whatever; otherwise, fruitless are all the precautions of the legislature. In vain do the laws require a previous publication of the banns, or the assent of parents or guardians of young minors, or prohibit a justice or minister from solemnising the marriage without these prerequisites. A young and inconsiderate couple may at a tavern or elsewhere, with or without the presence of witnesses, rush into matrimony, distress their friends, and destroy their own future prospects in life.

It may be objected to these principles, that if they are correct, a marriage among quakers, agreeably to the rules of their society, is void. I know not that the conclusion would not be just. I know that such was the opinion of lawyers before the revolution; and so general was this impression, that to guard those people from consequences so mischievous, in revising the the statute of 1786 c. 3 all marriages before had were confirmed, and such marriages authorised in future.

Marriages may be considered as void or valid, with respect either to civil rights incident to marriages, or to penal consequences to the parties, where marriages are questioned. Whatever foundation for the distinction there may be, when the parties might have lawfully intermarried; there can be none where the parties are prohibited from marrying. This last case comprehends, by our laws, incestuous marriages, marriages within the age of consent, when either of the parties has a husband or wife living, and marriages between a white person, and an indian, negro, or mulatto.

No person can lawfully solemnize marriages between persons, who might lawfully have intermarried, but a justice of the peace or an ordained minister. And a record of a marriage so solemnised, by either of those officers, founded on a certificate duly made, is legal evidence of the marriage and no inquiry is further made as to the publication of banns, the assent of parents or guardians, or the inhabitancy of the parties. When, therefore, the marriage appears to have been celebrated by a competent officer, as a justice or minister, the marriage is deemed lawful, although the officer, for his irregularity, may have incurred the penalty of fifty pounds. But a marriage, merely the effect of a mutual engagement between the parties, or solemnized by one not a justice of the peace, or an ordained minister, is not a legal marriage, entitled to the incidents of a marriage duly solemnized. The woman, when a widow, cannot claim dower, nor the issue seisin by descent.

Whether cohabitation, after such a pretended marriage, will subject either of the parties to punishment as guilty of fornication, may, perhaps, depend on circumstances, such as verily believing the marriage legal; but every young woman of honor, ought to insist on a marriage solemnized by a legal officer, and to shun the man who prates about marriage condemned by human laws, as good in the sight of heaven. This cant is a pretext for seduction, and if not contemned will lead to dishonor and misery.

193.

EVERENDIN v. BEAUMONT, Tenant, 7 R. 76.

PARSONS, C. J. It appears from the allegations of the demandants, that

they were never seized in fact of the premises, but only of the right, as Bussey on the death of their father abated them. The deed, therefore executed to D. and his heirs, by the demandants, being void as a conveyance, it was competent for them to release to B., the tenant, he being actually seized of the freehold, by right or by wrong; for the demandants have sued him as tenant of the freehold. But their release will operate to pass the right to the tenant in possession, and the right on which the action was founded having passed, the action can be no further maintained.

If the release is shown to be fraudulent, it will have no legal operation in favor of the tenant. a party to the fraud. The facts disclosed, are the prior deed executed to D., the suing the action for his use, and the knowledge thereof by B. Now the knowledge of B. can have no tendency to give any legal effect to the deed to D., the demandants right still remaining, not conveyed or extinguished; for the deed being void as a conveyance, no collateral transaction whatever, under any circumstances, can give it any operation to pass the right. The demandants thus having a right which could pass by release to B., might regularly pass it, and were not estopped by any maxim or principle of law. The knowledge of B. of the deed to D., as it cannot on the one hand give validity to that deed, so neither on the other hand can it defeat the release to himself.

The transaction between the demandants and D. was prohibited by law, (1 Hawk. P. C. c. 86,) and their mistakes or ignorance of law cannot avail him. Indeed the buying of titles by a stranger, when the grantor is not seisied, is an offence at law; and it was a lawful act in B., who was in fact seized, to protect his title, by purchasing the release of the right in the demandants; notwithstanding his knowledge that an illegal attempt had been made to obtain that right by a conveyance. For it would be an unreasonable imputation upon the law, to charge it with avoiding a release, in order indirectly to give any effect to an illegal act.

The allegation, that the demandants, in selling to D., and the latter in purchasing, supposed and believed that they were acting lawfully, if it be true, can have no legal effect; nor if it be untrue, can it from the nature of it be traversed and put in issue.

294.

CLAPP v. COFRAN, 7 R. 101.

PARSONS, C. J. Bonds for ease and favor are void, but they are given, not to the creditor, but to the sheriff, to obtain from him a favor and indulgence, to which the debtor is not legally entitled If a debtor in the execution, will voluntarily, without fraud, imposition or duress, give a bond to his creditor, conditioned that he will continue a true prisoner without escaping, such a bond is not against the common law, nor against any statute. If the penalty is not double, the sum for which the debtor is imprisoned, it is not a bond within the statute of 1784, c. 41, and the debtor may be relieved against the penalty, by a judgment for the sum, for which he is imprisoned; but the bond is not void. The creditor is not obliged to take such a bond as his indemnity against an escape; for he may, notwithstanding, charge the sheriff for the escape. If the debtor give no bond to obtain the liberty of the yard in the day time, and the sheriff grant this liberty, it is a voluntary escape in the sheriff. And if the bond which the debtor gives is not pursuant to the statute, and the sheriff upon such unauthorised bond, grants the debtor the liberty of the yard, this will be an escape in the sheriff; for he will not be

justified in granting the debtor this liberty, but upon receiving for the creditor such a bond as the statute authorises.

295.

BOYNTON v. HUBBARD, 7 Mass. 112.

PARSONS, C. J. A contract by an heir to convey, on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution or devise, is a fraud on the ancestor, productive of public mischief, and void as well at law as in equity.

The plaintiff supposes that chancery decisions are not authorities to influence the determinations of a court of law. This position cannot be admitted as universally true. Chancery from the nature of its jurisdiction and powers, may grant specific remedies for wrongs, not within the reach of a court of law. But when the proceedings in equity are founded upon principles of public policy, that same policy ought to prevail in courts of law that the measure of right may be the same in each court, although the remedies for the violation of right may be different. And we do not recollect a contract, which is relieved against in chancery, as originally against public policy, which has been sanctioned in courts of law, as legally obligatory on the parties. For although it has been said in chancery, that marriage brocage bonds are good at law, but void in equity; yet no case has been found at law, in which those bonds have been holden good. And we are satisfied that when chancery has relieved against a contract on principles of public policy, those principles ought to have their full weight in courts of law; although to attain justice, the remedy must be according to the course of the common law.

Arguments drawn from considerations of public policy, have and ought to have great weight, both in equity and at law. As fraud may be public mischief as well as a private wrong, in both cases equity will relieve against it, and I know not that in any case the law will give it a sanction. In a fraudulent contract, deceit may be practiced on a party to the contract; in which case neither at law or equity is he bound by such contract. Or the deceit may not be on either party to the contract, but on third persons; and if the deceit on third persons will operate as a public mischief, neither equity nor law will support the contract.

