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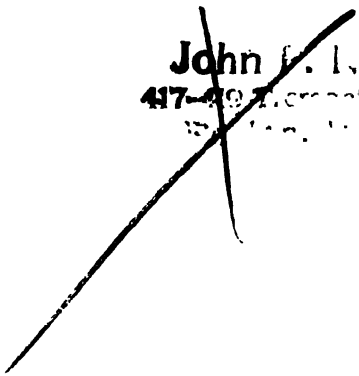
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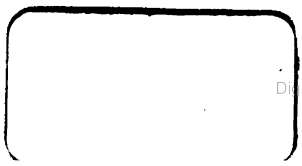
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128

CASES ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS

NOVEMBER 1879 — JUNE 1880

JOHN LATHROP

REPORTER

BOSTON

LITTLE, BROWN, AND COMPANY

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JUDGES

OF THE

SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. HORACE GRAY, CHIEF JUSTICE.
HON. JAMES D. COLT.
HON. SETH AMES.
HON. MARCUS MORTON.
HON. WILLIAM C. ENDICOTT.
HON. OTIS P. LORD.
HON. AUGUSTUS L. SOULE.

ATTORNEY GENERAL.

HON. GEORGE MARSTON.

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TABLE

OF THE CASES REPORTED.

Abbott (Rogers *v.*) 102
Adams *v.* Bigelow 365
——— (Hood *v.*) 207
Agawam National Bank *v.* South Hadley 503
Aldrich *v.* Blackstone . . . 148
Allen (Commonwealth *v.*) . . 46
——— (Commonwealth *v.*) . 308
——— (Fitzgerald *v.*) . . . 232
Ames *v.* Ames 277
——— *v.* Kendall 245
Amidon *v.* Benjamin . . . 534
Anderson (Childs *v.*) . . . 108
Andrews (Salisbury *v.*) . . . 336
Ashton (Claflin *v.*) 441
Atkins (Dix *v.*) 43
Attorney General *v.* Mayor of New Bedford 312
——— (Winthrop *v.*) . . . 258
Ayer *v.* Ayer 575

Baker *v.* Blood 543
——— *v.* Gavitt 93
Banker & Tradesman Publishing Co. (Chapman *v.*) . . 478
Barnes *v.* Chase 211
Barnstable Savings Bank *v.* Snow 512
Barrett *v.* McHugh 165
Bates *v.* Dewson 334
Bates College (Freison *v.*) . . 464
Beckler (Seavey *v.*) 471
Belknap *v.* Belknap 14
Benjamin (Amidon *v.*) . . . 534
Bigelow (Adams *v.*) 365
——— (Perry *v.*) 129
Binney *v.* Phœnix Cotton Manuf. Co. 496
Bird (O'Loughlin *v.*) . . . 600
Blackmer *v.* Davis 538
Blackstone (Aldrich *v.*) . . 148
Blood (Baker *v.*) 543
Boardman *v.* Cutter 388
Borden (Newell *v.*) 31
Boston (Cushing *v.*) 330
——— (Larkin *v.*) 521
——— (Steele *v.*) 583
Boston & Albany Railroad (Clark *v.*) 1
——— *v.* Pearson 445
——— (Sweeney *v.*) . . . 5
Boston & Lowell Railroad (Green *v.*) 221
Boston & Maine Railroad *v.* Haverhill 36
——— (Miller *v.*) 8
——— (Spofford *v.*) . . . 326
——— (Walker *v.*) 8
Boston, Clinton, Fitchburg & New Bedford Railroad (Julian *v.*) 555
Boston Lead Co. (Kelley *v.*) . 456
Bradford (Greenwood *v.*) . . 296
Brierly *v.* Davol Mills . . . 291
Bristol County Savings Bank *v.* Keavy 298
Brookfield *v.* Warren . . . 287
Brown *v.* Mayor & Aldermen of Fitchburg 282
——— (Meriam *v.*) 391
——— (Yaeger Milling Co. *v.*) 171
Buck (Hackett *v.*) 369
Burke *v.* Dunbar 499
Burlingame *v.* Foster . . . 125
Burnham (Provident Institution for Savings *v.*) . . . 458
Burt *v.* Geary 404
Butler *v.* Frank 29

Digitized by Google

Cambridge (Gay *v.*) 387
Campbell (New Haven & Northampton Co. *v.*) . . 104
Carroll (Fitzsimmons *v.*) . . 401
Chandler *v.* Lawrence . . . 213
Chapman *v.* Banker & Tradesman Publishing Co. . . . 478
——— *v.* Miller 269
——— (Missionary Society *v.*) 265
Chappell (Hodgkins *v.*) . . . 197
Charter (Clarke *v.*) 483
Chase (Barnes *v.*) 211
——— (White *v.*) 158
Childs *v.* Anderson 108
——— *v.* Franklin 97
Claflin *v.* Ashton 441
Clark *v.* Boston & Albany Railroad 1
——— *v.* Waltham 567
Clarke *v.* Charter 483
Cleveland *v.* Quilty 578
Cobb *v.* Rice 11
Coburn (Davis *v.*) 377
Colby (Commonwealth *v.*) . . 91
Colcord *v.* McDonald . . . 470
Collingill *v.* Haverhill . . . 218
Collins (Galvin *v.*) 525
Collinson (McNeil *v.*) . . . 313
Commonwealth *v.* Allen . . 46
——— *v.* ——— 308
——— *v.* Colby 91
——— *v.* Coolidge 55
——— *v.* Costello 88
——— *v.* Coupe 63
——— *v.* Dunan 422
——— *v.* Dyer 70
——— *v.* Eggleston . . . 408
——— *v.* Gilson 425
——— *v.* Hall 410
——— *v.* Hamer 76
——— *v.* Harkins 79
——— *v.* Hartwell 415
——— *v.* Haskins 60
——— *v.* Intoxicating Liquors 72
——— *v.* McKiernan . . . 414
——— *v.* Sprague 75
——— *v.* Wardell 52
——— *v.* Washburn . . . 421
Comstock *v.* Peck . . . 231 *n.*
Connell *v.* Reed 477
Coolidge (Commonwealth *v.*) . 55
Coöperative Homestead Co. (Hartford *v.*) 494
Costello (Commonwealth *v.*) . 88
Coupe (Commonwealth *v.*) . 63
Court Good Samaritan (Dolan *v.*) 437
Cummings *v.* Cummings . . 532
Cushing *v.* Boston 330
Cutter (Boardman *v.*) . . . 388

Daggett *v.* Tracy 167
——— *v.* White 398
Davis (Blackmer *v.*) . . . 538
——— *v.* Coburn 377
——— (Payne *v.*) . . . 383
——— *v.* Somerville . . . 594
Davol Mills (Brierly *v.*) . . 291
Dayton (Morse *v.*) 451
Dean *v.* Skiff 174
Dearborn *v.* Mathes 194
Denny *v.* Merrifield 228
Dewson (Bates *v.*) 334
Dion *v.* Powers 192
Dix *v.* Atkins 43
Dobbins (Grow *v.*) 271
Dolan *v.* Court Good Samaritan 437
Dolliver *v.* Ela 557
——— *v.* St. Joseph Ins. Co. 315
Donaldson (McCowan *v.*) . . 169
Dorr *v.* Tremont National Bank 349
Dove *v.* Torr 38
Drinan (Martin *v.*) 515
Dunan (Commonwealth *v.*) . 422
Dunbar (Burke *v.*) 499
Dunham *v.* Dunham 34
Dwight *v.* Ludlow Manuf. Co. 280
Dyer (Commonwealth *v.*) . . 70

Eastern Railroad (Wyman *v.*) 346
Eggleston (Commonwealth *v.*) 408
Ela (Dolliver *v.*) 557
Ellison (Kimball *v.*) 41

Farnsworth (Hooper *v.*) . . 487
Farrar (Hamilton *v.*) . . . 492
Fay *v.* Harlan 244
Fenton *v.* Lord 466
Fitchburg, Mayor & Aldermen of, (Brown *v.*) 282
Fitchburg Railroad (Fitzpatrick *v.*) 13

Digitized by Google

Fitzgerald *v.* Allen 282
Fitzpatrick *v.* Fitchburg Railroad 18
Fitzsimmons *v.* Carroll . . 401
Foster (Burlingame *v.*) . . . 125
Framingham Parish (Metcalf *v.*) 370
Frank (Butler *v.*) 29
——— *v.* Hoey 263
Franklin (Childs *v.*) 97
Freeland *v.* Freeland . . . 509
Freelove *v.* Freelove . . . 190
Freison *v.* Bates College . . 464

Gallagher *v.* Galletley . . . 367
Galletley (Gallagher *v.*) . . 367
Galvin *v.* Collins 525
Gavitt (Baker *v.*) 93
Gay *v.* Cambridge 387
Geary (Burt *v.*) 404
George *v.* Gobey 289
Gerrish *v.* New Bedford Institution for Savings 159
——— *v.* Shattuck 571
Gilhooley *v.* Sanborn . . . 485
Gilman *v.* Haverhill 86
Gilson (Commonwealth *v.*) . 425
Gobey (George *v.*) 289
Godfrey *v.* Macomber . . . 188
Goell *v.* Smith 238
Goss (Johnson *v.*) 433
Graham (Hawkins *v.*) . . . 20
Granger (Hammond *v.*) . . 272
Gray *v.* James 110
Green *v.* Boston & Lowell Railroad 221
Greenwood *v.* Bradford . . 296
Grinnell *v.* Spink 25
Grow *v.* Dobbins 271

Hackett *v.* Buck 369
Hall (Commonwealth *v.*) . . 410
Hamer (Commonwealth *v.*) . 76
Hamilton *v.* Farrar 492
——— (Newhall *v.*) . . . 463
Hammond *v.* Granger . . . 272
Hampden Savings Bank (Roche *v.*) 115
Harding *v.* Weld 587
Harkins (Commonwealth *v.*) . 79
Harlan (Fay *v.*) 244
Harris *v.* Newbury 321
Hartford *v.* Coöperative Homestead Co. 494
Hartwell (Commonwealth *v.*) . 415
Harvey (Mooar *v.*) 219
Haskins (Commonwealth *v.*) . 60
Haverhill (Boston & Maine Railroad *v.*) 36
——— (Collingill *v.*) . . . 218
——— (Gilman *v.*) 36
Hawkins *v.* Graham 20
Herrick (Wright *v.*) 240
Hersey *v.* Jones 473
Highland Foundry Co. (Lothrop *v.*) 120
Hodgkins *v.* Chappell . . . 197
Hoey (Frank *v.*) 263
——— (Jones *v.*) 585
Hood *v.* Adams 207
Hooper *v.* Farnsworth . . . 487
Howard (Small *v.*) 181
——— (Tucker *v.*) 361

Intoxicating Liquors (Commonwealth *v.*) 72

James (Gray *v.*) 110
Jenkins (Weston *v.*) 562
Johnson *v.* Goss 433
——— (Kelly *v.*) 530
Jones (Hersey *v.*) 473
——— *v.* Hoey 585
Julian *v.* Boston, Clinton, Fitchburg & New Bedford Railroad 555

Keavy (Bristol County Savings Bank *v.*) 298
Kelley *v.* Boston Lead Co. . 456
Kelly *v.* Johnson 530
Kenady *v.* Lawrence . . . 318
Kendall (Ames *v.*) 245
——— (McNeil *v.*) 245
Kenney (Look *v.*) 284
Kimball *v.* Ellison 41
Knowles (Thomas *v.*) . . . 22

Lamson (Pratt *v.*) 528
Lang (White *v.*) 598
Langley (Sullivan *v.*) . . . 235
Larkin *v.* Boston 521
Larrabee *v.* Peabody . . . 561
Lawless *v.* Reagan 592

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Lawrence (Chandler *v.*) . . 218
——— (Kenady *v.*) 318
——— (Libbey *v.*) 215
Libbey *v.* Lawrence 215
Lincoln *v.* Wood 203
Look *v.* Kenney 284
Lord (Fenton *v.*) 466
Lothrop *v.* Highland Foundry Co. 120
Lovejoy *v.* Middlesex Railroad 480
Lowell (Murphy *v.*) 396
Ludlow Manuf. Co. (Dwight *v.*) 280
Lyons *v.* Ricker 452

Macomber (Godfrey *v.*) . . 188
Marsh (Rollins *v.*) 116
——— (Upham *v.*) 546
Martin *v.* Drinan 515
Mathes (Dearborn *v.*) . . . 194
Mayor of New Bedford (Attorney General *v.*) . . . 312
Mayor & Aldermen of Fitchburg (Brown *v.*) 282
McCowan *v.* Donaldson . . 169
McDonald (Colcord *v.*) . . . 470
McFeely *v.* Scott 16
McHugh (Barrett *v.*) . . . 165
McKiernan (Commonwealth *v.*) 414
McNeil *v.* Collinson 313
——— *v.* Kendall 245
Meriam *v.* Brown 391
Merrifield (Denny *v.*) . . . 228
Metcalf *v.* Framingham Parish 370
Middlesex Railroad (Lovejoy *v.*) 480
Miller *v.* Boston & Maine Railroad 8
——— (Chapman *v.*) . . . 269
Missionary Society *v.* Chapman 265
Mooar *v.* Harvey 219
Morse *v.* Dayton 451
——— (Page *v.*) 99
Mugridge (Wass *v.*) 394
Munroe (Norris *v.*) 386
Murphy *v.* Lowell 396
——— *v.* Welch 489

Neveau (Owen *v.*) 427
New Bedford, Mayor of, (Attorney General *v.*) . . . 312
New Bedford Institution for Savings (Gerrish *v.*) . . . 159
New Bedford Savings Bank *v.* Union Mill Co. 27
Newbury (Harris *v.*) . . . 321
Newell *v.* Borden 31
Newhall *v.* Hamilton . . . 463
New Haven & Northampton Co. *v.* Campbell 104
Norcross (Savage *v.*) . . . 254
Norris *v.* Munroe 386

O'Loughlin *v.* Bird 600
Owen *v.* Neveau 427

Page *v.* Morse 99
Palmer *v.* Wall 475
Payne *v.* Davis 383
Peabody (Larrabee *v.*) . . . 561
Pearson (Boston & Albany Railroad *v.*) 445
Peck (Comstock *v.*) . . . 231 *n.*
Perry *v.* Bigelow 129
Phœnix Cotton Manuf. Co. (Binney *v.*) 496
Pierce *v.* Prescott 140
Powers (Dion *v.*) 192
Pratt *v.* Lamson 528
Prescott (Pierce *v.*) 140
Provident Institution for Saving *v.* Burnham 458
Putnam (Rawson *v.*) . . . 552
——— (Spaulding *v.*) . . . 363

Quilty (Cleveland *v.*) . . . 578

Randolph (Rooney *v.*) . . . 580
Rawson *v.* Putnam 552
——— *v.* Ward 552
Reagan (Lawless *v.*) . . . 592
Reed (Connell *v.*) 477
Rice (Cobb *v.*) 11
Ricker (Lyons *v.*) 452
Roche *v.* Hampden Savings Bank 115
Rogers *v.* Abbott 102
Rollins *v.* Marsh 116
Rooney *v.* Randolph 580

Salisbury *v.* Andrews . . . 336
Sanborn (Gilhooley *v.*) . . . 485
Savage *v.* Norcross 254

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Savage *v.* Stevens 254
Scott (McFeely *v.*) 16
Seavey *v.* Beckler 471
Shattuck (Gerrish *v.*) . . . 571
Skiff (Dean *v.*) 174
Small *v.* Howard 131
Smith (Goell *v.*) 238
Snow (Barnstable Savings Bank *v.*) 512
Somerville (Davis *v.*) . . . 594
South Hadley (Agawam National Bank *v.*) 503
Spaulding *v.* Putnam . . . 363
Spink (Grinnell *v.*) 25
Spofford *v.* Boston & Maine Railroad 326
Sprague (Commonwealth *v.*) . 75
Steele *v.* Boston 583
Stevens (Savage *v.*) 254
St. Joseph Ins. Co. (Dolliver *v.*) 315
Stratton (Templeton *v.*) . . 137
Sullivan *v.* Langley 235
Sweeney *v.* Boston & Albany Railroad 5

Templeton *v.* Stratton . . . 137
Thomas *v.* Knowles 22
Torr (Dove *v.*) 38
Towne *v.* Wason 517
Tracy (Daggett *v.*) 167
Tremont National Bank (Dorr *v.*) 349
Tucker *v.* Howard 361

Union Mill Co. (New Bedford Savings Bank *v.*) 27
Upham *v.* Marsh 546

Walker *v.* Boston & Maine Railroad 8
——— *v.* West Boylston . . 550
Wall (Palmer *v.*) 475
Waltham (Clark *v.*) 567
Ward (Rawson *v.*) 552
Wardell (Commonwealth *v.*) . 52
Warren (Brookfield *v.*) . . . 287
Washburn (Commonwealth *v.*) 421
Wason (Towne *v.*) 517
Wass *v.* Mugridge 394
Watson *v.* Watson 152
Welch (Murphy *v.*) 489
Weld (Harding *v.*) 587
West Boylston (Walker *v.*) . 550
Westgate *v.* Wixon 304
Weston *v.* Jenkins 562
Wetherbee *v.* Winchester . . 293
White *v.* Chase 158
——— (Daggett *v.*) 398
——— *v.* Lang 598
Winchester (Wetherbee *v.*) . 293
Winthrop *v.* Attorney General 258
Wixon (Westgate *v.*) . . . 304
Wood (Lincoln *v.*) 203
Wright *v.* Herrick 240
Wyman *v.* Eastern Railroad . 346

Yaeger Milling Co. *v.* Brown . 171

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TABLE OF CASES

CITED BY THE COURT.

Abbott *v.* Bradstreet, 3 Allen, 587 40
——— *v.* Middleton, 7 H. L. Cas. 68 374
Adams *v.* Barnes, 17 Mass. 365 466
——— *v.* Brackett, 5 Met. 280 170
——— *v.* Natick, 13 Allen, 429 324
——— *v.* People, 1 Comst. 173 409
——— *v.* Wilson, 12 Met. 138 131
Agricultural Bank *v.* Rice, 4 How. 225 270
Ahrend *v.* Odiorne, 125 Mass. 50 542
Aldrich *v.* Boston & Worcester Railroad, 100 Mass. 31 356
——— *v.* Springfield, Athol & Northeastern Railroad, 125 Mass. 404 196
Allen *v.* Dundas, 3 T. R. 125 143
——— *v.* Furbish, 4 Gray, 504 131
——— *v.* Taunton, 19 Pick. 485 505
Allis *v.* Morton, 4 Gray, 63 591
Alsop *v.* White, 45 Conn. 499 230
Alvord *v.* Marsh, 12 Allen, 603 196
Ames *v.* Ames, 128 Mass. 277 530
Amherst & Belchertown Railroad *v.* Watson, 8 Gray, 529 295
Amidon *v.* Benjamin, 126 Mass. 276 537
Anacosta Tribe of Red Men *v.* Murbach, 13 Md. 91 439
Angier *v.* Taunton Paper Co. 1 Gray, 621 470
Anon. 63 Maine, 590 90
Apthorp *v.* Comstock, 2 Paige, 482 357
Argenti *v.* San Francisco, 16 Cal. 255 509
Aspinwall *v.* Daviess County, 22 How. 364 506
Atkins *v.* Barnstable, 97 Mass. 428 234
——— *v.* Bordman, 2 Met. 457 362
——— *v.* Spear, 8 Met. 490 122
Attorney General *v.* Barbour, 121 Mass. 568 406
——— *v.* Simonds, 111 Mass. 256 311
Atwater *v.* Clancy, 107 Mass. 369 105
Austin *v.* Caverly, 10 Met. 332 123
——— *v.* Gage, 9 Mass. 395 556
Avery *v.* Stewart, 1 Cush. 496 551
Ayer *v.* Ashmead, 31 Conn. 447 256
——— *v.* Austin, 6 Pick. 225 359
——— *v.* Bartlett, 9 Pick. 156 307
Aynsley *v.* Glover, L. R. 18 Eq. 544 363
——— *v.* ——— L. R. 10 Ch. 283 363

Bacon *v.* Pomeroy, 104 Mass. 577 276, 280
Baggot *v.* Fleming, 10 Cush. 451 168
Baker *v.* Carpenter, 127 Mass. 226 295
Baldwin *v.* Williams, 3 Met. 365 390
Bangs *v.* Snow, 1 Mass. 181 359
Bannister *v.* Alderman, 111 Mass. 261 360
Barber *v.* Merriam, 11 Allen, 322 245
Barker *v.* Comins, 110 Mass. 477 358
——— *v.* Ray, 2 Russ. 63 357
Barnett *v.* London & Northwestern Railway, 5 H. & N. 604 257
Barnstable Savings Bank *v.* Higgins, 124 Mass. 115 230
Barr *v.* Gibson, 3 M. & W. 390 25
Barrett *v.* Malden & Melrose Railroad, 3 Allen, 101 219
Barrs *v.* Jackson, 1 Phillips, 582 143
Bartlett *v.* Bartlett, 4 Allen, 440 476
——— *v.* Nye, 4 Met. 378 268
Barry *v.* Abbot, 100 Mass. 396 479
——— *v.* Bennett, 7 Met. 354 586
Bassett *v.* Granger, 103 Mass. 177 534
Batchelder *v.* Rand, 117 Mass. 176 109
Baylies *v.* Davis, 1 Pick. 206 579
Bay State Brick Co. *v.* Foster, 115 Mass. 431 548
Bell *v.* Armstrong, 1 Add. Eccl. 365 155
Benjamin *v.* Wheeler, 8 Gray, 409 548
Bennett *v.* New Bedford, 110 Mass. 433 215
Benoit *v.* Conway, 10 Allen, 528 506
Bickford *v.* Parson, 5 C. B. 920 516
Bicknell *v.* Bicknell, 111 Mass. 265 118
——— *v.* Cleverly, 125 Mass. 164 103
Bigelow *v.* Collamore, 5 Cush. 226 541
Birmingham *v.* Gallagher, 112 Mass. 190 480
——— *v.* Kirwan, 2 Sch. & Lef. 444 155
Black & White Smiths' Society *v.* Vandyke, 2 Whart. 309 489
Blair *v.* Pelham, 118 Mass. 420 360
Blake *v.* Pegram, 109 Mass. 541 148
Blaney *v.* Sargeant, 1 Mass. 335 359