Thus marriage brocage bonds, which are not fraudulent on either party, are yet void, because they are a fraud on third persons and are a public mischief, as they have a tendency to cause matrimony to be contracted on mistaken principles, and without the advice of friends; and they are relieved against as a general mischief, for the sake of the public.

Upon this principle, bargains to procure offices are rescinded, not on account of fraud on either of the parties; but for the sake of the public, because they tend to introduce unsuitable persons into public offices.

Another case, where the deceit is upon persons not parties to the contract, is a deceit on a father, or other relation, to whom the affairs of an heir or an expectant are not disclosed; so that they are influenced to leave their fortunes to be divided amongst a set of dangerous persons and common adventurers, in fact, although not in form. This deceit is relieved against as a public mischief, destructive of all well regulated authority or control of persons over their children, or others having expectations from them; and as encouraging extravagance, prodigality and vice; (1 Atk. 351,-2,-3.)

From the forms of proceeding in courts of equity, it must be admitted, that these principles may often be more correctly applied there, than in courts of law. Chancery may compel a discovery of facts, which a court

of law cannot; and from facts disclosed, a chancellor, as a judge of facts, may infer other facts, whence deceit, public or private, may be irresistably presumed. Whereas at law, fraud cannot be presumed, but must be admitted or proved to a jury. But when a court of law has regularly the fact of fraud admitted or proved, no good reason can be assigned, why relief should not be obtained there; although not always in the same way, in which it may be obtained in equity.

A case, in which an heir or expectant is frequently relieved against his own contract is a *post obiit* bond. This is an agreement, on the receipt of a sum of money by the obligor, to pay a larger sum, exceeding the legal rate of interest, on the death of the person from whom he has some expectation, if the obligor be then living. This contract is not considered as a nullity; but it may be made on reasonable terms, in which the stipulated payment is no more than a just indemnity for the hazard. But whenever an advantage is taken of the necessity of the obligor, to induce him to make this contract, he is relieved, as against an unconscionable bargain, in payment of the principal and interest. This contract may be made on *data*, whence its reasonableness may be ascertained; for the lives of the obligor, and of the person on whose death the payment is to be made, are subject to be valued, as is done in insurances upon lives. But the covenant declared on in the case at bar is not a *post obiit* contract.

Another case, in which an heir is relieved, is when he is entitled to an estate in remainder or reversions expectant on the death of some ancestor or relative, and he contracts to sell the same for ready money. All these cases are not relieved against as fraudulent; because a reasonable and sufficient consideration may be paid, as ascertained by the annual value of the estate, and of the intervening life. But as in *post obiit* contracts, when an advantage is taken by the purchaser of the necessity of the seller, he will be relieved against the sale, on repaying the principal and interest, and sometimes paying for reasonable repairs made by the purchaser. This relief is granted on the ground that the contract of sale was unconscionable.

In unconscionable *post obiit* contracts, courts of law may, when they appear, in a suit commenced upon them, to have been against conscience, give relief by directing a recovery of so much money only, as shall be equal to the principal received and the interest. But in sales of remainders and reversions, by grants executed, I know of no relief that courts of law could give, unless the grant shall appear to have been fraudulently obtained of the grantor; in which case the fraud will vitiate and render null the grants so infected.

The contract before us is not a sale of a remainder or reversion; but is different from any noticed in the reports that have been cited. There is one case of a contract between presumptive heirs, respecting their expectances from the same ancestor. It is the case of Buckley v. Newland, (2P. Wms. 182.) The parties had married two sisters, presumptive heirs of Mr. Turgis. The husbands agreed that whatever should be given by Mr. Turgis should be equally divided between them. After Turgis' death, the defendant, who had the greater part given to him, was compelled to execute the agreement. The reciprocal benefit of the chance was a sufficient consideration. The tendency of the agreement was to guard against undue influence over the testator; and it could not be unreasonable to do what the law would have done, if Turgis had died intestate.

The covenant declared on in the case at bar is an agreement by an heir, having two ancestors then living, an uncle and an aunt, that if he survive them or either of them, he will convey to a stranger one third part of all the estate real and personal, which shall come to him from those ancestors or

either of them, by descent, distribution or devise. And it is found by the jury, that this contract was not obtained from the heir by the fraud of the purchaser. If, therefore, this covenant is void, it must be on the principle, that it is a fraud, not on either of the parties, for that the jury have negatived, but on third persons not parties to it, productive of public mischief, and against sound public policy. If the contract has this effect, it is apparent to the court from the record; the whole contract being a part of the record. And that a contract of this nature has this effect, we cannot doubt.

The ancestor, having no knowledge of the existence of the contract, is induced to submit his estate to the disposition of the law, which had designated the defendant as an heir. The defendant's agreement with the plaintiff is to substitute him as a co-heir with himself to his uncle's estate. The Uncle is thus made to leave a portion of his estate to Boynton, a stranger, without his knowledge, and consequently without any such intention. This Lord Hardwick calls a deceit on the ancestor. And what is the consequence of deceit of this kind upon the public? Heirs, who ought to be under the reasonable advice and direction of their ancestor, who has no other influence over them than from what arises from a fear of his displeasure, from which fear the heirs may be induced to live virtuously and prudently, are, with the aid of money speculators, let loose from this salutary control, and may indulge in prodigality, idleness and vice: and taking care, by hypocritically preserving appearances, not to alarm their ancestor, may go on trafficking with his expected bounty, making it a fund to supply the wastes of dissipation and extravagance. Certainly the policy of the law will not sanction a transaction of this kind, from a regard to the moral habits of the citizens.

When it is considered that a contract of this sort is a mere wager, in a case where there are no principles, by which the value of the chances may be estimated, so as to ascertain whether it be unconscionable or reasonable; and therefore if valid in any case, it may be valid in all cases; public policy has additional inducements to discountenance it, as dangerous to good faith and fair dealing.

That such is the nature of this contract, is manifest by considering the terms of it. It is true the comparative value of the lives of the uncle and nephew may be estimated. But there is no rule for estimating the estate which the uncle may leave. After the contract he may be unfortunate; and lose his property; or he may acquire a much larger estate. But if the estate of which he should die seized and possessed, could be known, what is the rule for calculating whether he will die intestate or not? Or if he should make a will, what estate he would devise to the nephew? The nephew when the contract is made may be co-heir; and afterwards the other co-heirs may die, leaving him the sole heir. Without pursuing the nature of the contract further, it is most manifest, that it must be a desperate wager on one side or the other; and as such ought not to be countenanced as the foundation of an action.

It is therefore our opinion, that this contract by an heir to convey, on the death of his ancestor, living the heir, a certain undivided part of what shall come to the heir by descent, distribution or devise, is a fraud on the ancestor, productive of public mischief, and void at law as well as in equity. Believing it void at law, we cannot treat it as an unconscionable bargain, in which the plaintiff may recover as damages the money he has paid with the interest. Nor do we decide that the plaintiff cannot in another action, recover back that money with the interest, as money paid, not fraudulently, but fairly on a consideration which has failed.

The judgment must be arrested, and the defendant recover his costs. (1 Term R. 132; 6 East, 241.)

70.

BOND v. WARD, Sheriff, 7 R. 123.

PARSONS, C. J. In respect to the duty of a sheriff in attaching goods on mesne process.

When there is any reasonable ground to induce an officer to believe, that in making an attachment, or in seizing upon execution, he may mistake, and expose himself to an action for damages, by attaching or seizing goods not the property of the debtor, he may insist on the creditor's showing him the debtor's goods, and also on being indemnified for any mistake he may make in conforming to the creditor's directions.

But if the officer does not request the creditor, his attorney or agent, to show him the debtor's goods; or to indemnify him; but agrees to execute the precept of the writ as well as he can, he is answerable to the creditor, if he does not attach the debtor's goods, which he might have found and attached; if the creditor be injured by his neglect. As where the debtor's furniture was in his house; and although other furniture may have been mixed with the debtor's, held, that he ought to have attached it; and if he had some furniture of other persons where the right owner claimed his part, the sheriff might have restored it, without subjecting him to an action by the plaintiff; for if the officer is unable to distinguish the goods on due enquiry, the owner can maintain no action against the officer, until notice and demand of his goods, and a refusal or delay of the officer to redeliver them.

But if the deputy of a sheriff undertakes any business not resulting from the duties of his office, the sheriff is not responsible; for in this respect he is not the deputy of the sheriff. The sheriff is not answerable for any default of his deputy, unless it be a default in executing the powers lawfully derived from the authority of the sheriff, under which his deputy acts. Thus, the debtor in this case proposed to the deputy to attach the hides then in the vats to tan; and to take a lease of the vats until the hides should be tanned, to which the deputy agreed; but proceeding to attach other property, another deputy had in the mean time attached them for other creditors; and whether the sheriff was guilty of laches, in not attaching the hides was the question.

The practice of attaching the effects of a defendant, and holding them to satisfy a judgment, which the plaintiff may recover, when perhaps judgment may be for the defendant, is unknown to the common law, and is founded on our statute law, explained by an usage in the ordinances in force under the colonial law.

At common law an attachment, as a part of the service of process in a civil suit, is a species of distress, in which the effects attached were the ancient *vadii* or pledges. Gil. on Dist. 24. When the defendant did not appear on a summons to answer to the plaintiff, an attachment was issued; and his chattels were seized by the sheriff to compel his appearance; but when he had appeared, he was entitled to his chattels in the same plight in which they were attached; if he did not appear, but made default, the chattels attached were forfeited.

By the statutes now in force, there is no express pro[illegible]n, that an attachment may go before a summons; but the form of a wri[illegible] attachment against the goods and estate is prescribed as an original process, and the attachment of goods and estate by virtue of such process is recognized, and the sheriff is obliged to hold them attached until judgment; and for thirty days after, if the plaintiff have judgment, that the estate attached may be applied to satisfy his judgment.

But what goods might be the subject of attachment or distress, must be

determined by the common law; no direction on this point being given by any statute.—At common law all distresses, as well those to compel appearance as to perform any other duty, must, when the duty is performed, be restored in the same plight in which they were taken: For this reason goods could not be distrained, which in consequence of the distress could not be returned in the same plight in which they were taken: as sheaves of corn, or hay in a cock or barn; because they would be injured, as the grain of the sheaves would be shattered. But the sheaves or hay in a cart might be distrained in the cart, because by removing them with the cart no damage might happen to them. (Gilb. L. of Dis. 345.)

From the application of these maxims to green hides in vats, it is manifest that such hides could not be distrained, as they would be materially injured by being removed; and if the defendant should recover judgment, they could not be returned to him in the same plight in which they were taken from him. The deputy sheriff therefore was guilty of no laches in not attaching and removing the hides from the vats. The sheriff was not obliged to take a lease and cause the hides to be tanned. Without the debtor's consent he could not lawfully do it: and with his consent he would have acted by authority derived from the debtor, and not from the sheriff; and the sheriff is not responsible, because the deputy did not do what by law he was obliged to, unless under colour of his office he does what the law prohibits.

297.

Daniels v. Daniels, 7 R. 135.

Tenants in common must join in action for the destruction of their charters; for the interest and damages are joint.

Parsons, C. J. In personal actions tenants in common must join, and also parcener, when damages are to be recovered for a tort done to their land, although the estate in the lands be several. (Co. Litt. 193.) The rule by which joinders in actions are governed, is stated in the case of Weller & al. v. Baker, (2 Wils. 423), as extending to all cases where the damages to be recovered are joint. The same rule is also laid down in Coryton v. Lythebye, 2 Saund. 115. Thus tenants in common must join in trespass, and also in nuisance. Cro. Jac. 231. But they cannot join in an action for forging false deeds, for that concerns the inheritance which is several. But they must join in detinue of charters, which also concerns the inheritance, Co. Litt. 197, b. The reason of the distinction is, that in the forged deed the tenants in common have no interest, and can receive no prejudice from them, but as they may effect their several titles to the lands; but in the lawful title deeds each tenant in common has a property, and this property from its nature must be joint.

As it is well settled that tenants must join in detinue of charters, from a necessary analogy founded on the same reason, they must join in an action for the destruction of their charters; for in this case not only the inheritance, but the damages are joint. And if tenants in common must join, so must the heirs by our statute of distributions; whether they be considered as tenants in common, or as resembling parceners.

But the action is case for destroying the charter, which is the evidence of the plaintiff's title; and in our opinion, they have very properly joined in demanding damages for this injury. And although trover will not lie by one or more of the heirs against the other heirs for the conversion of the charters, because each heir has an equal right to the possession of the title deeds; yet

when those deeds are absolutely destroyed by some of the heirs, trespass will lie against them by the other heirs, because by their destruction the tenancy in common cannot be set up in defence. Co. Litt. 200, b. And if trespass will lie, no reason has been assigned why case for the tort cannot as well be maintained.

298.

DAY v. EVERETT, 7 R. 145.

The right of a father to bind his minor son to service.

PARSONS, C. J. There is no question but that a father, who is entitled to the services of his minor son, and for whom he is obliged to provide, may at the common law, assign those services to others, for a consideration to enure to himself. He may contract that his minor son shall labor in the service and employment of others, for a day, or month, or any longer term, so that the time do not exceed the period of the child's emancipation from the father, which may take place as well on the father's death, as on the son's arriving at the age of twenty-one years. And the statute of 1794 does not take this power from the father. Accordingly, the father may maintain an action of covenant broken, for not paying a stipulated sum, where the son continued in defendant's service according to the contract. For the statute does not, like the English statute, relating to apprentices and servants, make void all contracts by which a minor is bound in service, unless such contracts are made pursuant to it. All contracts of service, legal at common law, remain legal since the statute; but the only remedy, either party can have, is on the contract, not under the statute. And as well parents and guardians as masters, ought duly to consider, that if the contract of apprenticeship does not pursue the statute, the apprentice cannot be discharged, if the master break the contract on his part; neither if the contract be broken on the part of the apprentice, can the master have those remedies, and that relief provided in the statute for contracts made pursuant to it; but the remedy for each party is by action, which in many cases may be inadequate.