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Bliss v. American Bible Society, 2 Allen, 334 268
Boardman v. Spooner, 13 Allen, 353 587
Bodwell v. Eastman, 106 Mass. 525 446
——— v. North Andover, 110 Mass. 511 n. 581
Boston v. Richardson, 13 Allen, 146 488
——— v. Robbins, 116 Mass. 313 196
Boston & Worcester Railroad v. Sparhawk, 5 Met. 469 553
——— v. Western Railroad, 14 Gray, 253 347
Bosworth v. Swansey, 10 Met. 363 596
Bottomley v. Forbes, 6 Scott, 866 586
——— v. ——— 5 Bing. N. C. 121 586
Boulton v. Beard, 3 DeG., M. & G. 608 147
Bowditch v. Andrew, 8 Allen, 339 335
Bowers v. Suffolk Manuf. Co. 4 Cush. 332 65
Boynton v. Dyer, 18 Pick. 1 593
Brabrook v. Boston Five Cents Savings Bank, 104 Mass. 228 161
Brace v. Taylor, 2 Atk. 253 480
Brackett v. Blake, 7 Met. 335 215
Brayton v. Fall River, 124 Mass. 95 348
Briggs v. Taunton, 110 Mass. 423 21
Brigham v. Coburn, 10 Gray, 329 475
Brimmer v. Sohier, 1 Cush. 118 43
Briscoe v. Briscoe, 1 Jon. & Lat. 334 155
Bristow v. Wright, 2 Doug. 665 419
Broderick's will, 21 Wall. 503 143
Bronson v. Coffin, 108 Mass. 175 516
Brooks v. Barrett, 7 Pick. 94 359
——— v. Jackson, 125 Mass. 307 276
——— v. Prescott, 114 Mass. 392 560
——— v. Rayner, 127 Mass. 268 272, 276
——— v. Tarbell, 103 Mass. 496 356
Brown v. Brown, 108 Mass. 386 154
——— v. Chase, 4 Mass. 436 118
——— v. Haverhill, 3 Dane Ab. 263 37
——— v. Kelsey, 2 Cush. 243 268
Browne v. Hammond, H. R. V. Johns. 210 375
——— v. McClintock, L. R. 6 H. L. 434 360
Bruce v. Wood, 1 Met. 542 270
Buckminster v. Perry, 4 Mass. 593 359
Buffum v. Bowditch Ins. Co. 10 Cush. 540 316
——— v. Deane, 4 Gray, 385 253
Bulfinch v. Winchenbach, 3 Allen, 161 237
Bullock v. Downes, 9 H. L. Cas. 1 40
Burke v. Miller, 4 Gray, 114 466
Burlen v. Shannon, 99 Mass. 200 158
Burt v. Wigglesworth, 117 Mass. 302 360
Busfield v. Wheeler, 14 Allen, 139 193
Bush v. Madeira, 14 B. Mon. 212 579
Butman v. Porter, 100 Mass. 337 511

Cabot Bank v. Russell, 4 Gray, 167 129
Cadigan v. Brown, 120 Mass. 493 480
Caffrey v. Darby, 6 Ves. 488 146
Campbell v. Howard, 5 Mass. 376 580
——— v. Stiles, 9 Mass. 217 601
Canal Co. v. Clark, 13 Wall. 311 477
Canfield v. Canfield, 112 Mass. 233 426
Capen v. Doty, 13 Allen, 262 431
Carpenter v. Holcomb, 105 Mass. 280 527
Carter v. Cambridge & Brookline Bridge, 104 Mass. 237 348
——— v. Cutting, 8 Cranch, 251 580
——— v. Kingman, 103 Mass. 517 470
Castrique v. Behrens, 3 E. & E. 709 84
Chapin v. Livermore, 13 Gray, 561 591
Charles River Mills v. Mill Creek Mills, 7 Pick. 207 347
Charlestown v. Groveland, 15 Gray, 15 288
Child v. Sampson, 117 Mass. 62 271
Childs v. Jordan, 106 Mass. 321 380
Choate v. Arrington, 116 Mass. 552 276
Churchill v. Wilkins, 1 T. R. 447 419
Clapp v. Campbell, 124 Mass. 50 106
Clark v. Clark, 108 Mass. 522 162
——— v. Pishon, 31 Maine, 503 143
——— v. Rawson, 2 Denio, 135 541
——— v. Waltham, 128 Mass. 567 584
Clayton v. Nugent, 8 Jur. 867 354
——— v. ——— 1 Collyer, 362 354
——— v. ——— 13 M. & W. 200 354
——— v. Wardell, 2 Bradf. 1 579
Cleaveland v. Flagg, 4 Cush. 76 553
Clinton National Bank v. Taylor, 120 Mass. 124 472
Clough v. Whitcomb, 105 Mass. 482 264
Cobb v. Boston, 109 Mass. 438 349
——— v. ——— 112 Mass. 181 349, 356
Codman v. Freeman, 3 Cush. 306 103, 307
Coffin v. Jones, 5 Pick. 61 601
Colebrook v. Stewartstown, 10 Foster, 1 139
Colton v. Ross, 2 Paige, 396 143
Commercial Bank v. Cunningham, 24 Pick. 270 103
Commercial Ins. Co. v. Spankneble, 52 Ill. 53 318
Commissioners v. Sellew, 99 U. S. 624 312
Commonwealth v. Allen, 128 Mass. 46 360
——— v. Ashton, 125 Mass. 384 71
——— v. Baker, 10 Cush. 405 313
——— v. Bagley, 7 Pick. 279 58
——— v. Barrett, 108 Mass. 302 71
——— v. Belding, 13 Met. 10 64
——— v. Carrington, 116 Mass. 37 90
——— v. Catlin, 1 Mass. 8 53
——— v. Davis, 121 Mass. 352 414
——— v. Dowdican's Bail, 115 Mass. 133 245
——— v. Drew, 19 Pick. 179 86
——— v. ——— 3 Cush. 279 409
——— v. Dunham, 22 Pick. 11 580
——— v. Durfee, 100 Mass. 146 86
——— v. Filburn, 119 Mass. 297 71
——— v. Fowler, 10 Mass. 290 310
——— v. Gavin, 121 Mass. 54 419
——— v. Goodnow, 117 Mass. 114 333
——— v. Gorham, 99 Mass. 420 245
——— v. Hadley, 11 Met. 66 409

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Commonwealth v. Hart, 11 Cush. 130 313
——— v. Hartwell, 123 Mass. 415 422
——— v. Hatfield, 107 Mass. 227 303
——— v. Hawkes, 123 Mass. 525 311
——— v. Holliston, 107 Mass. 232 68
——— v. Hooper, 104 Mass. 549 83
——— v. Hoyer, 125 Mass. 209 414
——— v. Hughes, 5 Allen, 499 419
——— v. Jeffries, 7 Allen, 548 419
——— v. Jennings, 107 Mass. 488 51
——— v. Jones, 121 Mass. 57 59
——— v. Keefe, 7 Gray, 332 74
——— v. Lambert, 12 Allen, 177 54
——— v. Lockwood, 109 Mass. 323 245
——— v. Low, 3 Pick. 408 64
——— v. Malloy, 119 Mass. 347 71
——— v. Matthews, 122 Mass. 60 69
——— v. McCarthy, 119 Mass. 354 360
——— v. McClellan, 101 Mass. 34 71
——— v. McDuffy, 126 Mass. 467 58, 82
——— v. Moylan, 119 Mass. 109 78
——— v. Newbury, 2 Pick. 51 64
——— v. Norton, 11 Allen, 266 86
——— v. O'Connell, 12 Allen, 451 49
——— v. O'Keefe, 123 Mass. 252 76
——— v. Old Colony & Fall River Railroad, 14 Gray, 93 66
——— v. Parker, 4 Allen, 313 54
——— v. Parmenter, 121 Mass. 354 83
——— v. Pray, 13 Pick. 359 313, 419
——— v. Randall, 4 Gray, 36 419
——— v. Rawson, 2 Denio, 135 541
——— v. Raymond, 97 Mass. 567 71
——— v. Richards, 17 Pick. 295 580
——— v. Taunton, 16 Gray, 228 67
——— v. Tobin, 125 Mass. 203 90, 196
——— v. Walton, 11 Allen, 238 422
——— v. Wellington, 7 Allen, 299 419
——— v. Williams, 6 Gray, 1 413
Comstock v. Smith, 13 Pick. 116 554
Concord Bank v. Bellis, 10 Cush. 276 465
Connecticut River Railroad v. Clapp, 1 Cush. 559 360
Connolly v. Boston, 117 Mass. 64 599
Cook v. Googins, 126 Mass. 410 365
——— v. Griffin, 1 Dane Ab. 581 286
——— v. Johnson, 121 Mass. 326 366
Cooper v. Robinson, 2 Cush. 184 286
——— v. Skinner, 124 Mass. 183 193
Crane v. Adams, 16 Gray, 542 355
Creely v. Bay State Brick Co. 103 Mass. 514 363
Crittenden v. Field, 8 Gray, 621 355
Crompton v. Anthony, 13 Allen, 33 479
Crowninshield v. Crowninshield, 2 Gray, 524 357
Cummings v. Barrett, 10 Cush. 186 480
——— v. Bramhall, 120 Mass. 552 163
——— v. Cummings, 123 Mass. 270 534
Curtis v. Aspinwall, 114 Mass. 187 527
——— v. Riddle, 7 Allen, 185 560
Cushing v. Billings, 2 Cush. 158 360
——— v. Boston, 122 Mass. 173 330
——— v. ——— 124 Mass. 434 330
Cutter v. Cochrane, 116 Mass. 408 120
Dadmun v. Lamson, 9 Allen, 85 553
Dana v. Kemble, 19 Pick. 112 45
Danker v. Atwood, 119 Mass. 146 542
Davenport v. Holland, 2 Cush. 1 196
Davis v. Cowdin, 20 Pick. 510 533
——— v. Davis, 123 Mass. 590 356
——— v. Mason, 4 Pick. 156 359
——— v. Ney, 125 Mass. 590 163
Day v. Bardwell, 97 Mass. 246 123
Degnan v. Farr, 126 Mass. 297 170
Delay v. Vinal, 1 Met. 57 155
Denn v. Reid, 10 Pet. 524 231
Dennis v. Wilson, 107 Mass. 591 251
Denniston v. Clark, 125 Mass. 216 548
Denny v. Merrifield, 128 Mass. 228 231 n.
Dent v. Auction Mart Co. L. R. 2 Eq. 238 363
Dickinson v. Conway, 12 Allen, 487 506
Dill v. Wareham, 7 Met. 438 508
Dingley v. Boston, 100 Mass. 544 349
Dixon v. Homer, 12 Cush. 41 277
Doe v. Cavendish, 3 Doug. 48 154
——— v. ——— 4 T. R. 741, n. 155
Dole v. Johnson, 3 Allen, 364 434
Dorr v. Wainwright, 13 Pick. 328 400
Dover v. McMurphy, 4 N. H. 158 139
Dow v. Lewis, 4 Gray, 468 270
Downer v. Boston, 7 Cush. 277 288
Downing v. Porter, 9 Mass. 386 579
Durant v. Essex Co. 101 U. S. 555 579
Durgin v. Lowell, 3 Allen, 398 67
Dutton v. Woodman, 9 Cush. 255 158

Eames v. Eames, 16 Pick. 141 358
Eastern Railroad v. Boston & Maine Railroad, 111 Mass. 125 348
Eastman v. Cooper, 15 Pick. 276 158
——— v. Foster, 8 Met. 19 307
Eaton v. Hewitt, 2 Dr. & Sm. 184 375
Edmands v. Mutual Safety Ins. Co. 1 Allen, 311 318
Elliott v. Hayden, 104 Mass. 180 255
Ellis v. County Commissioners, 2 Gray, 370 312
Emery v. Lowell, 104 Mass. 13 397
Evans v. Clapp, 123 Mass. 165 159
Ewer v. Hobbs, 5 Met. 1 316

Fairbank v. Phelps, 22 Pick. 535 307
Farnsworth v. Boston, 126 Mass. 1 316
Farnum v. Peterson, 111 Mass. 148 553
Farrar v. Parker, 3 Allen, 556 593
Farrington v. Kimball, 126 Mass. 313 253
Farwell v. Boston & Worcester Railroad, 4 Met. 49 11
——— v. Hilliard, 3 N. H. 318 256
Fay v. Cheney, 14 Pick. 399 96
——— v. Wenzell, 8 Cush. 315 297
Felch v. Allen, 98 Mass. 572 458
Fellows v. Miner, 119 Mass. 541 261
Ferson v. Dodge, 23 Pick. 287 374
Field v. Hitchcock, 14 Pick. 405 533
Finch v. Mansfield, 97 Mass. 89 264
Fisher v. Mellen, 103 Mass. 503 360
——— v. Fraprie, 125 Mass. 472 601
Fisk v. Cushman, 6 Cush. 20 170

Digitized by Google

Flake v. Eldridge, 12 Gray, 474 119
Fitchburg Railroad v. Gage, 12 Gray, 393 328
Flagg v. Hobart, Quincy, 332 359
Fletcher v. Vassal, 5 Dane Ab. 691 601
Folger v. Worth, 19 Pick. 108 64
Foote, appellant, 22 Pick. 299 435
Forster v. Fuller, 6 Mass. 58 119
Forward v. Forward, 6 Allen, 494 147
Foster v. Buffum, 20 Maine, 124 256
——— v. Dawber, 6 Exch. 839 26
——— v. Gamgee, 1 Q. B. D. 666 257
——— v. Mackay, 7 Met. 531 45
Fowler v. State, 5 Day, 81 55
Fox v. Harding, 7 Cush. 516 191
Frank v. Frank, 2 Mood. & Rob. 314 357
Freeman v. M'Gaw, 15 Pick. 82 370
French v. Braintree Manuf. Co. 23 Pick. 216 493
——— v. Currier, 47 N. H. 88 146
——— v. Lowell, 117 Mass. 363 283
Freto v. Brown, 4 Mass. 675 288
Frost v. Walker, 60 Maine, 468 446
Fulton, Ex parte, 7 Cow. 484 542

Gardner v. Barnes, 106 Mass. 505 370
——— v. Webber, 17 Pick. 407 103
Gear v. Barnum, 37 Conn. 229 488
George v. Haverhill, 110 Mass. 506 581
Gerrish v. Gary, 1 Allen, 213 602
——— v. Norris, 9 Cush. 167 527
Gibbins v. Shepard, 125 Mass. 541 435
Gifford v. Rockett, 119 Mass. 71 30
Gill v. Scituate, 100 Mass. 200 349
Gilman v. Eastern Railroad, 10 Allen, 233 11
——— v. Hunnewell, 122 Mass. 139 477
Gilmore v. Carr, 2 Mass. 171 255
Goddard v. Smithett, 3 Gray, 116 310
——— v. Worcester, 9 Gray, 88 99
Gordon v. Adolphus, 3 Bro. P. C. (2d ed.) 306 375
Gott v. Dinsmore, 111 Mass. 45 447
Gould v. Boston, 120 Mass. 300 68, 569
——— v. Norfolk Lead Co. 9 Cush. 338 541
Granger v. Bassett, 98 Mass. 462 533
Gray v. James, 126 Mass. 110 113
Greene v. Borland, 4 Met. 330 277
Greenwood v. Greenwood, 5 Ch. D. 954 374
Griswold v. Pratt, 9 Met. 16 122
Grow v. Dobbins, 124 Mass. 560 272, 276, 280
——— v. ——— 128 Mass. 271 276

Hadsell v. Hancock, 3 Gray, 526 551
Hall v. Bliss, 118 Mass. 554 286
——— v. Bumstead, 20 Pick. 2 276, 556
Hamblett v. Hamblett, 6 N. H. 333 155
Hammond v. Granger, 128 Mass. 272 279, 530
Hampson v. Hampson, 3 Ves. & B. 41 357
Hancock v. Carlton, 6 Gray, 39 355
——— v. Colyer, 99 Mass. 187 189
Hancock v. Franklin Ins. Co. 107 Mass. 113 395
——— v. Hazzard, 12 Cush. 112 507
Hanson v. Herrick, 100 Mass. 323 103
Hapgood v. Doherty, 8 Gray, 373 602
——— v. Houghton, 22 Pick. 480 154
Harding v. Larned, 4 Allen, 426 147
——— v. Medway, 10 Met. 465 98
Harper v. Gilbert, 5 Cush. 417 541
Harriman v. Harriman, 12 Gray, 341 26
Harris v. Newbury, 128 Mass. 321 388
Hartford Ins. Co. v. Walsh, 54 Ill. 164 518
Hartwell v. Kelly, 117 Mass. 235 560
Harvard College v. Society for Theological Education, 3 Gray, 280 261
Haskell v. Gordon, 3 Met. 268 103
Hastings v. Bolton, 1 Allen, 529 602
Hatch v. Proctor, 102 Mass. 351 196
Haven v. Adams, 8 Allen, 363 168
Hawes v. Anglo-Saxon Petroleum Co. 101 Mass. 385 449
——— v. Knowles, 114 Mass. 518 290
——— v. Waltham, 18 Pick. 451 237
Hawkins v. Providence & Worcester Railroad, 119 Mass. 596 170
Hawks v. Charlemont, 107 Mass. 414 290
Hayden v. Attleborough, 7 Gray, 338 66
——— v. Stone, 112 Mass. 346 65
Hayward v. Hapgood, 4 Gray, 437 280
——— v. Leonard, 7 Pick. 181 234
Hazen v. Boston & Maine Railroad, 2 Gray, 574 6, 393
Heard v. Hall, 16 Pick. 457 554
Henry's case, 4 Cush. 257 316
Herring v. Barrow, L. R. 13 Ch. D. 144 577
Herzo v. San Francisco, 33 Cal. 134 509
Heywood v. Stiles, 124 Mass. 275 166
Hicks v. Chapman, 10 Allen, 463 118
Hildreth v. Lowell, 11 Gray, 345 98
Hill v. Boston, 122 Mass. 344 561, 570
Hills v. Bearse, 9 Allen, 403 271
——— v. Farrington, 6 Allen, 80 103
Hillsborough v. Deering, 4 N. H. 86 139
Hinckley v. Baxter, 13 Allen, 139 560
Hingham & Quincy Bridge v. Norfolk, 6 Allen, 353 347
Hippesley v. Homer, Turn. & Russ. 48 360
Hobbs v. Lowell, 19 Pick. 405 65
Hodges v. Pingree, 108 Mass. 585 356
Holbrook v. Waters, 19 Pick. 354 21
Holman v. Sigourney, 11 Met. 436 98
Holt v. City Council of Somerville, 127 Mass. 408 215
——— v. Rice, 54 N. H. 398 155
——— v. Sargent, 15 Gray, 97 67
Holyoke v. Haskins, 5 Pick. 20 591
Hood v. Adams, 124 Mass. 481 210, 469
——— v. ——— 128 Mass. 207 469
Horton v. Ipswich, 12 Cush. 488 581
Houghton v. Bartholomew, 10 Met. 138 429
Howard v. Robinson, 5 Cush. 119 316
Howe v. Newmarch, 12 Allen, 49 290

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Hoyt v. Robinson, 10 Gray, 371 287
Huffer v. Allen, L. R. 2 Ex. 15 84
Hulburt v. Emerson, 16 Mass. 241 40
Humphrey v. Berkshire Woollen Co. 10 Allen, 420 193
Hunt v. Bay State Iron Co. 97 Mass. 279 398, 560
——— v. Thompson, 2 Allen, 341 253
Huntley v. Whittier, 105 Mass. 391 45
Hutchins v. Byrnes, 9 Gray, 367 491
Hyde v. Baldwin, 17 Pick. 303 154

Insurance Co. v. Haven, 95 U. S. 242 316
Irvin v. Gregory, 13 Gray, 215 355

Jackson v. Massachusetts Ins. Co., 23 Pick. 418 317
——— v. Phillips, 14 Allen, 539 267
Jacob v. United States, 1 Brock. 520 231
Jenkins v. Holt, 109 Mass. 261 510
Jenks v. Howland, 3 Gray, 536 144
Jennings v. Tisbury, 5 Gray, 73 66
Jewett v. Davis, 10 Allen, 68 270
——— v. Dringer, 4 Stew. (N. J.) 586 579
Jochumsen v. Suffolk Savings Bank, 3 Allen, 87 18, 144
Johnson v. Battelle, 125 Mass. 458 577
——— v. Bean, 119 Mass. 271 553
——— v. Johnson, 120 Mass. 465 382
——— v. Morse, 11 Allen, 540 158
Jones v. Andover, 10 Allen, 18 596
——— v. Garcia del Rio, Turn. & Russ. 297 480
Jordan, Ex parte, 9 Met. 292 124

Kearns v. Sowden, 104 Mass. 63 n. 599
Kelley v. Lindsey, 7 Gray, 287 508
Kelly v. Drew, 12 Allen, 107 171
Kenady v. Lawrence, 128 Mass. 318 325, 388
Kent v. Dunham, 106 Mass. 586 578
Kermode v. Macdonald, L. R. 3 Ch. 584 372
Kidney v. Richards, 10 Allen, 419 196
King v. Donahue, 110 Mass. 155 50
——— v. Johnson, 7 Gray, 239 306
King, The, v. Kinnear, 2 B. & Ald. 462 90
——— v. Woolf, 1 Chit. 401 90
Kingston's case, Duchess of, 20 Howell's St. Tr. 355 84
Kittr'dge v. Bancroft, 1 Met. 508 601
Kline v. Baker, 99 Mass. 253 264
Knowles v. Boston, 12 Gray, 339 215
——— v. Maynard, 13 Met. 352 366
Krehl v. Burrell, 7 Ch. D. 551 363
——— v. ——— 11 Ch. D. 146 363
Kuhn v. Webster, 12 Gray, 3 577

Lamb v. Montague, 112 Mass. 352 116
Lane v. Boston & Albany Railroad, 112 Mass. 455 225
Lane v. Old Colony & Fall River Railroad, 14 Gray, 143 107
Langdon v. Potter, 11 Mass. 313 195
Lawrence v. Fletcher, 8 Met. 153 286
Leather Cloth Co. v. American Leather Cloth Co. 4 DeG., J. & S. 137 477
——— v. ——— 11 H. L. Cas. 523 477
LeForest v. Tolman, 117 Mass. 109 599
Leggett v. Barton, 11 Vroom, 83 229
Leighton v. Sargent, 7 Foster, 460 135
Leslie v. Baillie, 2 Yo. & Col. Ch. 91 147
Levi v. Brooks, 121 Mass. 501 290
Lew v. Lowell, 6 Allen, 25 603
Lewis v. Armstrong, 3 Myl. & K. 45 354
——— v. ——— 2 Cr. & M. 274 354
——— v. Bolitho, 6 Gray, 137 594
——— v. Mason, 109 Mass. 169 356
Libby v. Chase, 117 Mass. 105 270
Locke v. Lexington, 122 Mass. 290 551
Long v. Blackall, 3 Ves. 486 40
Loring v. Alline, 9 Cush. 68 591
——— v. Steineman, 1 Met. 204 144
Loud v. Darling, 7 Allen, 205 558
Love v. Sortwell, 124 Mass. 446 395
Lovejoy v. Murray, 3 Wall. 1 255
Lovering v. Minot, 9 Cush. 151 578
Lowell Savings Bank v. Winchester, 8 Allen, 109 506
Lowson v. Copeland, 2 Bro. Ch. 156 146
Luxford v. Cheeke, 3 Lev. 125 375
Lyon v. Merritt, 6 Paige, 473 579
Lyons v. Desotelle, 124 Mass. 387 599
——— v. Merrick, 105 Mass. 71 313, 419