299.

HASTINGS v. DICKINSON AND WIFE, 7 R. 153.

The effect of a jointure in bar of dower.

PARSONS, C. J. If the marriage settlement in this case, is a bar to the action, this result must be derived from the supposed jointure settled on the intended wife before marriage, with her consent within the provisions of the statute of 27 Hen. 8, c. 10, which have always been in force here; or, from her covenant, never to claim or demand dower, operating as a release.

As to the first ground, it is well known, that at common law, a jointure made to a wife, before or after marriage, was no bar to her dower; because the dower being a freehold estate, could not be barred by any collateral satisfaction; Co. Lit. 36, b. 460, 1. A jointure, therefore, which will be a bar of dower, must be within that statute. But no jointure is a bar by that statute of dower, unless it be a freehold estate in lands, tenements or hereditaments, for the life of the wife at least, and which shall take effect in possession or profit immediately on the husband's death.

By comparing a jointure of this description with the provision for the de-

demandant in the marriage settlement before us, there seems to be no color for admitting that provision to be a jointure within the statute; as it is a mere personal annuity. The statute also makes provision, when the widow is evicted of her jointure, which has been regularly settled upon her, that she may be let in to claim her dower, in other lands of her husband; as the consideration on which she was barred has totally failed. As in this case, the insolvency of the husband has deprived the widow of the contemplated annuity; if it were possible to consider this annuity as a freehold estate, yet within the equity of this statute, she ought to be admitted to her claim of dower, the consideration of her covenant having wholly failed.

The second ground is, that the demandant's covenant ought to have the effect of a release of dower. But this effect cannot be admitted on a correct legal principle. It is true that a covenant never to prosecute an existing demand shall operate as a release to avoid circuity of action. But a release of a future demand not then in existence, is void. Now, in this case, the settlement being executed before the marriage, the demand of dower had no existence, the same not being inchoate. On this principle, if there be any relief against the widow on her covenant, it must be by action.

Here, it is manifest that she covenants on the consideration that the provision made for her is performed. But this consideration has failed through the insolvency of the husband; there is, therefore, no legal or equitable remedy against her on her covenants. The demandant, therefore, must have judgment to recover her dower, and her damages to be assessed, with her legal costs.

306.

RIDDLE v. PROPRI. OF LOCKS AND CANALS, 7 R. 169.

An action lies against a corporation for a breach of its duty, by any person injured by the breach.

PARSONS, C. J. The argument for the defendant is, that corporations have only a legal and not natural body, no *capiatur* lies against them; that in all actions of trespass and trespass on the case, where the general issue is not guilty, if judgment be against the defendant; a part of the judgment at common law is an entry of a *capiatur*; and that, therefore, no such actions lay against a corporation at common law; and the statute taking away the necessity of the entry of the *capiatur*, does not authorise an action which did not lie before.

That a process to take the body of a corporation does not lie, is certainly true; but the defendants must show that in all actions of trespass a *capiatur* against the defendant may, from the nature of the action, be entered. In 21 Edw. 4, 7, 12, 27, 67, it is holden that a corporation cannot be beaten nor beat, nor commit treason or felony, nor be imprisoned for a disseisin with force, nor be outlawed, nor a capias in debt be awarded against them.—These principles result from the nature of an aggregate corporation. But the defendants have relied on an opinion of Thorp, J. in 22 Ass. pl. 67.—He there says, that trespass does not lie against a corporation aggregate by its corporate name, for a capias and exigent do not lie against it. That a capias and exigent do not lie against a corporation, is evident; but that no action of trespass lies, is questionable; for it is agreed that a corporation may be fined or indicted, and the fine levied by distress; and why may not a corporation be amerced, and the amercement collected in the same manner? This has led us to look into the ancient law on this subject and we find

Thorp's opinion overruled as to certain trespasses. In 31 Ass. pl. 19, a corporation are holden answerable in assize as a disseizor with force. In 8 H. 6, 1, 14. 6, an aggregate corporation was holden answerable in trespass for distraining the plaintiff's cattle, until he paid a toll which he was not bound to pay. Several other cases are mentioned in Theobald's Dig. lib. 4, c. 13, as trespass against a corporation for disturbing the plaintiff in the profits of his liberties; or for disturbing him in holding a leet. It is, therefore, very clear, from an examination of the old books, that actions of trespass might at common law, be maintained against aggregate corporations. — And, as in these actions no capiatur could be entered, the omission of this entry can be no objection to actions of trespass on the case. The foundation of the defendant's argument seems to fail them.

Let us now leave the ancient cases, and resort to the maxims of the common law, which are founded in good sense and substantial justice. It is one of these maxims, that a man specially injured by the breach of duty in another, shall have his remedy by action. If the breach of duty be by an individual, there is no question; and why should a corporation receiving its corporate powers, and obliged by its corporate duties with its own consent, be an exception, when it has, or must be supposed to have an equivalent for its consent,

We distinguish between proper aggregate corporations, and the inhabitants of any district, who are by statute invested with particular powers, without their consent. These are in the books sometimes called quasi corporations. Of this description are counties and hundreds in England; and counties, towns, &c. in this state. Although quasi corporations are liable to information or indictment, for a neglect of a public duty imposed on them by law; yet is settled in the case of Russel, *et al.* v. The Inhabitants of the county of Devon, 2 Term, 667, that no private action can be brought against them for a breach of their corporate duty; unless such action be given by statute. — And the sound reason is, that having no corporate fund, and no legal means of obtaining one, each corporator is liable to satisfy any judgment rendered against the corporation. This burthen the common law will not impose, but in cases where the statute is an authority, to which every man must be considered as assenting. But in regular corporations, which have, or are supposed to have a corporate fund, the reason does not apply.

The case of the Mayor of Lynn, in error v. Turner, 36, seems in its principles directly to apply. By this decision it is settled, that case will lay against a corporation for neglect of a corporate duty, by which the plaintiff suffers.

Upon these principles, the court held, that case lay against the defendants, who were bound by their act of incorporation, so to construct their canal as to admit rafts of a particular description, for damages arising to the plaintiff in consequence of the canal not being wide enough to pass his raft.

301.

NEWHALL v. WHEELER, 7 R. 189.

In respect to a conveyance in trust.

In this case, J. H. owned the land in fee, and conveyed to J. S., who conveyed to the selectmen of the town of of H. to them and their successors in the said trust of selectmen, for the use and benefit of said J. H. and after his decease, to his heirs forever. J. H. divised the same by will to his wife.

PARSONS, C. J. The counsel for the tenant contends, that as the selectmen of H. were not a corporation to take in succession, and as the estate

conveyed to them was for the use of J. H. it vested in him by the statute of uses; but as the grantees took only a life estate, a life estate only vested in Hunt.

It is, therefore, necessary to determine what estate the selectmen of H., the immediate grantees took under Simond's deed. If they took an estate for the use of J. H. and his heirs, they took only a life estate; for it is very clear they are not a corporation. But if they took an estate in trust for H. and his heirs, then the legal estate of the trustees shall be commensurate with the equitable estate of the *cestui que trust*, which in this case is a fee-simple.

Having no court to compel the specific performance of a trust, it is a general rule to consider estates conveyed in trust, as estates conveyed to use, if it be not repugnant to the manifest intent of the grantor. If it be, it is considered as a trust estate, and the trustee is answerable for damages, as on an implied assumpsit to the *cestui que trust*, that he would execute the trust. A remedy certainly very inconvenient, frequently very inadequate, and resorted to from necessity, because no court is competent to compel a specific performance of the trust.

Now what is the manifest intention of S. in this conveyance to the selectmen? They are to hold the lands for the use of J. H. but at their discretion. It could not, therefore, be an estate for the use of H., for then the use being immediately executed, H would hold the estate during his life, not subject to any control or discretion of the selectmen. Farther they are to hold for the use of H., and if after his decease, any estate should remain, it is to go to his heirs. S. therefore, contemplated that the trustees were able to sell a part, if not the whole. He, therefore, could not mean that the legal and equitable interest in the estate should unite in H.

For these reasons, we are of opinion, that the selectmen, who were the immediate grantees, took the legal estate in trust for J. H. and his heirs.—Whether they could lawfully convey any part of the estate under this deed, by the terms of it, although it was clearly contemplated, is not now before us; as they in fact conveyed no part of the premises. As the estate of the grantees was in trust, it must be commensurate to the trust, and therefore, was an estate in fee simple.

J. H. had then an equitable fee simple, which he might lawfully devise; and upon his death, his widow had under his will the same equitable estate, which the judgment creditor and his assigns may lawfully claim against her. And no person can set up the legal estate against the equitable estate, but the trustees, or some persons claiming under them.

302.

Commonwealth v. Humphreys, 7 R. 242.

The defendant having been convicted on an indictment for highway robbery, a question arose whether the indictment was sufficient, by reason of the omission of the usual allegation, of putting in fear. Mr. Justice Sewall said he had advised with the Chief Justice, and Justice Parker, and all concurred in the opinion that the crime of robbery was technically described in the indictment, and that the prisoner was legally convicted of that offence.

The statute had not changed the definition of the crime or the form of the indictment in this respect; and neither in the opinion of the court was the question conclusively settled upon authority. The construction is, that we are not restrained by the common law definition of robbery, or by any precise form of the indictment, as to the circumstance in question; and without de-

parting from any established principle, the construction may be, what the words cited, certainly admit that a larceny committed without actual force and violence, or with a constructive force by any assault and putting in fear, is to be adjudged a robbery; and that in this respect the statute has preserved the definition of the crime, as it was described and punished by the common law.

302.

COMMONWEALTH v. NEWELL, ET AL. 7 R. 245.

Burglary.

PARSONS, C. J. The breaking and entering a dwelling house in the night is not burglary, unless it be done with an intent to commit a felony. The question for our decision is, whether the cutting off the ear of D., of set purpose and malice aforethought, with the intention to maim and disfigure him, is by our laws a felony; for if it be not a felony, an intention to do it cannot be an intention to commit a felony.

By the ancient common law, *mayhem* was an injury of a particular nature, constituting a specific offence, the commission of which could be regularly averred by no circumlocution, without the aid of the barbarous verb *mahemiare*. It consisted in violently and unlawfully depriving another of the use of a member proper for his defence in fighting; and was punished by a forfeiture of member for member, in consequence of which forfeiture it was deemed a felony. If the sufferer sought this satisfaction, or rather revenge, his remedy was by an appeal of *mayhem;* and the sovereign punished this injury done to his subject, by an indictment for a *mayhem;* and in both the appeal and the indictment, the offence must be alleged to have been committed feloniously.

But this was only in the rude state of society; and as civilization advanced, the punishment was disused, and the offender made satisfaction by paying pecuniary damages, and was punished by fine and imprisonment, as in cases of trespass. This was the state of the common law, long before and at the time when our ancestors emigrated to this country, bringing with them but a very small part of the common law defining crimes and their punishment. *Mayhem* therefore, was never deemed by them a felony, but only an aggravated trespass at common law; and as such the offender was answerable to the party injured in a civil action of trespass, and to the government upon an indictment for a misdemeanor; and no statute provision, during the existence of the colonial and provisional charters recognizes *mayhem*, as a distinct offence from trespass, or as constituting a specific felony. We are therefore obliged to consider *mayhem* as no felony by the common law adopted in this state.

Since the revolution, the only legislative provisions, relating to this offence, consider and punish it as a misdemeanor. If therefore the st. of 1804. ch. 123, has declared the maliciously cutting off an ear with intent to maim and disfigure, a *mayhem*, we cannot infer that it is felony. The statute, however has not made that declaration. It only enacts that if any person, with set purpose and aforethought malice, and with an intention to maim and disfigure, shall unlawfully cut off an ear of another, he and every person privy being present and aiding, or absent, having counselled or procured the commission, shall be punished by solitary imprisonment, and by confinement to hard labor. Here the word maim is used in the popular sense of mutilating, and not as synonymous with the technical word *mayhem*. The cutting off the ear is not called a maim, but is created an offence, when done with an

intention to maim and disfigure, and punished as a misdemeanor; for a trespass may be committed with set purpose, and with malice aforethought. The offence described, not being a felony, it is argued that it may nevertheless be supported as an indictment for a misdemeanor. There are one or two ancient cases in favor, of this position; as Holmes' case, Cro. Car. 376; Martin's lessor's case, in the time of H. 4. which is reported in Cro. Jac. 497. But in a later case of Rex v. Wesheer, the old cases were considered and overruled.

303.

Lee v. Gray, 7 R. 343.

Parsons, C. J. The question is, whether the plaintiffs are entitled to recover for any loss within the policy, which insures against all the usual risks. As no damage is stated as having happened to the goods insured, the only ground of claim is for a total loss, arising from the loss of the voyage insured. It must be admitted that the voyage has been wholly lost; but unless this loss is from some peril insured against, the plaintiff must fail, unless some exception be made with respect to the cotton.

When the master had notice of the British orders, and understood that he could not afterwards proceed to his destined port, he departed from the course of his voyage and arrived at Plymouth. As this was done for a good cause, and for the purpose of procuring inteligence and advice, and not with the intention of discontinuing the voyage, his proceeding is no deviation. It also appears that after he arrived at Plymouth, finding new obstacles to the prosecution of his intended voyage, he determined to proceed to London, and there discharge his cargo; but was prevented by head winds from sailing until the 1st of April, 1807

As an intention to deviate, where a ship has commenced the voyage assured, is no deviation, this determination of the master is no deviation; which must be considered as commencing on her sailing from Plymouth for London, for the original voyage was abandoned. Therefore whatever loss, from any of the perils insured against, happened before the first of April, is a charge on the underwriters.

It appears that the ship met with considerable sea-damage while in the harbor of Plymouth, for which the underwriters upon the ship are answerable.