McCandless v. McWha, 22 Penn. St. 261 135
M'Cluskey v. Provident Institution for Savings, 103 Mass. 300 171
McCreary v. Commonwealth, 29 Penn. St. 323 90
McDonald v. Mayor, &c. of New York, 68 N. Y. 23 509
——— v. Morton, 1 Mass. 543 594
M'Fadden v. Jenkyns, 1 Hare, 458 161
——— v. ——— 1 Phillips, 153 161
McFarland v. Stone, 17 Vt. 165 143
McGrath v. Merwin, 112 Mass. 467 599
McGregor v. Williams, 10 Cush. 526 370
Machinists' Bank v. Dean, 124 Mass. 81 601
McKeone v. Barnes, 108 Mass. 344 356
McMahan v. Bowe, 114 Mass. 140 553
McNeil v. Ames, 120 Mass. 481 253
——— v. Collinson, 128 Mass. 313 419
Maine v. Cumston, 98 Mass. 317 516
Maine Bank v. Osborn, 13 Maine, 49 256
Manhattan Ins. Co. v. Barker, 7 Heisk. 508 318
Marble v. Ross, 124 Mass. 44 599
Marlborough v. Rutland, 11 Mass. 483 151
Marsh v. Fulton County, 10 Wall. 676 506
Martin v. Frank, 75 N. Y. 134 164
May v. Bradlee, 127 Mass. 414 356
Meacham v. McCorbitt, 2 Met. 352 189
Melcher v. Chase, 105 Mass. 125 43
Mellen v. Whipple, 1 Gray, 317 469

Digitized by Google

Merrill v. Merrill, 126 Mass. 228 45
Metallic Compression Casting Co. v. Fitchburg Railroad, 109 Mass. 277 6
Metcalf v. Framingham Parish, 128 Mass. 370 435
Miller v. Congdon, 14 Gray, 114 207
——— v. Stevens, 100 Mass. 518 586
Milliken v. Pratt, 125 Mass. 374 591
Milroy v. Lord, 4 DeG., F. & J. 264 161
Milton v. Colby, 5 Met. 78 307
Minor v. Rogers, 40 Conn. 512 164
Minot v. Tappan, 122 Mass. 535 40
Mirick v. Hoppin, 118 Mass. 582 366
Mitchell v. Libbey, 33 Maine, 74 256
Moley v. Brine, 120 Mass. 324 101
Monagle v. County Commissioners, 8 Cush. 360 98
Morrison v. Howe, 120 Mass. 565 548
Morrissey v. Ingham, 111 Mass. 63 51
Morse v. Jewett, 5 Dane Ab. 563 359
——— v. Marshall, 97 Mass. 519 158
Mortimer v. Slater, 7 Ch. D. 322 40
Mortimore v. Mortimore, 4 App. Cas. 448 40
Morton v. Sweetser, 12 Allen, 134 601
——— v. Westcott, 8 Cush. 425 129
Morville v. American Tract Society, 123 Mass. 129 508
Moulton v. Trask, 9 Met. 577 234
Mudge v. Wilmot, 124 Mass. 493 229
Murphy v. Boston, 120 Mass. 419 69
——— v. Gloucester, 105 Mass. 470 324
——— v. Marland, 8 Cush. 575 307
Murray v. Hay, 1 Barb. Ch. 59 480

Nash v. Hunt, 116 Mass. 237 356
——— v. New England Ins. Co. 127 Mass. 91 363, 575
National Mahaiwe Bank v. Barry, 125 Mass. 20 356
National Mount Wollaston Bank v. Porter, 122 Mass. 308 28
National Pemberton Bank v. Lougee, 108 Mass. 371 542
Newburgh v. Newburgh, Sugden's Law of Property, 367–369 375
Newell v. Homer, 120 Mass. 277 356
New London Railroad v. Boston & Albany Railroad, 102 Mass. 386 347
North Adams Universalist Society v. Fitch, 8 Gray, 421 268
Northampton Bridge case, 116 Mass. 442 349

Oakes v. Hill, 8 Pick. 47 312
O'Brien v. Joyce, 117 Mass. 360 168
——— v. Schayer, 124 Mass. 211 574
O'Connell v. Kelly, 114 Mass. 97 116
Oliver v. Worcester, 102 Mass. 489 561, 569, 584
Olney v. Hull, 21 Pick. 311 40
Orcutt v. Nelson, 1 Gray, 536 264
Osbourne v. Hosier, 6 Mod. 167 50

Packer v. Hinckley Locomotive Works, 122 Mass. 484 227
Padbury v. Clark, 2 Macn. & Gord. 298 155
——— v. ——— 2 Hall & Tw. 341 155
Page v. Cole, 123 Mass. 93 472
——— v. Osgood, 2 Gray, 260 359
Palmer v. Harris, 60 Penn. St. 156 477
——— v. Stebbins, 4 Pick. 41 n. 580
Parish v. Whitney, 3 Gray, 516 516
Parker v. Lowell, 11 Gray, 353 26
——— v. May, 5 Cush. 336 354
——— v. Nightingale, 6 Allen, 341 251
Parks v. Boston, 15 Pick. 198 380
——— v. Brinkerhoff, 2 Hill, 663 541
Parr v. Greenbush, 72 N. Y. 463 509
Parrott v. Thacher, 9 Pick. 426 587
Parsons v. Goshen, 11 Pick. 396 505
Partridge v. Forsyth, 29 Ala. 200 587
——— v. Hood, 120 Mass. 403 245
Patch v. Washburn, 16 Gray, 82 365
Patten v. Deshon, 1 Gray, 325 252
Paving Co. v. Mulford, 100 U. S. 147 480
Peabody v. Minot, 24 Pick. 329 157
Pease v. Bancroft, 5 Met. 90 431
Peck v. Conway, 119 Mass. 546 251
Peebles' appeal, 15 S. & R. 39 143
Peiffer v. Commonwealth, 15 Penn. St. 468 90
Penniman v. French, 2 Mass. 140 579, 594
People v. Thomas, 3 Hill, 169 82
Perkins v. Jewett, 11 Allen, 9 43
——— v. Pitts, 11 Mass. 125 393, 492
——— v. Richardson, 11 Allen, 538 476
Perry v. Hayward, 12 Cush. 344 370
——— v. Porter, 121 Mass. 522 381
——— v. Truefitt, 6 Beav. 66 477
Phelps v. Hartwell, 1 Mass. 71 357
——— v. Racey, 60 N. Y. 10 413
Philadelphia & Reading Railroad v. Derby, 14 How. 468 290
Phillips v. Bowers, 7 Gray, 21 307
——— v. Frye, 14 Allen, 36 147
——— v. Thompson, 1 Johns. Ch. 131 357
Phœnix Cotton Manuf. Co. v. Hazen, 118 Mass. 350 497
Phœnix Ins. Co. v. Abbott, 127 Mass. 558 479
Pidding v. How, 8 Sim. 477 477
Pierce v. Goddard, 22 Pick. 559 393
Pinney v. McGregory, 102 Mass. 186 591
Pitman v. Kintner, 5 Blackf. 250 491
Plimpton v. Plimpton, 12 Cush. 458 168
Pollock v. Learned, 102 Mass. 49 577
Pomeroy v. Latting, 2 Allen, 221 286
Pope v. Biggs, 9 B. & C. 245 367
Porter v. Ingraham, 10 Mass. 88 255
——— v. Merrill, 124 Mass. 534 253
Potter v. Jacobs, 111 Mass. 32 168
Powers v. Provident Institution for Savings, 124 Mass. 377 163
Pratt v. Sanger, 4 Gray, 84 601
Prentice v. Brimhall, 123 Mass. 291 469
Prescott Bank v. Caverly, 7 Gray, 217 129
Priest v. Groton, 103 Mass. 530 360

Digitized by Google

Priest v. Wheeler, 101 Mass. 479 191
Prior v. Talbot, 10 Cush. 1 400
Probate Court v. Van Duzer, 13 Vt. 135 143
Proprietors of Locks & Canals v. Nashua & Lowell Railroad, 104 Mass. 1 462, 553
Province v. Paxton, Quincy, 548 601
Puffer v. Orange, 122 Mass. 389 324
Pusey v. Desbouvrie, 3 P. Wms. 315 155
Putnam v. Longley, 11 Pick. 487 231
Pye, Ex parte, 18 Ves. 140 161

Railroad Co. v. Husen, 95 U. S. 465 413
Railroad National Bank v. Lowell, 109 Mass. 214 508
Ramsden v. Boston & Albany Railroad, 104 Mass. 117 290
Rathbone v. Rathbone, 4 Pick. 89 545
Ray v. Simmons, 11 R. I. 266 164
——— v. Smith, 9 Gray, 141 95
——— v. Wight, 119 Mass. 426 230, 472
Raymond v. Andrews, 6 Cush. 265 462
Read v. Sutton, 2 Cush. 115 297
Reed v. Dickerman, 12 Pick. 146 155
——— v. Northfield, 13 Pick. 94 64
Regina v. Abbott, 1 Denison, 273 86
——— v. Bryan, 2 F. & F. 567 85
——— v. Burgon, Dearsly & Bell, 11 86
——— v. Copeland, Car. & M. 516 87
——— v. Gardner, Dearsly & Bell, 40 85
——— v. ——— 7 Cox C. C. 136 85
——— v. Martin, L. R. 1 C. C. 56 85
——— v. Taylor, 6 Cox C. C. 58 50
——— v. Tiddeman, 4 Cox C. C. 387 58
——— v. Webb, 1 Denison, 338 54
——— v. Watson, 2 Cox C. C. 376 54
Rex v. Plestow, 1 Camp. 494 420
——— v. Williams, 7 Car. & P. 354 82
Richards v. County Commissioners, 120 Mass. 401 68
——— v. Delbridge, L. R. 18 Eq. 11 163
Richardson v. Hall, 124 Mass. 228 435
——— v. Hazelton, 101 Mass. 108 580
Riley v. Boston Water Power Co. 11 Cush. 11 307
Roberge v. Burnham, 124 Mass. 277 290
Roberts v. Boston & Lowell Railroad, 115 Mass. 57 348
Robinson v. Hitchcock, 8 Met. 64 359
——— v. United States, 13 Wall. 363 587
Rollins v. Marsh, 128 Mass. 116 591
Rogers v. Snow, 118 Mass. 118 488
Ross v. New England Ins. Co. 120 Mass. 113 357
Royce v. Burrell, 12 Mass. 395 556
Russ v. Alpaugh, 118 Mass. 369 556
Russell v. Allen, 2 Allen, 42 366
——— v. New Bedford, 5 Gray, 31 98
Ryerson v. Eldred, 18 Mich. 490 579

Sage v. Heller, 124 Mass. 213 230
Salem Turnpike v. Essex, 100 Mass. 282 349
Salisbury v. Andrews, 19 Pick. 250 344
——— v. ——— 128 Mass. 336 363
Sanders v. Partridge, 108 Mass. 556 250
Sargent v. M'Farland, 8 Pick. 500 115
——— v. Sargent, 103 Mass. 297 577
Saunders v. Robinson, 7 Met. 310 168
Sawyer v. Woodbury, 7 Gray, 499 158
Schultz v. Pulver, 11 Wend. 361 146
Schwoerer v. Boylston Market Association, 99 Mass. 285 383
Sears v. Russell, 8 Gray, 86 40
Seaton v. Grant, L. R. 2 Ch. 459 480
Shaw v. Loud, 12 Mass. 447 286
Shedden v. Patrick, 1 Macq. 535 579
Sheldon v. Smith, 97 Mass. 34 286
Shepherd v. Union Ins. Co. 38 N. H. 232 318
Sheren v. Lowell, 104 Mass. 24 295
Sheridan v. Welch, 8 Allen, 166 492
Sherman v. Favour, 1 Allen, 191 599
Shumway v. Collins, 6 Gray, 227 253
Silloway v. Columbia Ins. Co. 8 Gray, 199 479
Simmons v. Almy, 100 Mass. 239 118
Simonds v. Center, 6 Mass. 18 255
——— v. Parker, 1 Met. 508 601
Singleton v. Singleton, 8 B. Mon. 340 579
Slayton v. McIntyre, 11 Gray, 271 96
Smith v. Boston & Maine Railroad, 120 Mass. 490 597
——— v. Bradstreet, 16 Pick. 264 594
——— v. Colerain, 9 Met. 492 151
——— v. Crooker, 5 Mass. 538 542
——— v. Howden, 14 C. B. (N. S.) 398 488
——— v. Lowell Manuf. Co. 124 Mass. 114 458
——— v. Lowell Meeting-House, 8 Pick. 178 234
——— v. Peabody, 106 Mass. 262 151
——— v. Rice, 11 Mass. 507 144
——— v. Smith, 14 Gray, 532 154
——— v. Snow, 123 Mass. 323 577
——— v. Williams, 116 Mass. 510 480
Snow v. Ware, 13 Met. 42 234
Sohier v. Loring, 6 Cush. 537 28
Somerby v. Buntin, 118 Mass. 279 390
Sortwell v. Hughes, 1 Curtis, 244 264
Southard v. Russell, 16 How. 547 579
Southbridge Savings Bank v. Exeter Works, 127 Mass. 542 356
Sparhawk v. Bagg, 16 Gray, 583 554
——— v. Wills, 5 Gray, 423 466
Spaulding v. Day, 10 Allen, 96 270
Spelman v. Talbot, 123 Mass. 489 276
Spencer v. Williams, L. R. 2 P. & D. 230 143
Spofford v. Harlow, 3 Allen, 176 599
Sprague v. Waite, 17 Pick. 309 64
Spread v. Morgan, 11 H. L. Cas. 588 155
Stafford v. Bryan, 2 Paige, 45 579
Standen v. Chrismas, 10 Q. B. 135 516
Stanton v. Metropolitan Railroad, 14 Allen, 485 596
State v. Bruce, 24 Maine, 71 60
——— v. Engle, 13 Ohio, 490 90
——— v. Millard, 18 Vt. 574 55
——— v. Noble, 15 Maine, 476 420

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Stebbins v. Palmer, 1 Pick. 71 594
Stedman v. Southbridge, 17 Pick. 162 64
Steele v. Burkhardt, 104 Mass. 59 599
Stetson v. Bass, 9 Pick. 27 533
——— v. Kempton, 13 Mass. 272 506
Stevens v. Miner, 5 Gray, 429 n. 466
——— v. ——— 110 Mass. 57 466
Stickney v. Allen, 10 Gray, 352 227
St. Louis Ins. Co. v. Homer, 9 Met. 39 131
Stockbridge Iron Co. v. Hudson Iron Co. 107 Mass. 290 356
——— v. ——— 102 Mass. 45 357
Stone v. Bishop, 4 Clif. 593 164
Story, Ex parte, 12 Pet. 339 354
Stratford v. Powell, 1 Ball & Beatty, 1 264
Strong's case, 20 Pick. 484 155
Suit v. Woodhall, 113 Mass. 391 312
Sullings v. Sullings, 9 Allen, 234 511
Sullivan v. Fitzgerald, 12 Allen, 482 105
——— v. Holmes, 8 Cush. 252 157
——— v. Langley, 124 Mass. 264 237
Sumner v. Williams, 8 Mass. 162 119
Sunderland Bridge case, 122 Mass. 459 349
Supervisors of Election, case of, 114 Mass. 247 347
Swan v. Littlefield, 4 Cush. 574 123
——— v. Picquet, 3 Pick. 443 580, 594
Swedesborough Church v. Shivers, 1 C. E. Green, 453 480
Sweeting v. Prideaux, 2 Ch. D. 413 375
Sweetman v. Sweetman, I. R. 2 Eq. 141 155
Sweetser v. French, 2 Cush. 309 365

Taft v. Ward, 106 Mass. 518 446
——— v. ——— 111 Mass. 518 446
Tarbell v. Parker, 106 Mass. 347 280
Taylor v. Ætna Ins. Co. 120 Mass. 254 317
——— v. Boston Water Power Co. 12 Gray, 415 66
——— v. Carpenter, 3 Story, 458 477
——— v. ——— 2 Sandf. Ch. 603 477
——— v. Henry, 48 Md. 550 164
Tebbets v. Tilton, 4 Foster, 120 143
Terry v. Sisson, 125 Mass. 560 237
Thacher v. Dinsmore, 5 Mass. 299 118
Thomas v. Richmond, 12 Wall. 349 508
Thompson v. Hatch, 3 Pick. 512 545
——— v. Stone, 8 Cush. 103 124
——— v. Thompson, 9 Penn. St. 234 143
Thomson v. Luddington, 104 Mass. 193 40
Tisdale v. Harris, 20 Pick. 9 390
Topliff v. Jackson, 12 Gray, 565 355
Toram v. Howard Association, 4 Penn. St. 519 439
Torrey v. Millbury, 21 Pick. 64 551
Tower v. Richardson, 6 Allen, 351 129
Towle v. Swasey, 106 Mass. 100 435
——— v. Towle, 114 Mass. 167 170
Towne v. Rice, 122 Mass. 67 472
Towns v. Wentworth, 11 Moore P. C. 526 374
Tripp v. Brownell, 2 Gray, 402 196, 545
Tucker v. Howard, 122 Mass. 529 362, 574
——— v. ——— 128 Mass. 361 575
Tuttle v. Tuttle, 12 Met. 551 26
Tyler v. Sturdy, 108 Mass. 196 68
Tyrrell v. Washburn, 6 Allen, 466 449

Underhill v. Roden, 2 Ch. D. 494 375
Union Bank v. Willis, 8 Met. 504 542
United States v. Boutwell, 17 Wall. 604 312
——— v. Howard, 3 Sumner, 12 419
——— v. Knight, 1 Black, 488 579
——— v. Porter, 3 Day, 283 419
Urann v. Coates, 109 Mass. 581 161
Utica Ins. Co. v. Lynch, 2 Barb. Ch. 573 579

Vail v. Rice, 1 Selden, 155 587
Vincent v. Spooner, 2 Cush. 467 512

Wade v. Howard, 11 Pick. 289 96
——— v. Lindsey, 6 Met. 407 554
Wait v. Belding, 24 Pick. 129 42
Wake v. Wake, 1 Ves. Jr. 335 155
——— v. ——— 3 Bro. Ch. 255 155
Wales v. Coffin, 13 Allen, 213 270
Walker v. Boston & Maine Railroad, 128 Mass. 8 458
Wall v. Robinson, 115 Mass. 429 109
Wallace v. Townsend Parish, 109 Mass. 263 302
Wallis v. Bardwell, 126 Mass. 366 118
Waltham Bank v. Waltham, 10 Met. 334 316
Ward v. Proctor, 7 Met. 318 122
Wareham Bank v. Lincoln, 3 Allen, 192 365
Ware River Railroad v. Vibbard, 114 Mass. 447 107
Warren County v. Marcy, 97 U. S. 96 506
Warriner v. Rogers, L. R. 16 Eq. 340 163
Washburn v. Clarkson, 123 Mass. 319 21
——— v. Sewall, 9 Met. 280 268
Wasson v. Bowman, 117 Mass. 91 21
Waters v. Stickney, 12 Allen, 1 145, 533, 580
Watt v. Starke, 101 U. S. 247 354
Way v. Reed, 6 Allen, 364 253
Webster v. Potter, 105 Mass. 414 306
Weed Sewing Machine Co. v. Emerson, 115 Mass. 554 465
Weld v. Boston, 126 Mass. 166 288
Wells v. Calnan, 107 Mass. 514 25
West v. Platt, 116 Mass. 308 237
——— v. ——— 120 Mass. 421 191
Westcott v. Fargo, 61 N. Y. 542 446
Weston v. Weston, 125 Mass. 268 374, 567
Wheatley v. Purr, 1 Keen, 551 161
Wheaton v. Nelson, 11 Gray, 15 26

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Wheelock v. Hastings, 4 Met. 504 475
Whipple v. Newton, 17 Pick. 168 256
White v. Franklin Bank, 22 Pick. 181 508
——— v. Weatherbee, 126 Mass. 450 144
——— v. Whitney, 3 Met. 81 316
——— v. Winchester, 6 Pick. 48 373, 435
Whitehead v. Smithers, 2 C. P. D. 553 413
Whitney v. Houghton, 127 Mass. 527 469
Wiggin v. Swett, 6 Met. 194 594
Wilbur v. Taber, 9 Gray, 361 603
Willey v. Thompson, 9 Met. 329 145
Williams' case, 1 Lewin, 137 50
Williams v. Robbins, 15 Gray, 590 356
Williamsburg Ins. Co. v. Frothingham, 122 Mass. 391 461
Willington v. Gale, 7 Mass. 138 316
Wilmot v. Howard, 39 Vt. 447 135
Wilson v. Townshend, 2 Ves. Jr. 693 155
——— v. Webber, 2 Gray, 558 295
Winnisimmet Co. v. Grueby, 111 Mass. 543 360
Winslow v. Cummings, 3 Cush. 358 268
Witherhead v. Allen, 3 Keyes, 562 446
Wolcott v. Winchester, 15 Gray, 461 96
Wood v. New Bedford Coal Co. 121 Mass. 252 458
——— v. Quincy, 11 Cush. 487 98
Woodruff v. Halsey, 8 Pick. 333 307
Woodward v. Leavitt, 107 Mass. 453 196
Wooldridge v. Bishop, 7 B. & C. 406 195
Worcester v. Marchant, 14 Pick. 510 288
Worcester Medical Institution v. Harding, 11 Cush. 285 461
Wright v. Boston, 126 Mass. 161 288
——— v. Herrick, 125 Mass. 154 237, 242
——— v. Wright, 13 Allen, 207 19, 356
Wytcherley v. Andrews, L. R. 2 P. & D. 327 143
Young v. Gilles, 113 Mass. 34 602

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CASES

ARGUED AND DETERMINED

IN THE

SUPREME JUDICIAL COURT

OF

MASSACHUSETTS.

PHILIP CLARK *vs.* BOSTON & ALBANY RAILROAD COMPANY.

Suffolk. Nov. 14, 1878. — Nov. 11, 1879. COLT, J., did not sit. MORTON, J., absent.

In an action against a railroad corporation for personal injuries sustained by the plaintiff by being struck by a train of cars at a place where the railroad crossed a highway at grade, the plaintiff's evidence showed that he was employed by a corporation other than the defendant to watch the track and give notice when any cars or locomotive engines of either corporation were about to pass over the highway; that he saw the smoke of the locomotive engine when it first came in sight, went to the crossing and gave the usual signal; that after the locomotive engine passed he looked up and down the track, and saw nothing, and started to recross the track and was struck by the train of cars which was making a flying switch, and which came upon him from behind; that the usual signal for cars making a flying switch was not given, but one was given indicating that only a locomotive engine or a train of cars was coming, and there was no brakeman on the cars; that a person could see up the track from where he stood nearly seven hundred feet; that he could not tell whether any smoke prevented his seeing the cars coming, but if it did he should have waited until it passed away. *Held*, that the action could not be maintained.

TORT for personal injuries occasioned to the plaintiff by being struck by a car, run and managed by the defendant over the track of the Eastern Railroad Company, at or near the place where said track crosses Saratoga Street at grade in Boston. Trial in this court, before *Morton*, J., who allowed a bill of exceptions in substance as follows:

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The plaintiff was a flagman, employed and paid by the Eastern Railroad Company, upon an understanding between that company and the defendant that the former should provide such flagman, and his duty was to watch the track and give notice when any cars or locomotives, whether of said company or of the defendant, were about to cross the street. There was a small building called a flag-house, situated near the side of Saratoga Street, south of the same, and east of the railroad, with a door fronting on the railroad, and windows on each side. The accident occurred about ten or eleven o'clock in the forenoon of a cold day in December. The train in question consisted of a locomotive and three oil cars, the latter being plain, uncovered platform-cars without sides, each having on it a tank about three to four feet high, cylinder-shaped, and appearing somewhat like a steam-boiler. The cars approached from the north, from the direction of Revere, and, as the plaintiff walked from Saratoga Street to the flag-house, they came behind him, partly towards his left side, and struck him, causing the injuries complained of.

Patrick Rowe testified as follows: "I was about thirty feet off from where the plaintiff was standing, on the same side with him. The first thing I heard was the engine coming, and I pulled up my horse about thirty feet off. I saw the plaintiff flagging the engine past. I heard the whistle and saw the engine pass. The plaintiff looked down the track, and up afterwards, and rolled up his flag, and walked across the track, kind of slanting, towards the flag-house. I started up my horse about ten or fifteen feet, and then I saw the oil cars, and pulled up again, because I saw the cars coming. The plaintiff was then crossing the track. I did not hear any noise of the train of oil cars until I saw them, and did not see any brakeman. I cannot exactly tell how long it was before the oil cars came along after the engine passed, — a second or so. I think it might be between a minute or two. I saw the cars strike the plaintiff on the right shoulder, and turn him round and knock him down; he had one foot between the tracks and the other over. I think there was difficulty in his seeing the cars, because there was a great deal of smoke flying. I could not see them until the smoke went away. It might be a minute or two after I saw the cars coming before the plaintiff was hit. He was walking across the track

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kind of sideways. The cars were coming behind him. I don't know as he could have seen them very well if he had turned round."

Richard Welsh testified as follows: "I am employed by the Eastern Railroad Company as flagman at another crossing, about eight hundred feet away from the plaintiff at the time he was struck. I saw the locomotive and oil cars go by me. Cannot state whether there was any brakeman on the oil train or not. There is a switch there, and the engine comes down one way and the man throws the switch to let the cars go the other. I was watching for this train to come down there, and knew they were going to make a flying switch. I saw the man at the switch to switch in the oil tanks. I saw the switch thrown and the engine pass, and saw the cars coming on the other track. They passed me. When I saw the engine I did not see the cars behind it. I knew it was going to make a flying switch at the time. I was looking out for my own crossing at the time, without thinking an accident would happen. I knew the cars were coming behind the engine. The switch is about three hundred feet from Saratoga Street. Did not see the cars when I saw the engine coming. I knew they were coming." The witness in answer to the question whether there was any signal for a flying switch, and, if so, what it was, answered: "Well, that is only a signal the men have among themselves. He will whistle for the switch; he will make one whistle for a locomotive or train, and two whistles for a flying switch, and the switchman understands that and will go by it. I know it as well as the switchman. All flagmen and everybody knows when a flying switch is coming. I did not hear the signal that day. Whether it was given or not I do not know. I do not recollect hearing any signal given for the switch that day; whether it was given or not I do not know."

Frank E. Pray testified that a person standing upon the west or northwest side of the track, near the track where it crosses Saratoga Street, could see up the track nearly seven hundred feet, towards Revere; that it was nearly a straight line.

Harriet Kirkwood testified that she could see the crossing at Saratoga Street quite plainly from her house; that she saw the accident; that she heard one whistle, and saw the engine pass

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that the cars came along a minute and a half or two minutes after the engine; that, after the engine passed, she saw the plaintiff roll up his flag and walk leisurely across the track; that there was no brakeman on the cars that she could see; that she did not see the plaintiff when he was struck, as the cars hid him from her sight, but saw that he must be struck; that she had not the slightest difficulty in seeing the cars from where she was; that there was no difficulty in the plaintiff's seeing them for a certain distance, and she supposed he could see them for as great a distance as she could; and that there was nothing to obstruct her view of the cars, and she did not see any smoke.

The plaintiff testified that he had been flagman at that crossing about twelve months; that the first he saw of the train was the smoke of the engine, and he went out to the crossing and flagged it until she went by; that he heard one whistle; that locomotives frequently passed there without cars; that, after the locomotive had passed, he looked up and down the track, but saw nothing and expected nothing, and started to go to the flag-house, when he was struck by the train of cars; that he had never seen a flying switch made coming that way during all the time he had been there; that he could not swear whether there was any smoke or steam that day to interfere with his seeing or not, but that, if there was, he should have waited until it passed away; that he waited about the usual time.

Upon this evidence, the judge ruled that the jury would not be justified in finding for the plaintiff; and directed a verdict for the defendant. The plaintiff alleged exceptions.

S. B. Allen, for the plaintiff, cited *French* v. *Taunton Branch Railroad*, 116 Mass. 537.

G. S. Hale, for the defendant.

ENDICOTT, J. The ruling of the presiding judge must be sustained. The plaintiff undertook to perform a duty, which he failed to perform, and, while thus neglecting his duty, he received the alleged injury.

As flagman, he was employed to give notice in the usual manner, by standing on the crossing with his flag, when any cars or engines, whether of the Eastern Railroad Company or of the defendant, were about to cross the street. From the flag-house near the crossing he could see up the track seven hundred feet.

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On this occasion he saw the smoke of the engine when it first came in sight, and at once went to the crossing with his flag. After the engine had passed he says that he looked but saw nothing; and walked across the track towards the flag-house. While so doing he was struck by the train of cars, which had been detached from the engine, and was following it over the crossing. He simply failed to see what it was his duty to see, and failed to give the notice he was there to give.

One of the witnesses, who testified in his behalf, was at the crossing in a carriage when the engine passed. He saw the plaintiff fold up his flag and walk towards the flag-house. The witness thereupon started his horse to cross the track, but, seeing the cars coming, at once stopped, and saw them strike the plaintiff on the shoulder while crossing the track directly in front of him. This witness also testified that he thought there was a difficulty in the plaintiff's seeing the cars, as there was a great deal of smoke flying. But the plaintiff stated that, if the smoke or steam from the engine had interfered with his seeing, he should have waited until it passed away.

Judgment on the verdict.

MARY SWEENEY, administratrix, *vs.* BOSTON & ALBANY RAILROAD COMPANY.

Suffolk. Nov. 25, 1878. — Nov. 11, 1879. COLT, J., did not sit. MORTON, J., absent.

A city made a contract with a person to take down and rebuild a bridge used as a highway over the tracks of a railroad corporation. In taking down and rebuilding the abutments of the bridge, if more men were needed temporarily on one side than were there at work, they were called to that side from the other; and were in the habit of crossing the track for that purpose. If a larger force had been employed, there would have been no necessity for crossing. *Held*, that an action would not lie against the railroad corporation for an injury sustained by a workman by being struck by a locomotive engine while so crossing the track.

TORT for personal injuries occasioned to Morgan Sweeney, the plaintiff's intestate, by being struck by an engine owned and run

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by the defendant corporation over its railroad near the Huntington Avenue Bridge, so called, in Boston. At the trial in this court, before *Morton*, J., the jury returned a verdict for the plaintiff for $3000; and the defendant alleged exceptions. The facts appear in the opinion.

G. S. Hale, for the defendant.

S. B. Allen, for the plaintiff.

ENDICOTT, J. A railroad corporation has a right, in the due performance of its public duties, to the use of the land within its location and occupied by its tracks, which is permanent in its nature, and generally speaking exclusive, though not absolutely so under all circumstances. Emergencies and necessities may arise which will justify its invasion; as when it is necessary to pass over it to procure water to stop a conflagration, or to lay hose for the same purpose over the tracks used by the railroad. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574, 580. *Metallic Compression Casting Co.* v. *Fitchburg Railroad*, 109 Mass. 277.

It is impossible to enumerate all the cases in which such a necessity may arise; but it is undoubtedly true, that, in building a bridge over a railroad for the purpose of laying out a highway, or in repairing such a bridge upon an existing way, it may be necessary in certain stages of the progress of the work for the city or town engaged in it, or its servants, to enter upon the railroad in order properly to build or repair the bridge. Whether such obstruction or use is necessary must depend upon the peculiar circumstances of each case, and it is incumbent on those who enter to show that there is a real and imperative necessity for so doing.

In the case at bar, the city of Boston had made a contract with two persons to take down and rebuild the abutments of the bridge on Huntington Avenue over the road of the defendant, and to make alterations and repairs in the superstructure of the bridge itself. The contract contained this clause, "that the contractor must not deposit any stone, earth or other material on the road-bed of the railroad, nor in any way impede or endanger the passage of trains during the progress of the work." The persons thus contracting with the city underlet that portion of the contract which related to the removal and rebuilding of the abutments to sub-contractors, and the plaintiff's intestate was employed by

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them on that work when he received the alleged injury. The bill of exceptions states that they were removing the abutments or beginning to rebuild them at that time, and it is to be inferred from the evidence reported that the bridge had either been taken down or was then impassable. The defendant had five parallel tracks at this point, and engines and trains were constantly passing over them at intervals of fifteen or twenty minutes, as testified by one of the plaintiff's witnesses.

It appears from the evidence that the work upon both abutments was proceeding at the same time, and that it was the practice of the sub-contractors to cross the tracks constantly, and also for the men employed by them to do so, when directed by those in charge. The plaintiff's intestate, when struck by the defendant's engine, was crossing in obedience to a direction by one of the sub-contractors. The only occasion or necessity for this crossing, as stated by all the witnesses, was that the men were wanted on the one side or the other as the work went on. But it also appears that there was no necessary connection between the construction of the two abutments. All the work on either was done on that side, and it does not appear that there was any difficulty in constructing each abutment separately, or in constructing them both at the same time, if a sufficient number of men were employed. The so-called necessity which required the men to cross arose from the manner in which the contractors undertook to do this particular work, and not from any inherent difficulty arising out of the work itself. It was for the convenience of the contractors that the men should be thus transferred, and not because such transfer was necessary for the proper prosecution of the work.

We are, therefore, of opinion that the jury should have been instructed, as requested by the defendant, that, upon the evidence in the case, the contractors and their servants had no legal right to cross or to be upon the tracks.

Exceptions sustained.

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SARAH F. WALKER, administratrix, *vs.* BOSTON & MAINE RAILROAD.

MARY L. MILLER, administratrix, *vs.* SAME.

Suffolk. November 14. — 15, 1879. LORD, J., did not sit. SOULE, J., absent.

Through the negligence of a competent road-master of a railroad corporation, a switch was misplaced, and a locomotive engine and a train of cars were turned upon a side track, the sleepers of which were rotten; the engine and train were thrown from the track, and the engineer and fireman of the engine were injured. *Held*, that they were fellow-servants with the road-master, and could not maintain an action against the corporation.

TWO ACTIONS OF TORT, each for a personal injury occasioned to the plaintiff's intestate by the alleged negligence of the defendant. Trial in this court, before *Ames*, J., who reported the cases for the determination of the full court in substance as follows:

On the day of the accident, a freight train consisting of forty-seven loaded cars, drawn by two engines, started from the defendant's station in Boston in the direction of Andover. Charles C. Walker, the plaintiff's intestate in the first case, and Carl Miller, the plaintiff's intestate in the second case, were the engineer and fireman respectively of the second engine. On arriving at Ballardvale, the train, in consequence of the displacement of a switch, was suddenly turned off upon a side track, upon which two other cars were standing, and, although the forward engine was not thrown from the track, there was a general wreck of the train, the cars were piled together, and great damage was done to the train and to the road-bed. In consequence of this accident, Walker and Miller were so badly injured that they died, Walker in a few minutes, and Miller in about one hour.

Edward Marland testified, for the plaintiffs, that he was the defendant's station agent at Ballardvale, and, as such, sold tickets and had charge of the station; that at the time of the accident he was in Boston; that, when he left Ballardvale, the switches were all right; that, by the rules of the corporation, all station agents have charge of the switches, tracks, sidings, &c. at their stations, and would be held responsible for the security and posi-

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tion of the switches; that he had a copy of these rules for his direction, and was responsible accordingly; that he was in Boston on that day on the business of the defendant, and went to see their freight auditor in the course of his duty; that he had the consent of the defendant's general superintendent to go to Boston, but not at any particular time; that he went perhaps once or twice a month, sometimes on the defendant's business, and sometimes on his own; that when he went, he left his wife in charge of the station; and that he was the postmaster at Ballardvale, keeping the post-office at the station. On cross-examination, he testified that when he left on the day in question he notified the flagman; that the amount of business at the post-office was very small, and did not in the least interfere with his duties as station agent; that he did not think the defendant was aware of his absence in Boston on all occasions, and could not say that he ever went by their orders; that when he said he went there by their consent, he meant only that he went to their office and reported, and no objection was made; that there were a great many switchmen, conductors, road-masters and section bosses in the defendant's employ, and many of the persons employed by the defendant were entrusted with keys to the switches; and that these persons, William Horan being one of them, had been long accustomed, in the discharge of their duties and in the regular management of the road, to lock, unlock, open and move the switches, without objection from the principal officers of the company, and without permission from the witness, while the rule above described was in force.

William Horan testified that he had charge of a section of the road, of about two miles and a quarter in length, and that it was his duty to keep the road-bed in proper condition; that he was the head man of his section, and had two men under him; that, on the day of the accident, and a short time before it occurred, he with his two men came to that station on a hand-car, with three rails to be used in repairs at a crossing; that he shifted the switch in order to make it more convenient and easy to unload the hand-car, and to leave the rails near where they were to be used; that, after the hand-car had passed the switch, he noticed that a bolt in the connecting-rod was not in proper condition, and he accordingly replaced it by another bolt; and

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that he then went to his dinner, leaving the switch in the position in which it was at the time of the accident. On cross-examination, he testified that, all the time he had worked on the road, namely, twelve years, he had had a key which unlocked all the switches in his section, the switch in question being one, and that he had always been accustomed to open and close them as his business required; that finding the bolt on the ground, he went to a car-house and obtained tools and materials for repair, and put the switch in order; that he left it open to the side track and went away to dinner; and that by reason of his mistake in thus leaving the switch, the train ran off upon the siding.

There was evidence tending to show that the sleepers on the side track were decayed and rotten, so that the spikes could easily be pulled out by hand; that Walker's engine was stuck in the ground, the rails under and behind it and behind the tender of the foremost engine having spread apart, the supporting sills being rotten; and that Marland was frequently absent from the station, and went to Boston four or five times a month.

George Byam testified that he was a conductor on the train; that it was a double train, but had the same complement of brakemen, &c. as they would have on a single train; that it was made up by Robinson, the superintendent of the freight yard, and the conductor and engineers of the train had nothing to do with its making up. On cross-examination, he said that by "a double train," he meant a train with two engines; that there was no particular number of cars constituting a single train, and that this was a large and heavy train requiring two engines to draw it.

The plaintiff offered to prove that the station agent was required by the defendant to go to Boston as often as stated, which was excluded. He also offered to show that the salary of the station agent was very small and inadequate, and this was also excluded.

There was no evidence that the condition of the sleepers on the side track had ever been brought to the attention of any officer of the company, or that Horan had ever been known before, during a service of twelve years, to have been wanting in reasonable and ordinary care and attention in the execution of his duties.

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Upon this evidence, the judge ruled that the action could not be maintained, and directed a verdict in each case for the defendant. If this ruling was correct, judgment was to be entered on the verdicts; otherwise, the cases were to stand for trial.

L. M. Child, for the plaintiffs.

S. B. Ives, Jr. & S. Lincoln, Jr., for the defendant, were not called upon.

BY THE COURT. The cause of action in each of these cases was the misplacement of a switch through the negligence of a fellow-servant of the plaintiff's intestate. *Farwell* v. *Boston & Worcester Railroad*, 4 Met. 49. *Gilman* v. *Eastern Railroad*, 10 Allen, 233. *Judgments on the verdicts.*

SAMUEL C. COBB *vs.* JAMES W. RICE & others.

Suffolk. November 13, 1879. MORTON & SOULE, JJ., absent.

Under the Gen. Sts. c. 113, § 8, an appeal claimed from the final decree of a single justice of this court in equity, and entered upon the docket for the county, is at once pending before the full court, and should be entered by the clerk upon its docket; and if the appellant omits seasonably to furnish the proper copies, the appellee may have the decree affirmed, not by petition for neglect to enter the appeal in the full court, but by motion for failure to prosecute the appeal.

BILL OF INTERPLEADER, heard on the pleadings and proofs before *Colt*, J., who on February 8, 1879, made a final decree, from which on February 13 two of the defendants claimed an appeal, and their appeal was entered on the docket of this court for the county.

On November 12, 1879, the other defendants presented a petition to the full court, reciting the decree, and the claim and entry of the appeal as aforesaid, "and now, said appeal not having been entered in this court, nor any other or further action having been taken in said cause by said appellants," praying that the appeal be dismissed and the decree affirmed.

J. H. Benton, Jr., for the petitioners.

B. F. Butler, for the appellants.

GRAY, C. J. Questions of law, arising on the common law side of this court when held by one justice, or in the Superior

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Court, and reserved by bill of exceptions or by report of the judge, as well as those presented by appeal from a judgment of the Superior Court, are required by statute to be entered by the party in the law docket of this court, in order to give the full court jurisdiction thereof; and such entry does not transfer the case, but only the question of law to be determined. Gen. Sts. *c.* 112, §§ 10, 11; *c.* 114, § 14; *c.* 115, § 12. St. 1864, *c.* 111. If the appellant or excepting party does not seasonably so enter the question in this court, provision is made for entering it afterwards upon his petition, or for affirming the judgment below on complaint of the adverse party. Gen. Sts. *c.* 112, §§ 16, 17.

But when an appeal is claimed from a final decree of a single justice of this court sitting in equity, and entered on the docket of the court for the county in which the cause is pending, it is declared that "such appeal shall be thereupon pending before the full court;" it is to be entered upon a separate docket from that of actions at law; and the full court, if the evidence is duly reported, may consider the whole cause, and, in special cases, allow further evidence to be taken, and may, in case of reversing the final decree, remand the cause to a single justice for further proceedings. Gen. Sts. *c.* 113, §§ 8–10, 14, 15, 21. When a party, by accident or mistake, "omits to claim an appeal" from a final decree within thirty days, he may, by petition to the full court, obtain leave to appeal. § 13. But no provision is made, either for a petition of the appellant, or for a complaint of the adverse party, in case of omission to enter the appeal in the full court; because, as soon as the appeal is claimed and entered before a single justice, the cause is at once pending before the full court, and may be dealt with on motion.

Immediately upon the entry of the claim of an appeal from a final decree of a single justice in equity, it is therefore the duty of the clerk to enter the cause upon the equity docket of the full court; and if the appellant neglects to order the proper copies to be prepared for the hearing of the cause before the full court, the remedy of the adverse party is not to be sought by complaint or petition to affirm the decree, for non-entry of the appeal; but by motion to have the appeal dismissed, and the decree affirmed, for failure duly to prosecute the appeal.

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It appearing, by the uncontroverted statements of counsel, that the appellants intend to prosecute their appeal, and that it is by mistake that the proper copies have not been prepared, it is ordered that the petition of the appellees be dismissed, and that, upon copies being furnished to the judges, the

Appeal stand for hearing.

JAMES J. FITZPATRICK *vs.* FITCHBURG RAILROAD COMPANY.

Suffolk. November 17. — 18, 1879. MORTON & SOULE, JJ., absent.

In an action against a railroad corporation for personal injuries occasioned to the plaintiff, a boy nine years old, by being struck by a train of cars run by the defendant along a highway, evidence that, prior to the accident, the plaintiff had been seen on the tracks, and had been warned not to go there, is admissible upon the question whether he was using due care.

TORT for personal injuries occasioned to the plaintiff, a boy nine years old, by being struck by a car of the defendant.

At the trial in this court, before *Ames*, J., it appeared that the tracks of the defendant's railroad at the place of the accident were along a highway in that part of Boston formerly Charlestown. The plaintiff testified that he had been in the habit of collecting hay-seed, which fell upon the tracks from the defendant's cars; that at the time of the accident he was alongside the track on his way home; that he saw the rear of a car, standing still, ahead of him upon the track; that he stopped and was looking across the street, when he heard a bump of the cars, looked round, and was struck on his shoulder and knocked down by the car.

Michael McEllhany, a watchman and policeman in the defendant's employ, testified that, previously to the accident, he had warned the plaintiff not to go on the defendant's track; that on the day before the accident he saw the plaintiff on the track sweeping up hay-seed; that the plaintiff did not notice a hay train which was backing down on him, and the witness caught him up and asked him what he was doing, and he said his mother sent him to get hay-seed; and that the witness told him that he

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would get killed, and to go home and tell his mother not to send him there again.

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One Palmer, a policeman, also testified, against the plaintiff's objection, that he had seen the plaintiff on the defendant's tracks almost every night before the accident, and had told him to keep off; and that he had seen the plaintiff hanging on the cars while in motion, and frequently cautioned him not to do it.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions to the admission of the above evidence.