But the policy before us, is only on the merchandize. Now if the voyage was lost by a peril within the policy, that peril must be either capture, or the arrest and detention of any prince But the departure from the direct course of the voyage, and the final abandonment of it, were not from capture, but from the fear of capture, which is not insured against. And there appears to be no arrest and detention of any prince. For when the ship was in Plymouth, she might have cleared even for her port of destination; but the danger of proceeding thither was too imminent, in consequence of the French decrees, to justify that measure; or the ship might have returned home with her cargo. Indeed no fact is stated which can be correctly construed as an arrest. It is true that the cotton was refused to be cleared at Plymouth for Rotherdam; but this was no arrest. For the refusing in a foreign country to clear out a vessel for any particular port or ports, cannot be deemed an arrest within the policy, while the vessel remains in the master's possession, with liberty to proceed to any but the prohibited ports. In this case it is manifest that if the cotton might have been cleared out, the master would not have availed himself of it, to proceed to his destined port. We cannot, therefore, find any peril insured against, by which the voyage has been lost. Plaintiff nonsuit.

304.

TAYLOR, & AL. v. PORTER, 7 P. 355.

The action was a special entry *sur disseizin* to foreclose a mortgage. The case was thus:—In April, 1895, U. C. and others; owned the land in fee, and conveyed to the demandants, who reconveyed in mortgage to secure the purchase money. The demandants on the next day sold the lands to N. & L. who also gave a mortgage to the vendors to save them harmless from the prior mortgage. L. afterwards conveyed one undivided moiety to Porter the tenant, who was to pay one half the first mortgage.
The mortgage money has been paid, except $442 10, which is now due.

PARSONS, C. J. The demandants are entitled upon the mortgage, as a security for the 442 dollars 10 cents paid by them on the said notes, they having been damnified in that sum by paying it to Cotting. But three questions arise.—Shall they have the conditional judgment to have seizin of the lands mortgaged—or shall they recover seizin of a moiety—or shall they recover any judgment, as they have not sued all the tenants in common.

As the title of the demandants under the mortgage is to a sole seizin, it seems very clear, that if they can have judgment on this writ, that judgment must be for sole seizin, unless the money necessary to indemnify them be paid; otherwise the mortgagee might have his sole tenancy changed into a tenancy in common. And it is our opinion, that the demandants are entitled to the conditional judgment against the tenant, who must be considered as a deforciant, and therefore as to them be taken to be a tenant, against whom the whole freehold can be demanded; although as to others, he may be tenant in common of a moiety, For in a writ of entry to foreclose a mortgage, the demandants count against the assignee of a mortgagor as the immediate wrongdoer, and not as having entered by the mortgagor; because the assignee must hold subject to the mortgage, has a right to redeem, and his title is lawful against all but the mortgagee, or him who claims under him. But if the mortgagor shall assign to more than one as tenants in common, yet as to the mortgagee, when they resist his entry, or drive him to an action to foreclose, each assignee is to be considered as a deforciant of the whole.

If two distinct closes are included in the same mortgage, and the mortgagor convey the closes in fee to different persons, by whom they are held in severalty, the mortgagee to foreclose must have two several writs of entry; because each grantee under the mortgagor holds but a part in severalty, of which he is a several deforciant. But in such a case the mortgagee shall have judgment on each writ, unless the mortgage money be paid; because each close is liable for all the money due on the mortgage. And if either grantee shall pay the money, the mortgage is discharged as to the other.—And when there are two or more grantees under the mortgagor, whether severally or in common if either pay off the mortgage, the others shall be holden to a reasonable contribution.

305.

PURRINGTON v. LORING, 7 R. 388.

Trespass for taking and carrying away a calf, chaise and harness, &c.

PARSONS, C. J. The action is trespass *vi et armis*, for taking and carrying away a calf, and a riding chaise and harness; and it comes before us on a case stated by the parties. The property in the plaintiff, and the taking and carrying away by the defendant are agreed.

The justification by the defendant is, that as a deputy sheriff he, on warrants of distress against the plaintiff, duly issued and delivered to him to execute, took, carried away and sold to satisfy those warrants, the chattels mentioned. The warrants of distress, and the authority of the defendant originally to take and carry them away are admitted; but the plaintiff insists that the defendant by removing the goods seized, out of the town in which the plaintiff lived, and in which they were seized, became a trespasser *ab initio*. The expense of keeping or of advertising may not be increased by the removal, and the sale may be under more favourable circumstances for the owner. If the officer had wantonly removed the goods to a great distance, thereby increasing the charges of keeping and advertising, or injuring the sale, a special action on the case might be maintained against him; but he would not be a trespasser *ab initio*, if the goods were legally seized and carried away.

Another objection to the defendant's justification is, that it appears from his return upon the warrants of distress, on which the chattels were seized, that he sold them after having advertised the time and place of sale twenty-four hours. As by the law the defendant ought to have made the advertisement four days before the sale, this objection is admitted to be fatal, unless the defendant can be admitted to prove by parole, notwithstanding his return endorsed on the warrants, that he in fact did advertise the time and place of sale four days before the sale. But this evidence is not admissible. The officer's return must be in writing; and were it otherwise, there would be great danger of fraud and perjury. The plaintiff therefore has maintained his action and the defendant must be called.

306.

STUBBS v. LUND, 7 R. 453.

In respect to the right of consignors to stop goods *in transitu*.

PARSONS, C. J. The title of the plaintiff is admitted to be good, if the consignors had under the circumstances a right to stop the goods in question *in transitu*. To this right the defendant has made two objections.

1. That the general credit given to the original consignees by the consignors which is stated at large in the exceptions, had excluded the consignors from the right of stopping *in transitu* goods shipped and consigned pursuant to that agreement. But in our opinion this objection cannot prevail. That agreement cannot bind the consignors after the insolvency of the consignees; the credit contemplated being predicated upon the supposed ability of the consignees to pay at the expiration of the credit. And a credit, given under such an agreement, can have no other effect on this question, than the credit given under the first bills of lading.

2. The other objection is, that the consignees being either the owners or the hirers of the ship Henry, as soon as the goods were received on board of that ship, and bills of lading signed by the master, there was no further transit, the goods being in the custody and possession of the consignees. And to support this objection, it was urged by the defendant's counsel that the right to stop *in transitu* extends only to goods shipped on board a general ship.

We think this objection cannot prevail. The right of stopping all goods shipped on the credit and risk of the consignee remains until they come into his actual possession at the termination of the voyage, unless he shall have previously sold them bona fide, and endorsed over the bills of lading to the purchaser. And in our opinion, the true distinction is, whether any actual

possession of the consignee or his assigns, after the termination of the voyage be, or be not provided for in the bills of lading. When such actual possession, after the termination of the voyage, is so provided for, then the right of stopping *in transitu* remains after the shipment. Thus, if goods are consigned on credit, and delivered on board a ship chartered by the consignee to be imported by him, the right of stopping *in transitu* continues after the shipment (3 East, 381); but if the goods are not to be imported by the consignee, but to be transported from the place of shipment to a foreign market, the right of stopping *in transitu* ceases on the shipment, the transit being then completed; because no other actual possession of the goods by the consignee is provided for in the bills of lading, which express the terms of the shipment. (7 Term, 442.)