A. A. Ranney, for the plaintiff.

E. D. Sohier & C. A. Welch, for the defendant.

By the Court. The testimony was competent to prove that the boy had been previously warned, and was therefore aware of the danger, as tending to show that he was not using due care at the time of the accident; and it does not appear to have been admitted for any other purpose.

Exceptions overruled.

Henry Belknap *vs.* Edward Belknap & trustee.

Suffolk. November 17. — 18, 1879. Morton & Soule, JJ., absent.

If A. puts property in trust, the income to be paid to him for life, and after his death to his wife for life, and the principal after the death of both to his executor to be divided equally among his children, and A. retains no power of revocation or further disposition, it does not pass by his will, or by an assignment executed by one of his children by which he conveys, after his father's death, "all my interest of whatever name, nature or description in the estate real and personal of my father, and all my share thereof under the will of my father, together with all income, benefit and advantage thereof accrued or to accrue."

Trustee process. Writ dated October 4, 1877. The defendant was defaulted. Frederick O. Prince, administrator *de bonis non* of the estate of John Belknap, summoned as trustee, answered that at the time of the service of the writ upon him he had in his hands the sum of $1267 belonging to the defendant. H. E. Tremain appeared as claimant of the fund in the hands of the trustee, by virtue of two assignments: the first from the defendant to Edwin R. Tremain, dated February 19, 1876, and

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the second by Edwin R. Tremain to the claimant, dated December 11, 1877. By the first assignment, the defendant conveyed "all my share, right, title and interest, of whatever name, nature or description, of, in or to the estate, real and personal, of my late father, and all my share thereof under the will of my father, together with all income, benefit and advantage thereof accrued or to accrue, which can in any event come to me." By the second assignment the claimant acquired all the rights of Edwin R. Tremain under the first assignment.

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At the trial in this court, before *Endicott*, J., it appeared that John Belknap, the father of the defendant, on January 1, 1856, purchased of the Massachusetts Hospital Life Insurance Company an "annuity in trust" for $5000, the net income of which was payable to John during his life, and after his death to his wife Mary if she should survive him; and after the death of the survivor, the principal and any accrued interest was to be paid "to the executors or administrators of said John Belknap, to be divided equally among his children," and the issue of any deceased child by right of representation. John Belknap died on February 7, 1856, leaving a will, by which he gave the residue of his estate to the plaintiff and defendant as trustees to hold during the life of his wife on certain trusts, and, on her death, to divide the same among his children. His wife Mary died August 16, 1877. The whole annuity fund was thereupon paid over by the company, under the provisions of the trust, to Prince, as administrator *de bonis non* of John Belknap. Edward's share of this fund was $1267.

The judge ruled that the interest of the defendant in the fund did not pass by the assignments, and that the claimant was not entitled thereto; and ordered the trustee to be charged. The claimant alleged exceptions.

M. F. Dickinson, Jr., for the claimant.

G. A. James, for the plaintiff, was not called upon.

GRAY, C. J. The terms of the assignment executed by the defendant, under which the claimant asserts a title to the fund in the hands of the trustee, are appropriate to designate and transfer the share or interest which the assignor may have taken in the estate of his deceased father, either as heir or next of kin, or by will, as well as in any income or benefit of that

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estate. But they do not purport to include anything that did not either form part of the father's estate at the time of his death, or afterwards grow out of the same.

The sum which the father in his lifetime had transferred, reserving no power of revocation or of further disposition, to the Massachusetts Hospital Life Insurance Company, in trust to pay the income to himself and his wife for life, and, after the death of both, to pay the principal to his executors or administrators, to be divided equally among his children, and the issue of any deceased child by right of representation, had, immediately upon the execution of that trust settlement, ceased to be part of his estate, or to be subject in any way to his control; and, when paid to his executors or administrators, would vest in them under the provisions of the transfer and instrument of trust so executed in the father's lifetime, and not by virtue of his will, or by operation of law. Any right of the defendant in this sum in the hands of his father's administrator, summoned as trustee in this case, is derived from the gift made by his father in his lifetime, and is in no proper sense a share, interest or benefit in or of the father's estate, and therefore did not pass under the assignments to the claimant. *Exceptions overruled.*

MICHAEL MCFEELY, administrator, *vs.* PETER B. SCOTT.

Suffolk. April 1, 5. — July 26, 1879. AMES & LORD, JJ., absent.

SAME *vs.* SAME.

Middlesex. November 18. — 19, 1879. MORTON & SOULE, JJ., absent.

Under the Gen. Sts. *c.* 117, § 4, it is no defence to an action by an administrator, that his appointment as administrator was procured by his fraud and false statements respecting the place of residence of his intestate, unless the want of jurisdiction in the Probate Court to appoint appears of record.

A., who had been appointed administrator of B., brought an action at law against C. to recover money entrusted to C. by A.'s intestate; and cited C. to appear in the Probate Court to be examined concerning B.'s property in his hands. C. set up in defence of both proceedings that A.'s appointment was procured by his fraud and false statements respecting the residence of his intestate, and that the Probate Court had no jurisdiction to appoint him. A justice of this court

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reported the facts in the action at law for the determination of the full court, and reversed an order of the Probate Court directing C. to answer, on the ground that that court had no jurisdiction to appoint A. on account of his fraud and false statements in procuring his appointment. A., relying on the report of the action at law, and supposing that C. would abide the determination of this court thereon, omitted to seasonably take an appeal from the order in the probate proceeding. *Held*, that a petition for leave to appeal, under the Gen. Sts. c. 113, § 13, on the ground of mistake, should be granted.

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THE FIRST CASE was an action of contract for money had and received. The declaration alleged that Bernard McFeely in his lifetime entrusted certain funds to the keeping of the defendant; that Bernard subsequently died, and the plaintiff was on October 24, 1876, duly appointed his administrator by the Probate Court for the county of Middlesex; and a demand upon the defendant, and his refusal to pay. The defendant filed an answer in abatement, denying the jurisdiction of the Probate Court to grant letters of administration to the plaintiff, alleging that the intestate never was an inhabitant of, or a resident in, the county of Middlesex, and left no estate to be administered therein; and that administration was fraudulently obtained by the false representations of the plaintiff.

At the trial in this court, without a jury, *Lord*, J., found the allegations of the answer in abatement to be true, and reserved for the determination of the full court the question whether judgment should be entered for the defendant.

H. Stevens, for the plaintiff.

A. A. Ranney, for the defendant.

COLT, J. It is provided by statute, that the jurisdiction assumed in any case by the Probate Court, "so far as it depends on the place of residence of a person, shall not be contested in any suit or proceeding, except in an appeal in the original case, or when the want of jurisdiction appears on the same record." Gen. Sts. c. 117, § 4. Rev. Sts. c. 83, § 12.

It appears from the records of the Probate Court in this case, that the only ground alleged in the plaintiff's petition for the grant of administration in Middlesex is that the intestate last dwelt in Cambridge in that county. The appointment of the plaintiff upon this petition implies that the court passed upon the question of residence, and assumed jurisdiction because of the intestate's residence in that county. There is nothing, there-

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fore, in the record which shows want of jurisdiction, and the case is brought clearly within the provisions of the statute.

Before this statute was enacted, it had been often decided, that, where jurisdiction was assumed in the wrong county, all proceedings under the grant of administration were absolutely void; and that the fact that the Probate Court had passed on the question was not enough to exclude any other court from inquiring into it. See *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, and cases there cited. As to other parties innocently deriving title from, or dealing with, an administrator illegally appointed, the application of the rule was often attended with hardship, and the purpose of this section of the statute doubtless was to protect such parties by making the decree of the Probate Court in all collateral proceedings conclusive on the question of the intestate's residence. The commissioners for the revision of the statutes, in a note to this section, say that "creditors, heirs, legatees, and all others interested in the question, have a right to appear in the original suit, and contest the jurisdiction; and if they omit to do so, they cannot justly complain of the decision. As to all other persons, it is a matter of indifference, whether the estate is settled" "in one county or another."

The only fraud and false statements of the plaintiff in procuring letters of administration related to the intestate's place of residence. To allow the defendant to defeat this action by proof of such fraud and false statements only, would be to allow a party, upon the question of the residence of the intestate, to contest the jurisdiction of the Probate Court, in a suit which is "not an appeal in the original case," in violation, as we think, of the spirit and letter of the statute.

Answer in abatement adjudged bad.

THE SECOND CASE was a petition filed October 2, 1879, for leave to appeal from a decree of a single justice of this court sustaining an appeal taken by Peter B. Scott from an order of the Probate Court of the county of Middlesex.

The petition set forth the proceedings in the first case; and further alleged that on December 1, 1876, the petitioner cited Scott to appear before the Probate Court of the county of Mid-

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dlesex to be examined as to the estate of Bernard McFeely in his possession, under the Gen. Sts. *c.* 96, § 6; that Scott appeared and refused to be examined, on the ground that the court had no jurisdiction to appoint the petitioner administrator, for the reasons set forth in the answer in abatement in the first case; that the Probate Court ordered him to answer; and he appealed to this court; that his appeal was heard and dismissed by a single justice of this court, and he alleged exceptions which were allowed; that on February 7, 1879, the first case was by agreement of parties reported for the determination of the full court; and at the same time the single justice reconsidered his ruling, sustained the appeal from the Probate Court, and decreed as follows: "That the order of said Probate Court requiring said Scott to answer be reversed, said court having no jurisdiction of the subject-matter in which said decree was passed."

The petition further alleged, that the questions of want of jurisdiction and fraud were precisely the same in both cases; and that it was understood and agreed between the parties, by their respective counsel, that these questions should be submitted to and decided by this court upon the facts as agreed in the first case; that the petitioner always regarded the decision rendered on the probate appeal as merely a *pro forma* judgment, not doubting that the decision of this court upon the questions so distinctly stated and upon the facts agreed would be deemed final, and be acquiesced in by Scott; and therefore omitted to claim an appeal in the time allowed by law; and that on September 19, 1879, Scott in his answer to the merits in the first case set up the decree on the probate appeal as a defence.

Stevens, for the petitioner.

Ranney, contra.

GRAY, C. J. The petitioner shows a clear case of mistake, upon which he should be granted leave to appeal. Gen. Sts. *c.* 113, §§ 13, 14. If the question that he desires to bring before us is not sufficiently presented by the record of the decree appealed from, (which we by no means intimate,) he may apply to the justice who made that decree for a report of the facts on which it was based. *Wright* v. *Wright*, 13 Allen, 207.

Leave to appeal granted.

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HENRY C. HAWKINS & another *vs.* CATHERINE GRAHAM & trustee.

Bristol. Oct. 29. — Nov. 3, 1879. COLT & AMES, JJ., absent.

If a person summoned as trustee files an answer at the first term, upon which he is entitled to be discharged, and no interrogatories or further allegations are filed, he is not entitled to costs at subsequent terms, while the case is pending on the docket, although the principal defendant does not appear.

Under the Gen. Sts. *c.* 142, § 60, a person summoned as trustee is not entitled to an attorney's fee, nor to any allowance for counsel fees, except at the discretion of the court; and the exercise of such discretion by the Superior Court cannot be revised by this court on appeal by the trustee from the taxation of costs.

APPEAL from the taxation of costs in a trustee process. The record showed the following facts:

The action was returnable at September term 1878 of the Superior Court. At that term, Henry Matthews, summoned as trustee, answered that, at the time of the service of the writ upon him, he had not in his hands, possession or control any goods, effects or credits of the defendant; and that two other writs of other plaintiffs, returnable at the same term as the present writ, had been served upon him as alleged trustee; and prayed to be discharged, and for his costs. The trustee afterwards, at the same term, filed a supplemental answer, alleging that, since filing the original answer, he had learned that, previously to the service upon him of the writ in this action, there had been served upon him, as supposed trustee, a writ in another action against Graham, which action was duly entered and was still pending; and that, between the time of service upon him of the writ in that action, and the service upon him of the writ in the present action, the pecuniary relations between him and the defendant had in no respect been changed. The defendant, though summoned, did not appear; and the case was continued from term to term until June term 1879, when the defendant was defaulted, and the trustee discharged.

The trustee claimed a term fee and travel for each term that the case was in court, and an attorney's fee for the first term. The clerk allowed the term fee and travel for the first term, but

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disallowed the attorney's fee for that term, and also disallowed the costs of the subsequent terms. *Brigham*, C. J., affirmed the clerk's taxation of costs; and the trustee appealed to this court.

B. K. Lovatt, for the trustee.

W. H. Pierce, for the plaintiffs.

GRAY, C. J. The trustee having filed answers at the first term, upon the face of which he appeared to be entitled to his discharge, and the plaintiffs having taken no step to avoid the effect thereof by further interrogatories or allegations, the trustee had no occasion to attend, and was not entitled to costs, at subsequent terms, while the case was still pending upon the docket and had not been disposed of as between the principal parties, no final judgment having been entered on the default of the defendant. *Wasson* v. *Bowman*, 117 Mass. 91. *Washburn* v. *Clarkson*, 123 Mass. 319.

The trustee was not entitled to an attorney's fee, nor to any allowance for counsel fees, except at the discretion of the court. *Holbrook* v. *Waters*, 19 Pick. 354. Gen. Sts. *c.* 142, § 60. And this court has no authority to revise the exercise of the discretion of the Superior Court in this respect. *Briggs* v. *Taunton*, 110 Mass. 423, 427. Since the decision in *Holbrook* v. *Waters*, appeals to this court, which under former statutes opened the whole case, in matters of fact as well as of law, have been limited to questions of law only. Rev. Sts. *c.* 82, § 6. St. 1840, *c.* 87, §§ 4, 5. Gen. Sts. *c.* 114, § 10. *Taxation affirmed.*

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ANTONE THOMAS *vs.* JOHN P. KNOWLES, 2d.

Bristol. Oct. 30. — Nov. 3, 1879. COLT & AMES, JJ., absent.

A written agreement recited that A. had bought of B. a fractional part of a vessel, with the understanding that B. was "to take her back at the end of the voyage" at a certain rate; and that A. agreed that B. should "have her at that rate." In an action for breach of this agreement, by A. against B., it appeared that, after the vessel had ended that voyage and started on another, A. tendered a bill of sale of his share in the vessel to the defendant, but the vessel had then become a wreck, and had been abandoned and sunk in the ocean. *Held*, that the action could not be maintained.

CONTRACT for breach of the following agreement, signed by the plaintiff and the defendant: "New Bedford, June 9, 1876. This is to certify that I have this day bought of John P. Knowles 2d $\frac{8}{32}$ of the bark Sarah at the rate of five thousand dollars, as she was discharged from her late voyage, with the understanding that he, the said John P. Knowles 2d is to take her back at the end of the voyage at the rate of thirty-two hundred dollars, and I, the said Antone Thomas, the present purchaser, agree that the said Knowles shall have her at that rate." Writ dated January 9, 1879, returnable to the Superior Court. The answer admitted the making of the contract declared on; and alleged an offer to perform on the part of the defendant, and a refusal to perform on the part of the plaintiff.

The case was referred to an auditor, who found the following facts:

The defendant was agent and part owner of the bark Sarah, a vessel employed and fitted for the whaling business from the port of New Bedford. In the course of the business, she arrived home from a whaling voyage on May 3, 1876, and, after discharging her cargo, and being repaired and refitted, she sailed upon another whaling voyage on June 20, 1876. From this voyage she arrived home on September 3, 1878, was discharged, again repaired and refitted, and sailed upon another whaling voyage on October 12, 1878, in the forenoon. She was capsized in a severe gale at sea on that night, and all hands lost except three men who clung to the wreck until October 15, when they were rescued by a pilot-boat. As to her subsequent fate, it was

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agreed by the parties that the last seen of the bark was by the crew of the pilot boat on the 15th, and the bark was then capsized, and full of water, and abandoned, and nothing has been since heard from her, although when last seen she was afloat on the surface of the ocean.

While the vessel was in port, on June 16, 1876, the defendant sold and duly conveyed by a bill of sale, properly recorded, three thirty-seconds of the bark to the plaintiff. At the time of the sale, the parties duly executed the agreement for reconveyance declared on. While the bark was refitting for her last voyage, the plaintiff, who was engaged in the business of outfitting and furnishing seamen for the whaling business, endeavored to ship some men on this bark; but the defendant refused to receive the men, saying to the plaintiff, "You owned in her the last voyage; but you have nothing to do with her now." On another similar occasion he said to the plaintiff, "I never had an outfitter for owner before, and I never will again." Soon after these conversations, and about a week before the vessel sailed, the defendant read the contract declared on to the plaintiff, and asked him if he was going to give him, the defendant, a bill of sale; he told the plaintiff the money was ready for him; that the vessel was nearly ready for sea, and if the plaintiff did not give up the bill of sale, the vessel would be cleared with the plaintiff as an owner. The plaintiff said he did not think he should give the bill of sale for the amount named in the contract. The day before the bark sailed, the plaintiff caused a bill of sale in due form, and acknowledged, to be prepared, in which the consideration was stated to be $300. Taking this bill of sale with him, he twice during the day endeavored to find the defendant, but did not see him. He then gave the bill of sale to an attorney, who, acting under instructions from the plaintiff, went on the same day with the bill of sale to the defendant, and said to him, "I am authorized by Mr. Thomas to deliver you this bill of sale upon your payment to me of $450." The defendant said, "I have a written agreement with Mr. Thomas to sell his interest for $300. I am willing to carry out my agreement, and shall make him carry out his contract." The attorney replied, "Thomas claims that he is not bound by that agreement, as, at the time of making it, the vessel was

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represented to be sound, whereas she was not; and much money had to be expended in repairs; and also the outfits for the voyage were much larger than it was represented they would be; so that the whole enterprise had cost $19,000 or thereabouts, instead of $12,000, as he, Thomas, had been led to believe it would be. And so Thomas claims he should have $450 for his interest in the vessel." To this the defendant said, "The contract was executed after the condition of the vessel was fully known, and the price of the repurchase was governed by that fact; I shall compel Thomas to carry out his agreement." No money or check was offered to the attorney by the defendant. The attorney reported this interview to the plaintiff, and handed him back the bill of sale. On October 14, after the bark had sailed, there was a rumor to the effect that the bark had put into Newport disabled. The defendant, while trying to ascertain the source of the rumor, met the plaintiff, and said to him, "Will you give me a bill of sale of the Sarah, or do you decline to do it?" The plaintiff replied, "I don't say whether I will or not." There were no further conversations on the subject of the bill of sale between the parties. On January 8, 1879, the bill of sale above referred to was duly tendered by the plaintiff's attorney to the defendant, who refused it.

The auditor found that the vessel was not afloat, but was sunk in the ocean, on January 8, 1879; and found for the defendant.

The parties then agreed to accept the auditor's report as an agree statement of facts. The Superior Court ordered judgment for the defendant; and the plaintiff appealed to this court.

G. Marston, for the plaintiff.

C. W. Clifford, for the defendant, was not called upon.

GRAY, C. J. The stipulation, in the contract of sale of the vessel from the defendant to the plaintiff, that the defendant should, at the end of the voyage, "take her back" and "have her" at a certain price, clearly contemplated that the plaintiff, when the voyage was ended, should deliver or tender a bill of sale of the vessel to the defendant. It being agreed that, at the time when the plaintiff tendered a bill of sale, the vessel had become a wreck, abandoned and sunk in the ocean, the plaintiff

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fails to show that she existed at that time in the character of a ship, as the contract required, and therefore cannot maintain this action. *Barr* v. *Gibson*, 3 M. & W. 390, 400. *Wells* v. *Calnan*, 107 Mass. 514. *Judgment affirmed.*

DAVID D. GRINNELL *vs.* JOHN SPINK.

Bristol. Oct. 28. — Nov. 5, 1879. COLT & AMES, JJ., absent.

The giving by a creditor of a receipt, not under seal, for a certain sum "in full" of a claim for a larger sum, is not of itself conclusive evidence of payment; and the payment by the debtor of the sum acknowledged in the receipt does not operate as a discharge, unless it is received in accord and satisfaction of a disputed claim.

In an action upon an account annexed, the defence of accord and satisfaction is not open under an answer containing a general denial, and alleging payment.

CONTRACT upon an account annexed for work and materials. Answer: 1. A general denial. 2. Payment.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the plaintiff put in evidence tending to show that he performed labor and furnished materials for the defendant on the latter's house, to the value of $142.43; and that, at the time he rendered his bill for said amount, the defendant disputed the amount, and refused to pay the bill. It also appeared that subsequently, and before any payment was made, the plaintiff and the defendant again looked over the bill, and the defendant again objected to the amount and to the bill generally.

The defendant testified that the plaintiff then agreed to accept $120 in payment of the bill; and it was admitted that he gave the following receipt: "$120.00. Fall River, August 25, 1877. Received of John Spink one hundred and twenty dollars in full for stock and labor on his house corner Second and Cottage Streets, to date. David D. Grinnell."

The plaintiff testified that, before and after the giving of the receipt, he told the defendant that he did not propose to receipt the bill until he got it; that twelve men would decide whether he should have any more; this conversation was denied by the

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defendant. The plaintiff further testified that he took his bill away; and explained the receipt by saying that he intended it for a receipt in full for $120, and no more, and that, at the time he gave it, he intended to sue the defendant for the balance.

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The defendant offered the receipt in evidence; and asked the judge to rule that the plaintiff could not recover. The judge refused so to rule; and ruled that there was no defence open under the answer but that of payment; that the receipt was *prima facie* proof of this, but it was rebutted by the establishment of the plaintiff's claim for a larger sum than the amount paid; and that, under the pleadings, no question was open as to the effect of the payment as an accord and satisfaction, or of the conduct of the plaintiff as amounting to an estoppel; and ordered judgment for the plaintiff for the balance of his claim. The defendant alleged exceptions.

N. Hatheway & J. W. Cummings, for the defendant.

T. H. Niles, for the plaintiff.

GRAY, C. J. The receipt, not being under seal, did not operate as a technical release, and was not of itself conclusive evidence of payment; and there being conflicting testimony upon the question whether the sum paid was the whole amount originally due to the plaintiff, the payment of that sum would not as matter of law operate as a discharge, unless it was received in accord and satisfaction of a disputed claim. *Tuttle* v. *Tuttle*, 12 Met. 551. *Harriman* v. *Harriman*, 12 Gray, 341. The judge, before whom the case was tried without a jury, found as matter of fact that there was no payment, and rightly ruled as matter of law that the defence of accord and satisfaction was not open under the answer. Gen. Sts. *c.* 129, § 20. *Wheaton* v. *Nelson*, 11 Gray, 15. *Parker* v. *Lowell*, 11 Gray, 353. *Foster* v. *Dawber*, 6 Exch. 839. ***Exceptions overruled.***

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NEW BEDFORD FIVE CENTS SAVINGS BANK *vs.* UNION MILL COMPANY & others.

Bristol. Oct. 28. — Nov. 26, 1879. COLT & AMES, JJ., absent.

It is no ground for postponing judgment in an action on a promissory note, signed by a corporation as principal and an individual as surety, that the plaintiff has proved the note against the estate of the principal in bankruptcy, and that the amount of the dividend thereon has not been determined.

CONTRACT on the following promissory note signed by the defendants: "$30,000. New Bedford, July 14, 1877. For value received, we, Union Mill Co. of Fall River as principal, and S. A. Chace, E. C. Kilburn and F. H. Stafford as sureties, jointly and severally, promise to pay the treasurer of the New Bedford Five Cents Savings Bank, or order, thirty thousand dollars, on demand, with interest, on usual terms 6 per cent." Stafford alone defended; and the case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court on appeal, on an agreed statement of facts in substance as follows:

The defendant Stafford is liable on the note, unless the following facts relieve him, and judgment is to be entered on the note, unless the court rules that the case is not in a condition for judgment as matter of law. Prior to August 1, 1878, the plaintiff proved its debt against the Union Mill Company in bankruptcy. On August 6, 1878, the plaintiff, with the consent of the defendant Stafford, and upon his written agreement that said act should not affect his liability, released and discharged E. C. Kilburn as a co-surety, the latter, by agreement with Stafford, conveying certain property to trustees under a declaration of trust.

Propositions have been issued by the trustees of the Union Mill Company in bankruptcy to the creditors, inviting them to subscribe to the extent of thirty per cent of their respective claims, as proved in bankruptcy, to the capital stock of a new corporation to be organized under the laws of Massachusetts to purchase the property and estate of the Union Mill Company. The defendant Stafford is one of said trustees. The plaintiff has

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never offered to assign its claim to the defendant, unless he took up the note in suit.

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H. K. Braley & M. G. B. Swift, for Stafford.

C. W. Clifford, for the plaintiff.

ENDICOTT, J. The defendant does not deny his liability, but contends that the case should be continued for judgment until the amount of the dividend of the Union Mill Company can be ascertained and appropriated to the payment of the note. But we see no good reason why the case should be thus postponed, even if we assume that, as against the plaintiff, the liability of the company and the defendant is that of principal and surety. Where a principal and surety are liable on a note, and both are bankrupts, the holder may prove the amount against each, and receive dividends on the full amount, provided he does not receive in all more than his due; and when he has received a dividend from the principal, he may maintain an action for the balance against the surety. *Sohier* v. *Loring*, 6 Cush. 537. *National Mount Wollaston Bank* v. *Porter*, 122 Mass. 308.

In the case at bar, the plaintiff, being the payee of the note, has proved it in bankruptcy against the Union Mill Company, the principal, but has received no dividend. We are of opinion that he is entitled to judgment against the defendant, who is described in the note as surety; and, when the defendant has paid it, he will be entitled to stand in the place of the plaintiff, and receive any dividend which may be paid in bankruptcy by the Union Mill Company. U. S. Rev. Sts. § 5070.

Judgment for the plaintiff.

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JOHN BUTLER *vs.* CHARLES FRANK.

Bristol. Oct. 28. — Nov. 28, 1879. COLT & AMES, JJ., absent.

A. owed a debt to B. which B. had assigned to C. D., who had attached the debt, agreed that the amount thereof might be paid by A. to C. C., by mistake, demanded and received of A. part only of the debt, and A. thereupon paid the balance to D. *Held*, that C. could not maintain an action of money had and received against D. for this balance.

GRAY, C. J. Charles Frank brought an action against James Duggan as principal defendant and the city of Fall River as trustee, the record of which shows a recovery of judgment by Frank against Duggan for $40.75, but no proceedings with regard to the trustee or to any claimant.

In the statement of facts, upon which the present case has been submitted to us, it is agreed that at the trial of the trustee process John Butler came in as claimant under an assignment from Duggan, and his claim was allowed to the amount of $108.59; that the attorneys for him and for Frank agreed that the claimant need not obtain an execution, but might go to the trustee and get the money in its hands, which amounted to $91.88; that the attorney for the claimant, supposing that judgment had been given for him in the sum of $55 only, obtained that sum from the trustee, and gave the trustee a receipt therefor; and the trustee paid the balance of $36.88 in its hands to Frank, who afterwards on the same day, upon the claimant's attorney discovering and explaining to him the mistake and demanding this sum, refused to pay it.

This action is brought by the claimant to recover the money so paid to Frank by the trustee, as money had and received to the plaintiff's use.

We are of opinion that the action cannot be maintained. Although it is stated to have been agreed between the claimant and the plaintiff in the trustee process that the claimant need not obtain execution, it is quite clear that, even without any such agreement, the claimant could not have obtained judgment or execution against either of them, but that the only judgment that the court could have rendered, if satisfied that the plaintiff had made out his claim to the fund, would have been to dis-

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charge the trustee. *Gifford* v. *Rockett*, 119 Mass. 71. The case then stands thus: The city of Fall River owed a debt to Duggan, which Duggan had assigned to Butler; Frank, who had attached that debt, agreed that the amount thereof might be paid by the debtor to the assignee of the debt; the assignee, by mistake, demanded and received of the debtor part only of the debt, and the debtor thereupon paid the rest to Frank. Frank may be liable to the original debtor for this sum, as for money had and received, on the ground that it has been paid to Frank under a mistake of fact. The debtor (if not discharged by reason of having made the payment in reliance on the receipt given by the assignee of the debt) would be liable for this sum as part of the original debt; but, not having promised to pay it to the assignee, and the debt not being negotiable, could not be sued at law, except in the name of the original creditor, Duggan. As the assignee could not maintain an action at law in his own name against the original debtor, there is still less reason for allowing him to maintain such an action against another person, to whom that debtor has paid the sum, who has never received it for him or undertaken to pay it to him, and who, if that payment by the debtor was made by mistake of fact, is himself liable to refund the money to him. In short, if Frank, the present defendant, is liable to any action for this sum, it must be brought in the name of the city of Fall River, or possibly of Duggan, and not in that of this plaintiff.

Judgment for the defendant.

H. K. Braley & M. G. B. Swift, for the plaintiff.

C. Frank, pro se.

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CHARLES P. NEWELL *vs.* ARTHUR R. BORDEN & others.

Bristol. Oct. 29. — Nov. 28, 1879. COLT & AMES, JJ., absent.

In an action against the members of an unincorporated association, for work and materials furnished in fitting up the room in which the association held its meetings, oral evidence that the defendants, at one of the meetings of the association, passed a vote authorizing the act of the defendant, who ordered the work and materials of the plaintiff, is competent to show that the other defendants were jointly liable with him; and the fact that one of the defendants, who acted as clerk of the meeting at which such vote was passed, has since destroyed the informal minutes which he had taken for the purpose of preparing a record, does not preclude the plaintiff from showing that such a vote was passed.

CONTRACT on an account annexed for work and materials, originally brought in the Second District Court of Bristol, against the first-named defendant alone. Judgment was entered for the plaintiff; and the defendant appealed to the Superior Court. In that court he filed an answer in abatement, alleging the non-joinder of certain persons as defendants, and also an answer containing a general denial. Both issues were tried together, and a verdict was rendered for the defendant upon his answer in abatement. The plaintiff then amended his writ and pleadings, and summoned in those persons named in the answer in abatement, as co-defendants in this action. Some of these appeared and filed answers containing a general denial, and alleging that the goods and labor declared for were furnished to the defendant Borden individually. Borden also defended under his answer of a general denial. The other defendants, eight in number, were defaulted.

At the trial before *Rockwell*, J., it appeared in evidence that the defendants were members of the Quequechan Steam Fire-Engine Company in Fall River, an unincorporated association, but having regular officers including a clerk, who kept a record of all meetings; that the company met about once a month; that, on the last day of the year 1875, they moved from their old engine-house to a new one built and owned by the city of Fall River; that the plaintiff, who had already done some work in the way of fitting up the new house under orders from the city, was waited upon by the defendant Borden, then foreman of the company, and, acting under his direction, furnished

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certain goods and labor for further fitting up the house; and that, soon afterwards, the city paid for a part of the goods and labor so furnished, leaving a balance of $282.69, for which this action is brought.

The plaintiff testified that, at the time of ordering the goods and labor, Borden said the city would probably pay for everything, and that he might open an account with it, but that Borden would be responsible and would see him paid; that the matter was entirely in his hands; and that the plaintiff gave credit to Borden. Borden testified that the goods and labor were procured on the credit of the Quequechan Engine Com pany; and that he gave the plaintiff so to understand.

The plaintiff sought to maintain his action, first, upon the ground that Borden was authorized to act with the plaintiff in the premises by a direct vote of these defendants, or otherwise by informal directions at a meeting of the company held just previous to their removal from the old to the new engine-house; secondly, upon the ground that these defendants, by their subsequent use and enjoyment of the property, and silence and acquiescence with a knowledge of the facts, had ratified the acts of Borden, and become liable to the plaintiff.

James R. Francis, one of the defendants who had been defaulted, testified for the plaintiff that he was clerk *pro tem.* of a meeting of the company just previous to their removal; that a vote was passed in respect to fitting up the new room; that the record of the meeting was kept on the back of an envelope in lead pencilling; that the pencil-marks became blurred, and that a few days after the meeting he tore the envelope up, subsequently giving to the regular clerk of the company the contents of the record as he remembered it. The witness was asked to state the substance of this vote as he remembered it. This question was objected to by the defendants, and excluded. The witness further testified that he personally had authorized and consented to Borden's acts; that he had seen the defendants Lottie, Winter, Burr and Wordell at the meetings of the company before and after the removal; and that he had "heard them talk both ways, that they were responsible and that they were not." The defendant objecting to the use of the word "them" as too general, the witness specified one instance of a

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talk with Wordell in which the latter said, "I suppose we have got it to pay for."

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The plaintiff called Borden and asked him whether either or any of these defendants had instructed him to act for them in procuring the goods and labor in question. The witness answered, "No." The plaintiff then asked the witness the following question: "At the meeting of the company held just previous to their removal, was anything said or done in respect to fitting up the new room?" The question was objected to by the defendants, on the ground that, the record of the meeting having been destroyed, oral evidence could not be introduced as to what took place there, and that evidence of what the company did was not admissible where the issue was that of the individual liability of these defendants. The question was excluded. The witness further testified that he had heard objections made by the members of the company to this bill; that these objections were to the effect that it was exorbitant; that no objection was made to what he had done until recently; that he did not remember any one saying anything to him privately about it; and that almost everything was said in company meeting.

It also appeared in evidence that the plaintiff had sent bills made out against the Quequechan Engine Company to the company, one through Borden, one by mail, and one through the foreman who succeeded Borden. A record of the company, dated in September 1876, was put in evidence, which read as follows: "The bill of Mr. Newell for fitting up the room was read to the company, and no action taken upon it." There was no evidence that the defendants used the room at the new engine-house at any other time than their regular monthly meetings; or that any notice was ever given to the plaintiff by any of the defendants that they repudiated the act of Borden, or that the plaintiff might take back the materials he had furnished.

The defendants Lottie, Wordell, Tower, Winter and Burr asked the judge to rule that there was no evidence to go to the jury of their liability. The judge so ruled, and directed a verdict for them.

The defendant Borden asked the judge to rule that there was no evidence to go to the jury of his joint liability; and that the verdict at the former trial was conclusive as to his sole liability.

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The judge so ruled, and directed a verdict for him. The plaintiff alleged exceptions.

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J. F. Jackson, for the plaintiff.

H. K. Braley, for Borden.

A. J. Jennings, for the other defendants.

GRAY, C. J. The defendants were not a corporation, and any record of their doings, if admissible in their favor, would not be the only evidence of facts stated therein. Oral testimony that they had passed a vote authorizing the acts of Borden was competent to show that the other defendants were jointly liable with him. The fact that one of them, who acted as clerk of the meeting, had since destroyed the informal minutes which he had taken for the purpose of preparing a record, afforded no reason for depriving the plaintiff of the benefit of his testimony. The exclusion of this evidence, and the ruling that there was no evidence of a joint liability to be submitted to the jury, were therefore erroneous; and the verdict must be set aside, both as to Borden and as to the other defendants; and it is unnecessary to consider what, if any, effect could legally be given to the answer in abatement first filed by Borden in the Superior Court after judgment against him on the merits in the District Court, or to the verdict rendered upon the answer in abatement so filed. *Exceptions sustained.*

SUSAN R. DUNHAM *vs.* ALEXANDER B. DUNHAM.

Nantucket. Oct. 30. — Nov. 6, 1879. COLT & AMES, JJ., absent.

Under a deed of land to "S. D., wife of A. D.," "to be held by said D. as a homestead," *habendum* "to the said S. D. and her heirs and assigns, to her and their use and behoof forever," the wife acquires a homestead; and if, after she has ceased to live with her husband and has obtained an absolute divorce from him, he continues to occupy the premises, no order having been made in regard to the land in the divorce proceedings, she may recover possession of them from him by a writ of entry.

WRIT OF ENTRY to recover a parcel of land in Nantucket. Plea, *nul disseisin*. Trial in the Superior Court before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

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The demandant derived her title to the demanded premises under a deed dated April 11, 1871, by which John R. Easton, "in consideration of $750 paid by Susan R. Dunham, wife of Alexander B. Dunham," conveyed the land in question with the dwelling-house thereon "unto the said Susan R. Durham." After the description of the premises was this clause: "to be held by said Dunham as a homestead." Then followed the habendum, "to the said Susan R. Dunham, her heirs and assigns, to her and their use and behoof forever."

At the time the deed was given, the demandant and tenant were living together as husband and wife; the entire consideration for the deed was paid by the husband, and no part thereof came from the wife. The tenant was then a householder having two minor children, and they occupied the premises together until February 1877, when the wife and children left, and the tenant has continued to occupy the premises to the present time. By a decree of the Supreme Judicial Court at November term 1878, in the county of Bristol, the demandant was divorced from the tenant, for the cause of extreme cruelty, and no order was passed respecting alimony or the property of the parties. Two children of the parties are living, one twenty-four years of age, and the other nineteen. The tenant is, and always has been, in possession of the premises, since the giving of the deed; and the demandant has not been in possession or occupation of any part of the premises since February, 1877.

Upon this evidence, the tenant asked the judge to rule that the demandant could not maintain her action. The judge refused so to rule, and directed a verdict for the demandant. The tenant alleged exceptions.

J. Brown, for the tenant.

G. Marston, for the demandant.

SOULE, J. The deed to the demandant contains a statement that the premises are to be held "by said Dunham" as a homestead. This must be interpreted as meaning that they are to be so held by the grantee. The habendum is to her and her heirs and assigns to their own use. A declaration that the premises were to be held as a homestead by a third person would make the deed inconsistent with itself.

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Whether such a deed would give to the husband a homestead right, while the marriage relation continued between him and the grantee, it is not necessary for us to consider, because, if it did, such right was destroyed by the divorce in favor of the demandant. It would be a somewhat anomalous state of things which permitted a man to maintain such a right in the lands of the woman who had obtained a decree of divorce which released her from all relations and duties to him, and rendered it impossible that they should be members of the same family. And it is provided by the Gen. Sts. *c.* 107, § 40, that, on the dissolution of a marriage for any cause except adultery on the part of the wife, the wife shall be entitled to the immediate possession of all her real estate, in like manner as if her husband were dead. The only modification of this provision is in the St. of 1873, *c.* 371, § 7, which provides that, when a divorce is decreed for any cause, the court granting it may decree alimony to the wife, or any part of her estate to her husband in the nature of alimony. As no right or estate in the demanded premises was decreed to the tenant, in the divorce proceedings, his possession of the demandant's real estate, after the divorce, was without right, and she is entitled to judgment. *Exceptions overruled.*

JOHN P. GILMAN & others *vs.* CITY OF HAVERHILL.
BOSTON AND MAINE RAILROAD *vs.* SAME.

Essex. Nov. 6. — 12, 1879. COLT & AMES, JJ., absent. LORD, J., did not sit.

The owner of land taken for the laying out or altering of a highway is entitled to a jury under the Sts. of 1870, *c.* 75, and 1873, *c.* 261, although he has not claimed damages before the county commissioners.

TWO PETITIONS by owners of land in Haverhill for juries to assess damages sustained by the widening and straightening by the county commissioners of a highway over the same. The record of the county commissioners contained no mention of the petitioners in the first case, and this statement only with regard

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to the petitioner in the second case: "Boston and Maine Railroad to be paid by the city $5."

In the first case, the petition for a jury was presented under the St. of 1870, *c.* 75, to the county commissioners, who thereupon issued a warrant for a sheriff's jury, which was summoned accordingly, but, before it was empanelled, the respondent, appearing by attorney specially for this purpose, objected to any further proceedings, and moved that the case be dismissed, because it did not appear that the petitioners made any claim for damages before the county commissioners. The sheriff overruled the motion, and certified a verdict for the petitioners with this ruling to the Superior Court, before which the respondent renewed its objection by motion to set aside the verdict. *Gardner*, J., overruled the motion, and ordered the verdict to be accepted, and the respondent appealed to this court.

In the second case, the petition for a jury was presented to the Superior Court, under the St. of 1873, *c.* 261. The respondent, in its answer and at the trial in that court, made the like objection, which *Bacon*, J., overruled; a verdict was returned for the petitioner; and the respondent alleged exceptions.

H. N. Merrill, for the respondent.

H. Carter, for the petitioners, was not called upon.

GRAY, C. J. The only case which tends to support the respondent's position is one decided in 1798, in which a writ of mandamus to the Court of Sessions to order a jury to assess damages sustained by the laying out of a highway over land of the petitioners, is said to have been denied by this court, "principally because the petitioners did not state that they demanded damages before the committee that laid out the way, who gave them no damages at all; for, said the court, the application for a jury is very clearly in the nature of an appeal; and to be entitled to apply for a jury, the party must demand damages to be assessed for him by the locating committee." *Brown* v. *Haverhill*, 3 Dane Ab. 263.

At the time of that decision, the Court of Sessions consisted of the justices of the peace of the county; St. 1782, *c.* 14, § 1; and the right of appeal from the judgment of a justice of the peace in civil actions was restricted to cases "where both parties have appeared and pleaded." St. 1783, *c.* 42, § 6. In such a

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state of the law, it was not unreasonable to hold that the provision of the St. of 1786, c. 67, § 4, allowing parties aggrieved by the doings of the committee of the Court of Sessions in laying out a highway, or in estimating damages, to apply for a jury, must be likewise restricted to cases in which there had been an actual contest before the tribunal of first instance.

But in the later statutes, all provisions restricting the right of appeal to cases in which there has been a joinder of issue in the court below have been stricken out. Rev. Sts. c. 82, § 6; c. 85, § 13; c. 87, §§ 15, 35; and notes of Commissioners to c. 82, § 6, and c. 85, § 12. *Holman* v. *Sigourney*, 11 Met. 436. Gen. Sts. c. 116, § 32; c. 120, § 25. There is therefore no longer any reason for applying such a restriction, and none has been applied in practice, to petitions for a jury to assess damages for the laying out or altering of a highway, whether presented to the county commissioners under the Rev. Sts. c. 24, § 13, the Gen. Sts. c. 43, § 19, and the St. of 1870, c. 75, or to the Superior Court, under the Sts. of 1873, c. 261, and 1874, c. 341.

The result is, that in the first case the judgment accepting the verdict must be affirmed, and in the second case the

Exceptions overruled.

GEORGE W. W. DOVE & others *vs.* GEORGE H. TORR.

Essex. November 7. — 12, 1879. COLT & AMES, JJ., absent.

A testator, after devising the residue of his real estate to his daughters and the survivor of them until death or marriage, provided that, "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." *Held*, that the devise over was to those who were the heirs of the testator at the time of his death.

CONTRACT by the heirs at law of John Dove, deceased, upon a written agreement, dated June 21, 1879, by the terms of which the plaintiffs agreed to sell and the defendant agreed to buy a parcel of land in Andover; the plaintiffs, within one week from the date of the agreement, to convey said land in fee simple to

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the defendant free from all incumbrances by a good and sufficient warranty deed; and the defendant to pay the plaintiffs $100 upon the delivery of the deed. The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court on appeal, on an agreed statement of facts in substance as follows:

The agreement declared on was duly made between the plaintiffs and the defendant; and a deed of the land named therein properly executed and acknowledged by the plaintiffs was tendered by them to the defendant within one week from the date of the agreement. John Dove died in 1876, seised in fee simple of the land described in the agreement, and leaving a will, the sixth clause of which was as follows: "Sixth. I devise to those of my daughters who shall not have married at my decease all the residue of my real estate, to have and to hold the same to them and the survivor of them for their lives and during the life of such survivor, they and the survivor of them continuing unmarried. The marriage of any one of my daughters who take under this item shall terminate her interest and life estate under this devise. After the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." The land described in the agreement is part of the residue of the estate under the above clause; and is not needed for the payment of debts and legacies. Two of the plaintiffs were the only daughters of John Dove who had not married at the time of his decease, and they have not since married; and no conveyance or other incumbrance has been made or suffered by any of the plaintiffs since the decease of the testator. The defendant refused to accept the deed on the sole ground that, under the sixth clause of the will, the deed did not convey a good title.

If, upon the foregoing facts, the deed conveyed the title called for by the agreement, judgment was to be entered for the plaintiffs for $50; otherwise, for the defendant.

S. Lincoln, Jr., (*S. B. Ives, Jr.* with him,) for the plaintiffs.

L. S. Tuckerman, for the defendant.

GRAY, C. J. The decision of this case depends upon the true construction of that clause of the will of John Dove by

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which, after devising the residue of his real estate to his daughters and the survivor of them until death or marriage, he provides as follows: "After the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs."

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The word "then" is here inserted, not as in *Long* v. *Blackall*, 3 Ves. 486, in *Sears* v. *Russell*, 8 Gray, 86, and in *Thomson* v. *Luddington*, 104 Mass. 193, by way of description of the persons who are to take, but by way of defining the time when they shall come into the enjoyment of that which is devised to them. The word "surviving" is not superadded, as in *Hulburt* v. *Emerson*, 16 Mass. 241, and in *Olney* v. *Hull*, 21 Pick. 311; nor is the devise to those who would have been the testator's heirs at law if he had died at that time. But the testator declares it to be his will that the estate "shall descend to those persons who may then be entitled to take the same as my heirs." A devise to "heirs," or "heirs at law," is always construed as referring to those who are such at the time of the testator's death, unless a different intent is plainly manifested by the will. *Abbott* v. *Bradstreet*, 3 Allen, 587. *Minot* v. *Tappan*, 122 Mass. 535. The application of this rule to the present case is fortified by the use of the word "descend," which ordinarily denotes the vesting of the estate by operation of law in the heirs immediately upon the death of the ancestor. Upon a view of the whole clause, we are of opinion that it manifests the intention of the testator to have been, that, after the particular estates which he had specifically given by his will should have failed, the law should take its course, and his estate go to his heirs, as if he had made no further disposition. *Bullock* v. *Downes*, 9 H. L. Cas. 1. *Mortimer* v. *Slater*, 7 Ch. D. 322; *S. C. nom. Mortimore* v. *Mortimore*, 4 App. Cas. 448. ***Judgment affirmed.***

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MARY V. KIMBALL *vs.* MARY S. ELLISON.