The same rule must govern, if the consignee be the ship owner. If the goods are delivered on board his ship, to be carried to him, an actual possession by him after the delivery is provided for by the terms of the shipment; but if the goods are put on board his ship to be transported to a foreign market, he has on the shipment all the possession contemplated in the bills of lading. In the former case the transit continues until the termination of the voyage; but in the latter case the transit ends on the shipment.

The same distinction must exist in the case of a general ship.—If a ship sail from this country to Great Britain, with the intention of taking on board goods for divers persons on freight, to be transported to a foreign market, as the mercantile adventures of different shippers—If goods are so shipped by the several consignors, there is no transit to the consignees after the shipment; and no right of stopping remains with the consignors. But it is otherwise when several persons import goods in a general ship on their own credit and risk, for a future actual possession by them is provided for in the bills of lading.

307.

HAWLEY v. NORTHAMPTON, 8 R. I.

PARSONS, C. J. In construing a will, the testator's manifest intention to be collected from the will, and not from any detached passages, must prevail, so far as such intention is consistent with the rules of law. And when the particular intent cannot be executed, the general intent must direct the construction. As it is the interest of the commonwealth that lands should be transferrable, and not remain in any man or family unalienable, so it is one of the rules of law, which limit the power of devising, that perpetuities be not created. Therefore in a devise in fee simple, on condition that the devisee do not alien, the condition is void. Also in a devise of lands in tail, on condition that the devisee do not bar the entail, the condition is void. And in a devise to one and his heirs, remainder to another and his heirs, which is termed the limiting a fee simple after a fee simple, the remainder is void, because it would defeat the right of alienation in the first devisee.

But the law will allow a devise of lands in fee simple to one, with an executory devise over to another on a contingency, which must happen within the course of a life or lives in being, and twenty-one years and a few months after. The twenty-one years are introduced to provide for the minority of a child born, and a few months are allowed to let in a posthumous child.—But if the devise over is limited after the devise of a part, and not of the whole of a fee simple, the second devisee shall take by remainder, either vested or contingent, and not by executory devise.

As remainders are estates at common law while executory devises can only be created by will, and are admitted from necessity, to execute the legal

intent of the testator, it is an essential principal of law, in the construction of wills, to exclude executory devises, when they can pass as a remainder.

It is another important rule in the construction of wills, to give to specific words of the testator that technical effect, which has been derived from usage, and sanctioned by a series of decisions. Thus, in a devise to one and his heirs, we cannot consider the heirs as deriving any interest from the devise, although the testator might have contemplated such interest; but we are bound to consider the word *heirs* merely as limiting a fee simple in the devisee. In a devise to a man and the heirs of his body, these last words are a limitation of an estate tail; and if it descend from the devisee in tail, all the heirs of his body cannot take together, but only in succession, the eldest son and his issue, then the second son and his issue, and so on. But if lands are devised to one, without any limitation, he has only an estate for life; although undoubtedly the testator, when he devises a farm or an house to one, supposes that he has given a fee simple.

And there are cases, where the same words shall have different constructions, according to the nature of the property to which they are applied, for the purpose of supporting the manifest general intent of testator, when the particular intent is against law. When lands and a chattel interest are devised to one, and if he die without leaving issue, then a devise over; the devisee has an estate tail in the land, the words *leaving no issue* being as to the land understood as an indefinite failure of issue; but as to the chattel interest they are construed as leaving no issue at the death of the devisee. Now the testator had the same particular intention in devising the land and the chattel interest; but to support his general intention, the same words have a different technical construction. (1 P. Wms. 667; 3 Atk. 288; 2 Vez. 606; Coup. 410.) In the devise of the land, the words *dying without issue* being understood as an indefinite failure of issue, giving the devisee an estate tail, provided for his issue, and the second devisee could takea remainder; so that it became unnecessary to introduce an executory devise; but as to the chattel interest, if an indefinite failure of issue was admitted, the first devisee would have the absolute property of the chattel, and the testator's general intention in favor of the second devisee would be defeated. And with respect to the land, if dying without leaving issue is to be intended as without having issue at his death, the first devisee would have an absolute estate in fee simple on having issue; yet he might aliene it from his issue, and the second devisee would have no benefit from the devise.

This technical effect to be given to specific words is required only in similar cases; for in a case where other words of the testator, or some particular circumstances, serve to give a different explanation to such specific words, a different construction ought to be admitted, so far as may be consistent with the rule of law.

The importance of adhering to a course of decisions in the construction of wills, is manifest; for their authority has established a rule of property, on which many estates depend; and to overturn them, would introduce perplexing uncertainty, and might shake many titles resting on the faith of them. To this reason another may be added; that the rules of property should be so certain, that generally men may know their titles, without having recourse to expensive law suits. And when gentlemen learned in the law, are consulted, they should have guides to direct them in their advice.

To decide without subjection to fixed principles, may be called discretion, but in fact it is power. The common law consists in maxims and principles, resulting from the practical wisdom of ages; and we know of no other discretion it gives to a judge, in deciding a novel question of property, than to apply those maxims and principles, by a sound analogy to the new case. It is for the legislature to introduce new rules of decision.

In the will before us, the testator was seized in fee simple of the tenements demanded; made his will, and afterwards died so seized; by his will, he devised some portion of his tenements to his wife for life; he devised the residue, including the remainder expectant on his wife's death, to his two nephews; but severally and in distinct parts, to have, and to hold the parts devised to E., to him, his heirs and assigns forever, on the conditions and limitations after, in his will mentioned; and to have and to hold the parts devised to J., to him, his heirs and assigns forever, on the conditions and contingencies after mentioned in his will. "And it is my will, &c. that if the said J. should decease, leaving no heirs, of his body, lawfully begotten, and the said E., or any heirs by him, the said E. lawfully begotten, then alive, that in such case all the devises and bequests of real estate, herein before made to the said J. should be and remain to him, the said E. or such to his said heirs. And in case the said E. should decease leaving no heirs of his body begotten, living the said J. or any heirs of his body lawfully begotten, in such case all the lands herein before devised to the said E. shall be and remain to the said J. or such his said heirs. But in case both the said J. & E. should decease leaving no heirs of either of their bodies begotten, then all the lands herein before given to the said J. & E., or either of them, shall be and remain to the children of my brethren and sister, who shall then survive.

On the death of the testator, his widow and his two nephews, J. & E. became seized of the estates devised to them; and afterwards E. died seized leaving no heirs of his body; and J. then entered and became seized. Afterwards J. died without any heirs of his body. Previous to the death of the latter, the widow died. J., while seized of all the tenements, suffered a common recovery thereof, to his own use, in fee simple, which was duly executed; and then made his will, giving the tenements to Northampton, who on his death became seized, and the original demandant entered on the latter who re-entered on him, and he thereupon sues his writ of entry.

The plaintiff's claim is under an executory devise, to take effect on the death of J. & E. without issue living at their decease, they having estates in fee simple, limited on this contingency, which in fact has happened. Or they claim in right of their father Moses, who was co-heir of Ebenezer, the original testator.