Essex. Nov. 5. — Dec. 22, 1879. LORD & SOULE, JJ., absent.

A testator, by his will, provided as follows: "I give, devise and dispose of all my estate, real and personal, together with any and all estate, right or interest in lands which I may acquire after the date of this will, in the following manner;" and after authorizing his executor to sell any of his real estate "not herein specifically bequeathed or appropriated," he devised his "mansion-house and the other buildings thereon, and the privileges thereto belonging," to A. for life, and upon his death to B. After the date of his will, the testator purchased an estate adjoining his mansion-house estate, removed the building standing thereon, tore down the fences, and made one garden with walks running through both estates, and erected a greenhouse on the purchased estate which was used in connection with the mansion-house; and the whole was thus used and occupied at the time of his death. *Held*, that the purchased estate passed by the specific devise of the mansion-house estate.

WRIT OF ENTRY to recover a parcel of land in Ipswich. Plea, *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the tenant, to this court, on appeal, on an agreed statement of facts, the substance of which appears in the opinion.

E. D. Sohier & C. A. Welch, for the demandant.

F. C. Welch, for the tenant.

ENDICOTT, J. The agreed statement of facts renders it clear that it was the intention of the testator to make the demanded premises, which he purchased after the date of his will, part and parcel of his mansion-house estate. He removed the house and shop standing thereon, tore down the fences and made one garden with walks running through both original estates, and erected a greenhouse on the demanded premises, which was used in connection with the mansion-house. The whole thus became one parcel, with nothing to distinguish the demanded premises from the mansion-house estate, as it was at the date of the will, and it was all thus used and occupied at the time of his death.

It is also manifest from the will itself that it was the intention of the testator that all real estate acquired by him in the future should be disposed of by his will. The statutes provide that "any estate, right or interest in lands acquired by the testator after making his will shall pass thereby, in like manner as if possessed at the time of making the will, if such clearly and

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manifestly appears by the will to have been the intention of the testator." Gen. Sts. c. 92, § 4. His language is, "I give, devise and dispose of all my estate, real and personal, together with any and all estate, right or interest in lands which I may acquire after the date of this will . . . in the following manner;" and, after authorizing his executors to sell any of his real estate "not herein specifically bequeathed or appropriated," he devises his "mansion-house and the other buildings thereon, and the privileges thereto belonging," to Mary Baker for her life, and upon her death to the demandant and her husband during their joint lives and to the survivor during his or her life. Mary Baker having died, and the demandant, being entitled, as survivor of her husband, to the use and occupation of all the mansion-house estate during her life, brings this action against the tenant, who holds the demanded premises under a deed from the executors.

But we are of opinion that the executors had no authority to give this deed, for they were empowered by the will only to convey lands not specifically devised; and the testator having in terms expressed the intention in his will that after-acquired real estate, as well as the real estate held by him at the date of the will, should be disposed of "in the following manner," (that is, as he proceeds to point out,) the fair construction is, that he intended that, if any of such after-acquired real estate should be added to and become part of the mansion-house estate, it should pass to the devisee under that specific devise. There are no words that limit or define the extent of the mansion-house estate; the description is general, and what constituted the estate at the time of his death passed under this will to the demandant.

In *Wait* v. *Belding*, 24 Pick. 129, a testator devised to his two sons "the whole of my land and buildings lying and being within the town of Hatfield." He made a codicil afterward, which was held to be a republication of the will; and it was also held that other lands acquired by the testator, in the interval between the date of the will and the codicil, passed to the two sons by the will. It was said by Chief Justice Shaw, in delivering judgment, "By the Revised Statutes it is provided that a will shall embrace after-acquired real estate as well as personal, when such

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is the intent of the testator. These statutes do not affect this will, and I only allude to them by way of illustration. Suppose this will had been made after the Revised Statutes, and the question should be whether the estate now in controversy passed by this devise. There seems to be no doubt that it would, the description being general of all the lands in Hatfield, without limitation as to the time of acquisition." See also *Brimmer* v. *Sohier*, 1 Cush. 118; *Melcher* v. *Chase*, 105 Mass. 125; *Perkins* v. *Jewett*, 11 Allen, 9. *Judgment for the demandant.*

JOHN H. DIX *vs.* JOHN E. ATKINS.

Suffolk. Nov. 11. — Dec. 2, 1879. MORTON & SOULE, JJ., absent.

In an action for rent, on the issue whether the plaintiff had waived an informality in a notice to terminate a written lease, the plaintiff offered to prove that, on receipt of the notice, he notified the defendant in writing that the notice was insufficient, and that he should hold him as tenant; and put in evidence tending to show that he wrote a letter to the defendant which was sent by a third person to the defendant's place of business and left with his clerk, who promised to deliver it. Notice was given to the defendant to produce the letter; but he declined to do so, and testified that he had not received it. The judge ruled, as matter of law, that sufficient proof of delivery of the letter to the defendant had not been shown, and refused to admit secondary evidence of the contents of the letter. *Held*, that the plaintiff's evidence would warrant the inference of fact that the defendant had received the letter; and that the plaintiff was entitled to a new trial.

CONTRACT for rent of certain rooms in the Hotel Pelham, Boston, for the months of October, November and December, 1877, under a lease, dated May 1, 1875, for two years from October 1, 1875, and containing the following provision: "And it is hereby mutually agreed that if, before the end of the said term, neither of the said parties shall give to the other three months' notice in writing of his intention to terminate this lease at the end of the said term, the lease shall continue in force for another term of one year, and in the same manner from year to year until one of the said parties shall determine this lease by notice in writing in the manner aforesaid, which notice shall terminate with the end of the year for which the premises are

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then held; and provided that either party may terminate this lease by notice in writing given three months before the termination of this lease."

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Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

The notice specified in the lease was not given by either party three months before the termination of the term of two years, but, on July 18, 1877, the defendant gave the plaintiff written notice of his intention to terminate the lease at the end of the term, and not to renew the lease after October 1, 1877, and, on September 30, 1877, he vacated the premises. The defendant contended, and put in evidence to show, that the plaintiff had waived the informality of this notice, and had accepted it as a sufficient notice under the lease; and this was the only question of fact in controversy.

The plaintiff denied that he had in any way waived the insufficiency of the notice; and he offered to prove that, upon receipt of the defendant's notice, he notified the defendant in writing that his notice was insufficient, and that he should not accept it, and should hold the defendant as his tenant for the ensuing year; and testified that, within a day or two after receiving the defendant's notice, he wrote a letter to the defendant, which he gave to the janitor of the hotel, with instructions to read it, and then to deliver it to the defendant. The janitor testified that he received the letter from the plaintiff at the time stated, with the instructions testified to by the plaintiff; that he read it, and then took it to the defendant's place of business; that the defendant's clerk there informed him that the defendant was not in, but that the clerk would deliver the letter to the defendant when he returned, and he thereupon left it with the clerk; that about a week afterwards he had a conversation with the defendant, in which the latter asked him what the plaintiff was going to do about it; that he told the defendant that it was not a notice, and that there was going to be a lawsuit about it; and that the defendant said, "Let the plaintiff go ahead. I have got as much money to fight it as he has." Nothing was said in this conversation about the plaintiff's letter; and the defendant testified that there was no such conversation. The plaintiff gave the defendant seasonable notice to produce the letter; but

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the defendant testified that he had never received it. The clerk was not called. The plaintiff then offered to prove the contents of the letter by the testimony of himself and of the janitor; but the judge declined to admit the evidence, on the ground that, as matter of law, sufficient proof of delivery of the letter to the defendant had not been shown.

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The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

R. M. Morse, Jr. & C. P. Greenough, for the plaintiff.

J. P. Treadwell, for the defendant.

GRAY, C. J. The testimony of the plaintiff and of his janitor tended to show that the plaintiff wrote a letter to the defendant, and delivered it to the janitor with instructions to read it himself and then deliver it to the defendant; and that the janitor, after reading the letter, took it to the defendant's place of business, and, not finding him in, left it with his clerk, who said he would deliver it to the defendant on his return. This testimony, if believed, would warrant the inference of fact that the defendant had received the letter, and, if the presiding judge was satisfied of that fact, would in law entitle the plaintiff, after notice to the defendant to produce the letter, to offer secondary evidence of its contents. *Dana* v. *Kemble*, 19 Pick. 112. *Huntley* v. *Whittier*, 105 Mass. 391. The judge, without passing upon the controverted question of fact, having ruled "that, as matter of law, sufficient proof of delivery of the letter to the defendant had not been shown," the plaintiff is entitled to a new trial. *Foster* v. *Mackay*, 7 Met. 531. *Merrill* v. *Merrill*, 126 Mass. 228. ***Exceptions sustained.***

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COMMONWEALTH *vs.* NATHANIEL ALLEN.

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Middlesex. June 26. — Oct. 23, 1879. MORTON & ENDICOTT, JJ., absent. November 25. — December 3, 1879.

The first count of an indictment charged that the defendant, at a time and place named, "a certain building, to wit, an elevator building there situate, and then and there the property of one A., feloniously, wilfully and maliciously did set fire to, burn and consume." The second count charged that the defendant, at the same time and place, "a certain building there situate, to wit, a building then and there used for shops, mechanics' work-shops, and for an elevator, and then and there called the elevator building, and then and there the property of one A., feloniously, wilfully and maliciously did set fire to, burn and consume." *Held*, that the two counts did not appear to describe different offences; and that the St. of 1861, *c.* 181, did not apply.

At the trial of an indictment for burning a building in L., it appeared that the fire was discovered at about half-past six o'clock in the morning; and the defendant contended that he left L. at ten o'clock on the previous night, and returned there about eleven o'clock on the day of the fire. A witness for the government testified that he saw the defendant at the fire about eight o'clock; and, against the defendant's objection, was allowed to testify to a conversation which he then had with him. *Held*, that the defendant had no ground of exception to the admission of the conversation.

At the trial of an indictment for burning a building, two witnesses, who owned a part of the property burned, testified for the government that, prior to the fire, there had been difficulties between them and the defendant. For the purpose of showing bias on their part, the defendant offered in evidence their several affidavits given in a case of the assignee in bankruptcy of the defendant against the latter's wife and others, tending to show that the witnesses, when they gave the affidavits, sought to injure the defendant and his wife by voluntarily and maliciously aiding the plaintiff in that case. *Held*, that the defendant had no ground of exception to the exclusion of the affidavits.

In a criminal case, the judge may properly exclude a paper writing, offered by the defendant, containing certain words written by him during the trial, for the purpose of being compared with the same words alleged to have been written by him at another time, the genuineness of which is in controversy.

At the trial of an indictment for burning a building, a witness, who owned part of the property burned, testified for the government that, prior to the fire, he and the defendant had been connected in business; that difficulties had arisen between them; and that the defendant had told him that he would "be even with him," and would "make it hot for him." On cross-examination, it appeared that the witness had made a complaint in a criminal court against the defendant for a forgery; that the complaint had been dismissed for want of probable cause; and that the defendant had afterwards brought an action against the witness for a malicious prosecution, which action was still pending. For the purpose of showing bias and interest in the witness, and that the above words used by the defendant were not used as a menace of injury to the witness's property by burning, the defendant offered in evidence the original writ and declaration in his action for malicious prosecution, with the docket entries relating to it, and the record of the proceedings in the criminal court upon the complaint against him for forgery. *Held*, that it was in the discretion of the presiding judge to exclude the evidence offered.

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INDICTMENT, in two counts. The first count charged that the defendant, on January 20, 1878, at Lowell, "a certain building, to wit, an elevator building there situate, and then and there the property of one Ann E. Ayer, feloniously, wilfully and maliciously did set fire to, burn and consume." The second count charged that the defendant, at the same time and place, "a certain building, there situate, to wit, a building then and there used for shops, mechanics' work-shops, and for an elevator and then and there called the elevator building, and then and there the property of one Ann E. Ayer, feloniously, wilfully and maliciously did set fire to, burn and consume."

In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment for the following reason: "Said indictment contains two counts describing different offences, and contains no averment that the different counts therein contained are different descriptions of the same act." *Allen*, J., overruled the motion.

The defendant was afterwards tried before *Bacon*, J., who allowed a bill of exceptions in substance as follows:

It appeared that the building in question was destroyed by fire on the day alleged in the indictment, the fire being discovered at about half-past six o'clock in the morning. The defendant contended that he left Lowell at ten o'clock on the previous night, proceeded to Groton in a carriage, put up at the Central House there about midnight, and returned to Lowell about eleven o'clock on the day of the fire.

Caleb Knight testified, for the government, that he saw the defendant at the fire about eight o'clock; and, against the defendant's objection, he was allowed to testify that he was at work removing cars loaded with potatoes from near the fire, when the defendant came up to him and inquired, "How many bushels of potatoes have you here?" and that the witness replied, "I don't know, and if I did, I would n't tell you." Before admitting this evidence, the judge inquired whether the defendant denied that he was there at the time, and he replied that he denied that he was there before eleven o'clock.

Enoch R. Blair testified for the government that he owned part of the personal property burned in the building; that he and the defendant had been connected in business from January

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to June, 1877; that difficulties had arisen between them, and the defendant had told him that he would be even with him yet, and would pay him, and would make it hot for him. On cross-examination, it appeared that Blair had caused a complaint for forgery to be made against the defendant; and that the defendant had brought an action against Blair for malicious prosecution. For the purpose of showing bias and interest in Blair, and that the words thus used by the defendant were not used as a menace of injury to Blair's property by burning, the defendant offered in evidence the original writ and declaration in a civil action, together with the docket entries relating thereto, entered in the Superior Court at December term 1877, and still pending therein, in which the defendant seeks to recover damages of Blair for maliciously prosecuting him, Allen, for said alleged forgery; but the judge excluded this evidence. For the same purposes, the defendant offered in evidence a certified copy of said complaint, which Blair caused to be made against him in June 1877, in the Municipal Court of the city of Boston, for said alleged forgery, and a certified copy of the record of the proceedings thereon in that court, with an order dismissing the complaint, after a hearing on the merits, for want of probable cause to hold Allen to bail thereon; but the judge excluded this evidence.

William R. Hoar testified for the defendant that he was the keeper of the Central House in Groton; and that the defendant put up there after midnight preceding the fire, making in his presence at the time the following entry on the register of the hotel: "W. C. Johnson and wife, Fitchburg, Mass." The government contended that the defendant did not make that entry; or, if he made it, that he made it at another time; and standards were introduced, by the defendant, of his handwriting. For the purpose of showing that the defendant wrote said entry, he offered in evidence certain paper writings, written by him since this prosecution was begun, for the purpose of being used as evidence, containing the identical words of said entry and none other; but the judge excluded them.

William W. Morse and John G. Sherburne testified for the government that they severally owned a part of the personal property destroyed by the fire; that there had been difficulties

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between them and the defendant in August or September, 1877; and that the defendant then said they would wish they had let him alone, that he would be even with them yet, and that he would "beat" them yet. For the purpose of showing that whatever hostile feeling the defendant then had towards the witnesses had passed away prior to the fire, and that, in December 1877, and afterwards up to the time of the fire, the defendant dealt with them on friendly terms, and also for the purpose of showing bias on their part, the defendant offered in evidence their several affidavits, given by them respectively on February 24, 1879, and filed in a case of the assignee in bankruptcy of the defendant in equity, against the latter's wife and others, tending to show that Morse and the defendant had bought and sold divers parcels of real estate and mining property to each other in December 1877, on friendly terms, and also tending to show that the witnesses, when they gave the affidavits, sought to injure the defendant and his wife by voluntarily and maliciously aiding the plaintiff in said case. Upon the affidavits being offered in evidence, the judge asked the defendant to point out any part of either of them which would be competent evidence upon the issues in this case, and the defendant answered that he could not do so. The judge thereupon excluded the affidavits. The jury returned a verdict of guilty; and the defendant alleged exceptions.

C. Cowley, (*D. O. Allen* with him,) for the defendant.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the Commonwealth.

AMES, J. The motion to quash the indictment was properly overruled. The two counts do not appear to be for different offences, and, for that reason, the St. of 1861, *c.* 181, requiring an averment that the different counts are different descriptions of the same act, does not apply. That statute was not intended for the case of merely slight verbal changes in the description of property stolen or injured, provided the substantial identity is not affected; but to prevent the objection of misjoinder where the description might at common law be open to that objection. *Commonwealth* v. *O'Connell*, 12 Allen, 451.

The evidence as to the conversation between the defendant and the witness Knight was properly admitted. It was compe-

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tent for the purpose of showing that the defendant was present at the scene of the fire at a much earlier hour than he admitted in his defence. The particulars of the conversation, though unimportant in themselves, had a tendency to identify the occasion on which, and the person with whom, it occurred. Its general nature and duration, and its connection with the employment in which the witness was engaged, were calculated to make an impression on his mind, and to strengthen his recollection of the time and place.

Neither do we see that any wrong was done to the defendant in the exclusion of the affidavits of the witnesses Morse and Sherburne. They had already admitted that before the fire they had had difficulties with him, and he was entitled, without using the affidavits, to whatever deduction should be made from their testimony on that account.

In the recent case of *King* v. *Donahue*, 110 Mass. 155, it was decided in substance that a party to an action is not entitled to write his signature in the presence of the jury, or to use his signature written for the occasion and *post litem motam*, for the purpose of comparison with a signature, the genuineness of which as his own is in controversy. The defendant's argument invites us to reconsider that decision, and he cites and relies upon the cases of *Osbourne* v. *Hosier*, 6 Mod. 167; *Williams' case*, 1 Lewin, 137; and *Regina* v. *Taylor*, 6 Cox C. C. 58, which it is suggested were overlooked when *King* v. *Donahue* was decided. We find nothing, however, in those cases that requires us to overrule or reconsider that decision. The cases cited, and which are presented as inconsistent with *King* v. *Donahue*, go no farther, as we find, on full examination, than to show that under some circumstances presiding judges in their discretion have ordered or allowed signatures to be written in the presence of the jury, and considered by them; not that a judge may not refuse to permit such a signature to be written when the circumstances are such that it does not appear to him to furnish a fair standard of comparison. We see no reason to hold that the presiding judge was bound by law to admit the paper writings offered by the defendant for the purpose of comparison.

Upon the remaining exception taken by the defendant

Further argument is ordered.

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The case was then submitted to all the judges, on additional briefs, by the same counsel.

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AMES, J. Upon the reargument of the only exception not already disposed of, it is the opinion of the majority of the court that the bill of exceptions, upon a fair construction, shows it to have been admitted that the witness Blair had made a complaint in a criminal court against the defendant, for an alleged forgery; that the complaint had been dismissed for want of probable cause; and that the defendant had afterwards brought an action against him to recover damages for a malicious prosecution, which action is still pending. So far as the question as to the bias and prejudice of the witness was concerned, the defendant had the full benefit of these facts. They were quite enough to show that there had been hostile relations of a serious character between them. But it was a question, not as to the particulars and merits of any controversy between them, but as to the state of mind of the witness, and the credit to which he was entitled. It was entirely within the discretion of the presiding judge to decide to what extent the inquiry as to the particulars of the quarrel should be carried. *Commonwealth* v. *Jennings*, 107 Mass. 488. *Morrissey* v. *Ingham*, 111 Mass. 63.

Upon the question as to the meaning of the threat said to have been made "to be even with" the witness, and to "make it hot for him," it is true that it does not necessarily express an intent to injure his property by burning. The defendant was entitled to offer any explanatory evidence tending to show that such was not his meaning. The original writ and declaration in his suit for malicious prosecution with the docket entries in relation to it, and the record of the proceedings in the Municipal Court of Boston, upon the complaint against him for forgery, cannot be said to have been incompetent for that purpose. But the witness had already, on cross-examination, admitted that he had caused a complaint to be made against the defendant on a charge of forgery, and that the defendant had brought an action against him for malicious prosecution. The record of the Municipal Court could only show that the complaint had not been sustained, a fact which was fully admitted. The writ, declaration and docket record would only show that the defendant was seeking redress in a civil action for the wrong done

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him, which was also admitted. The particulars of what transpired at the hearing in the Municipal Court could have little if any bearing upon the trial of this indictment. The record in the civil action could only show that such an action, for such an alleged wrong, was pending in the proper tribunal. It is true that an admission extorted from a witness upon cross-examination does not preclude the party obtaining it from showing the same fact in more detail by other evidence. But there was nothing in the evidence offered by the defendant that added anything to the proof of the bias and prejudice of the witness, or that threw, or could throw, any additional light upon the proper interpretation of the alleged threat made use of by the defendant. The majority of the court are of opinion that the presiding judge, in the exercise of his discretion, had a right to refuse to receive the details of what occurred at the trial upon the complaint, and also the details of the proceedings and pleadings in the action for damages. *Exceptions overruled.*

COMMONWEALTH *vs.* ROBERT WARDELL.

Franklin. Sept. 16, 1879.—Jan. 7, 1880. AMES & ENDICOTT, JJ., absent.

An indictment on the Gen. Sts. *c.* 165, § 6, for "open and gross lewdness and lascivious behavior," is supported by proof that a man intentionally and indecently exposed his person, without necessity or reasonable excuse therefor, in the house of another, to a girl eleven years old.

INDICTMENT on the Gen. Sts. *c.* 165, § 6, the second count of which charged that, on January 17, 1879, at Coleraine, the defendant "did commit open and gross lewdness and lascivious behavior, and did then and there lewdly and lasciviously expose his private parts in a most indecent posture and situation in the presence of one Rosa Beauchamp." At the trial in the Superior Court, before *Dewey*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, the substance of which appears in the opinion.

A. De Wolf, for the defendant.

G. Marston, Attorney General, for the Commonwealth

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COLT, J. The second count in the indictment charges an offence under the Gen. Sts. *c.* 165, § 6, which provides punishment for lewd and lascivious cohabitation and for open and gross lewdness and lascivious behaviour. No objection was made to the form of the indictment. The evidence at the trial was that the defendant went to a private house not his own with some small articles to sell, and, finding no one there but a girl of eleven years, and a child of four, proceeded in the presence of both to make an indecent exposure of his person, and that the elder girl, who alone saw it, fled in fright to a neighboring house. This was evidence from which the jury would be fully justified in finding that the exposure was made with evil purpose by the defendant, with the intention that it should be seen by one or both the children present.