The defendants claim under the will of J. on the ground that the plaintiff's right was a remainder expectant on the determination of an estate tail in Joseph, which he barred by the common recovery. And as Joseph survived E. we will notice particularly the devise to E.

The devise to E. is to him, his heirs and assigns. This is an express devise of a fee simple to him; and as the devise to J. is in the same terms, the plaintiffs can have no claim under the will of Ebenezer, if these devises were absolute. But he makes them upon the conditions, limitations and contingencies after mentioned. These expressions it would be unreasonable to construe technically; for a condition may, when necessary, operate as a limitation, a limitation may be on condition, and both may be contingent. This limitation, condition, or contingency is thus expressed—in case E. should die, leaving no heirs of his body, living the said J. or any heirs of his body, lawfully begotten, all the lands devised to E shall be and remain to J. or such his said heirs. But if J. & E. should both die leaving no heirs of either of their bodies, then all the estate shall remain to his cousins, who shall then survive.

The effect of these provisions is the question before the court. No decision of a similar devise has been found; and we must give such a construction as will best effect the general intention of the testator, without violating any established rules. We consider the words "dying without leaving heirs

of his body," as equivalent to "dying without leaving issue." Now it seems to be settled, that a devise to one and his heirs, and if he die without issue, or without leaving issue, then to another, creates an estate tail in the first devisee, with a remainder over, when the limitation over can take effect as a remainder, unless there are other words to control this construction; (Com. R. 373; Hardw. 258; Doug. 729; 2 Saund. 380.)

This rule is founded on the reasonable consideration, that the testator included the issue of the first devisee as objects of his bounty; and this bounty cannot be well effected, but by vesting an estate tail in the first devisee; in which case the issue on his death will take in succession, and when the issue shall fail, the remainder will take effect in possession. But if by such devise the first devisee shall take a fee simple conditional, although on his death not then having issue, the second devisee might take by executory devise; yet if the first devisee left issue, not only the claim of the second devisee would be defeated, but the issue could derive no benefit from the testator's bounty, as the ancestor might alienate the estate at his pleasure.

We have observed that this construction is sometimes controlled by other parts of the will. On this head two cases have been decided. The case of Porter v. Bradley, 3 Term, 143, was an express devise in fee simple to one, and if he died without leaving issue 'behind him,' then to another; and it was holden that the words 'behind him' confined the dying without issue to the death of the first devisee; and consequently that the first devise was a contingent fee simple, and the devise over executory. The other is the case of Sheers & al. v. Jeffery, 7 Term, 589, where after an express devise of a fee simple to one, and on his dying without issue, to another for life, it was holden that the testator intended the dying of the first devisee without issue at his death; because it could not be supposed that the testator would give a life estate to a person *in esse*, after the indefinite failure of the issue of the first devisee. This case is the stronger, because the life estate was not given by express words, but resulted from construction, as there was no limitation of the estate given to the second devisee. Whether the presumption was necessary may well be questioned, as the age of the first devisee might not give the testator any expectation that he would ever have issue.

Agreeably to this case, if the devise before us was to the nephews in fee simple, and if they died without leaving issue then to the cousins for life, the first devise would have been a contingent fee, and the second executory.—But if the devise to the cousins was of a life estate, it would not avail the claim of the plaintiffs under the will in this action, because their ancestor counted on a seizin in fee simple, which this construction would not support.

But admitting that a fee simple was devised to the cousins, yet we are satisfied that, on a principle analogous to this last case, the original devise to the nephews of an express fee simple would have been reduced to a conditional fee, if the devise over had been if they died without leaving issue, and no provision had been made for the issue of the nephews.—Fo devise over is to such of his cousins as should then be living. And t sumption, that the testator did not intend a life estate to a person in es. after the indefinite failure of the issue of the first devisee, is not stronger than a presumption, that he did not intend a contingent estate to such of his cousins as be living after the indefinite failure of the issue of both his nephews.

And if the testator had not considered the issue of his nephews as the object of his bounty, but leaving them to the discretion of their fathers, had confined it to his nephews and his cousins, we apprehend, the whole intention of the testator might well and legally be executed by a contingent fee simple to the nephews, and a devise over to the cousins, living at the death of both the nephews, without having at their decease issues of their bodies. But if

the issues of the nephews are provided for, then a different construction must prevail; 9 East. 382.

But the testator has provided that on E's. death, without leaving issue, living J. or his issue, J. or his issue shall take the lands devised to E.; and so for E.'s issue in the lands devised to F. on his death, without leaving issue, living E. or his issue. The testator has, therefore, expressly provided for the issue of his nephews, in the lands respectively devised to their uncles. But as he clearly intended that the issue of each nephew should have the lands devised to his uncle on his dying without leaving issue, it must be inferred that he intended such issue should have the lands devised to his father, leaving issue at his death; or we must absurdly suppose, that the testator had protected the issue of each nephew, against the alienation of their uncle, at the same time left them to be disinherited by their father.

The conclusion from this reasoning is, that the testator intended to prefer the issue of his nephews to his cousins, and that the estate given to each nephew, respectively, should go to his issue, if he left any. This being his clear general intention, the will must receive a construction which will execute it. But the rights of the issue cannot be secured, without vesting an estate tail in the fathers. For we know of no rule of construction, by which a devise in fee, on the contingency of his leaving heirs of his body, can be holden to be a contingent fee of the first devisee, and an executory devise to his issue. The devise of a contingent fee simple in the first devisee and then over to the heirs of his body, being by the same instrument, must, by analogy to the ancient rule in Shelly's case, be considered as vesting an estate tail in the first devise; and the issue cannot take as purchasers.

In the case at bar, the devise must be considered as a devise to J. S. and to his heirs, with remainder to the heirs of his body; in which case very clearly J. S. would take an estate tail, and the heirs of his body, if he left any, would take by descent, remainder.

The only construction, therefore, which will execute the manifest general intent of the testator, so as to include all the objects of his bounty, is by a devise to his nephews in tail, with cross remainders in tail, and a contingent remainder to his cousins living when these estates tail should be spent.—Upon this construction the nephews first take, then their issue in succession, then the survivor and his issue, and lastly the cousins.

But it is incident to an estate tail, to be barred by suffering and executing a common recovery, by which the rights of the issue, and all in remainder or reversion are extinguished. This is also the effect of the common recovery with single voucher, suffered by tenant in tail actually seised of the estate entailed.

We are, therefore, satisfied, that J. when he suffered the recovery, was seized of an estate tail, which was barred by the execution of the recovery, and an use in fee simple raised to himself: and that the estate lawfully passed by his will to the defendants to hold in fee simple.

Neither M. H., the original demandant, nor the plaintiffs in error, his heirs, have now any claim to the tenements demanded, under the will of E. H. And there does not seem to have been any color of title in M. H. as an heir at law of E. H. the testator, who certainly by his will devised all his interest in the lands, leaving no reversion in himself, unless the two nephews took estates in tail. And if they did, and the entails are legally barred, then that reversion is extinguished. And as we are of opinion, that the two nephews took remainders in tail, J. the survivor in possession, lawfully barred the reversion. The defendants in error, must, therefore, have judgment.

THE END.

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