The judge declined to rule that the evidence was not sufficient to sustain the charge, and instructed the jury that, if the defendant lewdly, lasciviously, and openly exposed himself to the elder of the two persons named, they would be authorized to find him guilty. We are of opinion that there was no error in this instruction, and that the evidence produced was sufficient to support the verdict.

The conduct of the defendant in thus intentionally, indecently, and offensively exposing himself in the house of another to two girls of tender years, without necessity or reasonable excuse, and in such a way as to produce alarm, proves that he was guilty of gross lewdness and lascivious behavior.

The defendant, however, insists that there was no proof of open lewdness within the meaning of the statute. He relies on the early case of *Commonwealth* v. *Catlin*, 1 Mass. 8, where it was decided that an indictment under this statute would not be supported by evidence of lewdness or lascivious behavior in secret. But in that case the acts proved accompanied acts of sexual intercourse, in which for all that appears both parties participated, without objection, and which both intended should be private, and attempted to conceal. In the case at bar, the conduct of the defendant was intentionally open and public, as distinguished from that which is intended to be private, covered and concealed. It was an act on his part intended to be seen by one or both the persons present; an act likely to become known, certain to offend

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public decency, and which was observed by at least one of those present. It was an intentional exposure of his person at a time and place and under circumstances calculated to corrupt public morals and offend public decency. It was such open and gross lewdness and lascivious behavior as it was intended by the provisions of the statute to punish.

In *Regina* v. *Watson*, 2 Cox C. C. 376, and in *Regina* v. *Webb*, 1 Denison, 338, it was decided that indecent exposure in the presence of only one person, although in a place of public resort, no others being able to see it, does not amount to an indictable offence. But in those cases the indictments were for misdemeanors at common law, in which the offence charged must always amount to a common nuisance committed in a public place and seen by persons lawfully in that place. The word "lewdness" at common law means open and public indecency; but as used and qualified in the statute it has a broader sense. It was held to mean, as used in other criminal statutes, (Gen. Sts. *c.* 165, § 13; *c.* 87, § 6;) "the irregular indulgence of lust, whether public or private." *Commonwealth* v. *Lambert*, 12 Allen, 177. See also *Commonwealth* v. *Parker*, 4 Allen, 313. The statute punishes, not public, but open lewdness. The word "open" qualifies the intention of the perpetrator of the act; it does not fairly imply that it must be public, in the sense of being in a public place, or in the presence of many people. The offence created does not depend on the number present. It is enough if it be an intentional act of lewd exposure, offensive to one or more persons present. To hold otherwise would be to hold that one might commit with impunity any act of indecency, however gross, before any number of individuals successively. The fact that the act in a given case was intended as an act of open lewdness is most commonly proved, it is true, by evidence that it occurred in a public place, or in the presence of many people; but it does not follow that the intentionally open and immodest character of the act may not be equally well proved by other evidence. An indecent act cannot well be public in its character without being open and immodest, and yet it may have both these latter qualities without being in any sense public in its manifestation. In the language of the statute, the word "open" is used as opposed to "secret."

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In an early case in Connecticut it was decided, under a statute against lascivious carriage, that a wanton and lascivious act of one person, towards and against the will of another of the opposite sex, may constitute the offence, although no third person is present. It was declared to be evident from the preamble of the statute, and the plain import of its terms, that it was intended to include all those wanton acts, between persons of different sexes, which are grossly indecent, and which are not otherwise punishable as crimes against chastity and public decency. *Fowler* v. *State*, 5 Day, 81. And in *State* v. *Millard*, 18 Vt. 574, it was decided that where a man indecently exposes his person to a woman, and solicits her to have sexual intercourse with him, against her opposition and remonstrance, his conduct amounts to open and gross lewdness and lascivious behavior within the statute, although no one else was present.

Exceptions overruled.

COMMONWEALTH *vs.* HENRY W. COOLIDGE.

Franklin. Sept. 16, 1879. — Jan. 27, 1880. AMES & ENDICOTT, JJ., absent.

At the trial of an indictment on the Gen. Sts. *c.* 160, § 28, for maliciously sending a threatening letter to A. with intent to extort money from him, the defendant requested the judge to instruct the jury, that they must find that the defendant must have maliciously intended to obtain what he knew he had no right to receive; and that, if he believed that A. actually owed him the sum demanded, he was not guilty of the offence charged. The judge declined to give these instructions, and instructed the jury that, to maintain the indictment, it was not essential that the defendant was endeavoring to obtain money that was not due him; that, if he endeavored to obtain money that was justly his due in this way, he would be guilty; that a man had no right to use this way to collect his debts; that a threat made by one whose goods had been stolen that he would prosecute the supposed thief for the offence, if there were grounds to suspect him to be guilty, could not be considered as made maliciously, unless there were other proofs of malice; and the jury were further instructed what would constitute a malicious threatening, and as to the weight to be given to the fact whether the defendant was or was not claiming more than he believed to be due, upon the question of malice, in a manner not excepted to. *Held*, that the defendant had no ground of exception.

INDICTMENT on the Gen. Sts. *c.* 160, § 28, charging the defendant with maliciously threatening Ralph H. Chapin to accuse

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him of having committed the crime of larceny, by sending him a written communication of the tenor following: "Mr. Chapin, if you want to settle with me for what you have stolen from me, you can do so by paying me $10; if not, I will put you where you will have a chance to look through iron. H. W. Coolidge;" with intent thereby to extort money from said Ralph H. Chapin.

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At the trial in the Superior Court, before *Pitman*, J., the jury returned a verdict of guilty; and the defendant alleged exceptions, the substance of which appears in the opinion.

C. C. Conant, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

LORD, J. In the trial of causes, civil or criminal, it is not the right of a party to have an instruction in law given simply because the instruction asked is right as an abstract proposition of law; and it is not the duty of a presiding judge to give any instruction which is not called for by the evidence in the case. It is true that whether the instruction asked is called for by the state of the evidence is itself a question of law, upon which the party has the right of revision by the ultimate tribunal.

Upon the trial in this case, the defendant requested the court to instruct the jury that they must find, in order to convict the defendant: "1. That the defendant, by means of the letter, must have maliciously intended to obtain that which in justice and equity he knew he had no right to receive. 2. That if the defendant believed that Chapin actually owed him the sum of $10 when he wrote the letter, he is not guilty of the offence charged in the indictment."

In order to determine whether the judge properly refused to give these instructions, or improperly gave the instructions which he substituted for them, it is necessary to see what was the charge against the defendant, and what was the state of the evidence when such instructions were asked.

The defendant was charged with a violation of the Gen. Sts. *c.* 160, § 28, which is in these words: "Whoever, either verbally or by a written or printed communication, maliciously threatens to accuse another of any crime or offence, or by such communication maliciously threatens an injury to the person or prop-

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erty of another, with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do any act against his will, shall be punished," &c.

The evidence tended to show that the defendant was the owner of a field of buckwheat ready for harvest, and made an arrangement with Chapin to assist him in harvesting it; and that the payment for his services was to be made by a portion of the buckwheat. What that portion was to be was a subject of dispute between the parties. The defendant had taken a portion of the crop when Chapin went and took a portion which the defendant contended was much more than he had the right to take, and that it was taken without his knowledge; and it is proper to be presumed in behalf of the defendant, that, in consequence of such taking, the letter was written. Upon this condition of the indictment and the evidence several questions arise:

First. Was it proper to allege the intent to be to extort money from the said Chapin?

Second. Upon such state of pleading and evidence, ought the requests of the defendant for instructions to have been granted? and

Third. Were the instructions actually given appropriate to the case as it was developed upon the trial?

In reference to the first of these propositions, it will be observed that the statute has various alternatives in reference to the purpose or intent with which the threat is made. The intent may be, either "to extort money," or "any pecuniary advantage whatever," or "to compel the person so threatened to do any act against his will."

It is not necessary in the indictment to allege more than one of these purposes. It may be that the same act may involve more than one of them; but it is necessary to allege only one intent, if that intent is proved, and all the other facts necessary to constitute the crime are established. In this case, the intent alleged is to extort money, and that fact must be proved; and this leads to the inquiry into the meaning of the Legislature in the use of the phrase, "to extort money." It is clear that it did not intend by this language to require that the defendant should

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seek to obtain the money by means of the technical crime of extortion. That crime can be committed only by a public officer, and only in reference to fees, by demanding as a fee for official service either something "which is not due," or "more than is due," or "before it is due;" and this offence consists wholly in the act, which may be without malice and without bad intent. See *Commonwealth* v. *Bagley*, 7 Pick. 279. And such is the necessary conclusion from the use of the phrase in its connection in the statute, for the language of the act is "to extort money or any pecuniary advantage whatever," thus making the word "extort" as applicable to a pecuniary advantage as to money. It must, therefore, mean simply to obtain such money or other advantage by means of the wilful and malicious threatening. It is not necessary to the consummation of the offence that the money be absolutely extorted, or that the party threatened should be in any manner defrauded or injured. It is not like the case of obtaining property by false pretences, where the gist of the offence is the actual defrauding of another. In such case, a party may obtain by false pretences what is actually his own, without being guilty of the crime, because he has not defrauded the other party. *Commonwealth* v. *McDuffy*, 126 Mass. 467. This distinction is clearly pointed out and illustrated in *Regina* v. *Tiddeman*, 4 Cox C. C. 387, cited at the bar by the counsel on both sides. Whether the purpose and intent of the defendant was to extort money, — using that phrase, as before indicated, to mean compelling or forcing the party to part with money against his will, — is purely a question of fact, to be submitted to the determination of the jury, under proper instructions.

Assuming, for the purposes of this discussion, that the state of the evidence was such as to make the matter of the instructions pertinent to the issue, and not merely speculative questions upon which the evidence did not call for a ruling, we are satisfied that it was not the duty of the presiding judge to give the instructions asked without qualification, and in the words in which they were asked, but that, so far as he refused them altogether, he properly refused them, and, so far as he modified them, the modification was proper. The first instruction asked, that the defendant must have maliciously intended to obtain that which in justice and equity he knew he had no right to receive, and

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the other, which differs only in form from that, that the defendant was not guilty if he believed that Chapin actually owed him, could not properly have been given without qualification; and the language of the presiding judge was entirely accurate when he said that the law did not authorize the collection of just debts by the malicious threatening to accuse the debtor of a crime. It was proper, however, for the presiding judge to define the crime, and to instruct the jury in relation to the elements which constitute it. And this the bill of exceptions shows that the presiding justice did. He instructed the jury that a threat, made by one whose goods had been stolen, that he would prosecute the supposed thief for the offence if there were grounds to suspect him to be guilty, could not be considered as made maliciously, and with intent to extort property, unless there were other proofs of malice and intended extortion. To this instruction no exception was taken, and we are of opinion that it sufficiently covers any rule which might by implication be involved in the defendant's specific requests for instructions.

It appears further that the jury were fully instructed as to what would constitute a malicious threatening, and as to the weight to be given to the fact whether the defendant was or was not claiming more than he believed to be due to him, upon the question of malice.

This case differs materially from *Commonwealth* v. *Jones*, 121 Mass. 57. In that case the presiding judge excluded evidence of the actual facts in the case, which might have had an important bearing upon the question of intent. But it was not held that, under the facts, even as offered to be proved, the offence could not be committed. In this case, all the facts in relation to the defendant's claim against the prosecutor were admitted, and, upon such state of facts, instructions were given so favorable to the defendant that he took no exception thereto; and the question was submitted to the jury whether, under those facts, the threat was a malicious one, with intent to extort money, with the further instruction that, if the only purpose was to obtain the proceeds of goods supposed to have been stolen, such threat could not be considered as made maliciously and with intent to extort property, unless there were other proofs of malice and intended extortion. And the previous instruction,

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in general terms, that a person has no right to resort to this means to collect honest debts, is to be understood as modified and qualified by the instructions which were actually given, and which were appropriate to the facts as developed. *State* v. *Bruce*, 24 Maine, 71.

No error in the instructions as given or in the refusal to give those requested having been shown, the exceptions must be

Overruled.

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COMMONWEALTH *vs.* CRITON G. HASKINS & another.

Hampshire. Sept. 16, 1879. — Jan. 12, 1880. AMES & ENDICOTT, JJ., absent.

Upon the trial of an indictment charging the defendant in one count with the larceny of a chattel, and in another count with receiving the same chattel, knowing it to have been stolen, a verdict of guilty on both counts is inconsistent in law, and no judgment can be rendered upon it; and the subsequent entry of a *nolle prosequi* of the second count does not cure the defect.

INDICTMENT charging the defendants in one count with the larceny of a cow, and in the other with receiving the same cow, knowing the same to have been stolen.

At the trial in the Superior Court, before *Allen*, J., there was evidence tending to show that a cow was stolen, and that, soon after the larceny, the cow was in possession of the defendants. The government went to the jury upon both counts, and the judge gave instructions to the jury upon the law with reference to the offences charged in both counts, to which no objection or exception was taken, and especially instructed the jury that there was no evidence in the case to authorize a verdict of guilty on the second count.

The jury returned a verdict of guilty against both defendants upon both counts; and this verdict was taken and affirmed by the court in the usual way against both defendants. Upon the rendering of the verdict the defendants filed a motion in arrest of judgment, on the ground that the verdict was inconsistent and void in law, and no judgment could be legally rendered upon it.

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The district attorney thereupon moved for leave to enter a *nolle prosequi* as to the second count. The judge, against the defendants' objection, allowed this to be done; and overruled the motion in arrest of judgment. The defendants alleged exceptions.

No counsel appeared for the defendants.

G. Marston, Attorney General, for the Commonwealth.

LORD, J. There is in this case no question affecting the power of the district attorney to enter a *nolle prosequi;* such an entry affects only the proceedings subsequent to it, but the record of what is antecedent to it remains.

By that record it appears that there had been the larceny of a cow, and but one larceny of that cow. The defendants were charged in one count of the indictment with such larceny, and in the second count with having received her knowing her to have been thus stolen. It is certain that the defendants could not be guilty upon both counts, because in law the guilty receiver of stolen goods cannot himself be the thief; nor can the thief be guilty of a crime of receiving stolen goods which he himself had stolen.

The presiding judge, as the record shows, instructed the jury that there was no evidence upon which they could convict upon the second count. Still, however, without directing a verdict of acquittal upon the second count, he submitted to the determination of the jury the question of the defendants' guilt upon that count. The fact that the verdict which they rendered was inconsistent with the views of the presiding judge does not invalidate it as a verdict after it had been recorded and affirmed. The record, therefore, notwithstanding the entry of the *nolle prosequi* shows that the defendants had been convicted by the jury upon both counts; and although, as a legal effect of a conviction upon each count it cannot be said strictly that it is an acquittal upon the other, yet the finding of guilty upon both is inconsistent in law, and is conclusive of a mistrial. It would have been quite proper, before the record and affirmation of the verdict, for the presiding judge to have called the attention of the jury to their misunderstanding of his previous instructions, and to have explained to them the mode by which it became their duty, if they convicted upon either of the counts, to acquit

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upon the other, and to have required of them to retire for further deliberation; if, after such instructions, the jury persisted in returning a general verdict of guilty upon both counts, it would have been proper in the presiding judge, if not his duty, to set aside the verdict as the only means of securing to the defendants their rights. After the affirmation of the verdict, when there was no means of knowing of record upon which count the jury intended to convict, as there was no right in them to convict upon both, to assume that the error is corrected by a *nolle prosequi* of either count by the district attorney, is to permit the district attorney to determine, instead of the jury, upon which count the defendants were guilty. But the *nolle prosequi* corrects no error, and has no effect upon the record as it stood prior to its entry. The record showed a verdict so inconsistent with itself, and so uncertain in law, that no judgment could be entered upon it. The *nolle prosequi* does not change that record, nor make the verdict which the jury rendered any less inconsistent with itself, nor any more certain in law than it was before such entry.

If, upon such a verdict, it is competent for the district attorney to elect not to prosecute one count and take judgment upon the other, it is of course at his own option to say which he will no further prosecute; and so it is necessarily the district attorney, and not the jury, who determines of what offence the defendant has been guilty. Inasmuch, therefore, as no judgment could properly be entered upon the verdict before the *nolle prosequi*, it is equally clear that the *nolle prosequi* works no such change in the record as to authorize a judgment upon the verdict. *Exceptions sustained.*

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COMMONWEALTH *vs.* WILLIAM COUPE.

Bristol. Oct. 28, 1879. — Jan. 9, 1880. COLT & AMES, JJ., absent.

The provisions of the St. of 1846, *c.* 203, reënacted in the Gen. Sts. *c.* 43, § 82, concerning the dedication of ways, do not apply to ways established by prescription.

At the trial of an indictment charging the defendant with erecting and maintaining a fence within the limits of a highway, witnesses over seventy years of age testified that the travelled track used by the public for more than fifty years, prior to 1878, and as long as they could remember, extended over the land enclosed by the defendant; and that a stone wall, which stood on a curved line where the corner of the highway intersected another road, and which was claimed by the government to be the boundary of the highway, about two feet distant from the travelled track, had been there for the same period, and until taken down by the defendant before he built the fence. *Held*, that this evidence was competent, and would justify the jury in finding a way by prescription, a portion of which the defendant had enclosed, and in returning a verdict of guilty.

ENDICOTT, J. The indictment charges the defendant with erecting and maintaining, on May 1, 1878, and on other days between that day and the day of the finding of the indictment, March 3, 1879, a fence within the limits of a highway in Attleborough. At the trial in September 1879, evidence was offered by the government that the corner of the highway, where it intersected another road, was a long curve, and that the defendant had built his fence with a square corner, thereby enclosing a portion of the highway, between the fence and the curved line which was claimed by the government to be the boundary of the highway. To prove that the parcel thus enclosed was part of the highway, the government, without offering any evidence that it had been laid out as a highway, was allowed to introduce witnesses, some of whom were over seventy years of age, who testified that the travelled track used by the public for more than fifty years, and as long as they could remember, extended over the land enclosed by the defendant; and also that a stone wall, which stood on the curved line about two feet distant from the travelled track, had been there for the same period, and until taken down by the defendant before he built the fence. There was nothing to show that this parcel had been dedicated to the public use by the owner of the land. The de-

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fendant objected to the admission of this evidence, and also contended that it was not sufficient to authorize a conviction. But the court ruled that it was competent and sufficient, and thereupon the defendant submitted to a verdict of guilty on the first count.

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The ruling that the evidence was competent and sufficient, made at that stage of the trial, must be taken to mean that the jury would be justified in finding upon the evidence, and under proper instructions, that the defendant had enclosed a portion of the highway. But, by the course of the defendant in submitting to a verdict, it became unnecessary for the court to state upon what ground the jury would be authorized to find it sufficient. If, therefore, there is any view upon which the jury would be justified, the exceptions must be overruled. And we are of opinion that, if the jury were satisfied that the parcel enclosed had been used as part of the highway for more than fifty years, and as long as witnesses over seventy years of age could remember, and that the stone wall had been the boundary of the highway during that period, then they might find a way by prescription, a portion of which the defendant had enclosed, and therefore return a verdict of guilty.

The defendant contends that since the St. of 1846, *c.* 203, public ways can only be established in the manner there pointed out; and that highways by prescription and by dedication are equally included within its terms. And further, that it does not appear from the evidence that this parcel had been used by the public for twenty years before 1846, the testimony of witnesses tending only to prove a use for fifty years prior to 1878.

That a highway may be proved by long and continued use and enjoyment by the public, upon the ground that a conclusive presumption arises from such use that it had been originally laid out or established by competent authority, is well settled in this Commonwealth. *Commonwealth* v. *Newbury*, 2 Pick. 51. *Commonwealth* v. *Low*, 3 Pick. 408. *Reed* v. *Northfield*, 13 Pick. 94. *Stedman* v. *Southbridge*, 17 Pick. 162. *Sprague* v. *Waite*, 17 Pick. 309. *Folger* v. *Worth*, 19 Pick. 108. *Commonwealth* v. *Belding*, 13 Met. 10, and cases cited.

It is also well established that, before 1846, a highway by dedication could be created by the owner of the land dedicating

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the particular parcel to the use of the public for the purposes of a highway, and the acceptance of the gift, or the acquiescence in such use by the city or town bound to keep it in repair; and that, where such dedication was made and accepted, the land became subject to the easement of a public way. No specific length of time was necessary; the acts of the parties to the dedication, when once established, completed it. Evidence of use by the public was not necessarily essential to its establishment, but was competent where the intent to dedicate was in dispute, and also as having some tendency to prove an acceptance on the part of the town. *Hobbs* v. *Lowell*, 19 Pick. 405. *Bowers* v. *Suffolk Manuf. Co.* 4 Cush. 332. *Hayden* v. *Stone*, 112 Mass. 346, and cases cited. Such was the law at the time of the passage of the St. of 1846, *c.* 203, which, as reënacted in the Gen. Sts. *c.* 48, § 82, is as follows: "No way opened and dedicated to public use, which has not become a public way, shall be chargeable upon a city or town as a highway or town way, unless the same is laid out and established by such city or town in the manner prescribed by the statutes of the Commonwealth."

Ways by prescription and ways by dedication rest upon entirely different principles. The first is established upon evidence of user by the public, adverse and continuous for a period of twenty years or more; from which use arises a presumption of a reservation or grant, and the acceptance thereof, or that it has been laid out by the proper authorities, of which no record exists. The second is created by the permission or gift of the owner, and, upon the acceptance of such gift by the public authorities, it becomes a way, and the owner cannot withdraw his dedication.

Nearly all the cases above cited, which held that a highway might be proved by prescription, arose prior to the St. of 1846, *c.* 203. In the first case, after the passage of that statute, in which this court was called upon to consider highways by prescription, in connection with highways by dedication, it was held that the St. of 1846 had no application to ways by prescription, but only to those established by dedication; and it was said by Chief Justice Shaw, in delivering the opinion, that "the object of the St. of 1846, *c.* 203, seems to have been to put an end to the establishment of any way by dedication in future, and to

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prevent any road, before the passing of the statute opened and dedicated by the owners of the land to public use, from becoming a public highway, or rendering any town chargeable, unless it had already become a highway, by which we understand unless it had been so accepted, adopted and confirmed, either by general use by all travellers, or otherwise, as to make it an actual public way, according to the laws theretofore in force on that subject. From that time, public ways could only be established by being laid out in the manner prescribed by the statutes of the Commonwealth. But this leaves untouched the case of public ways by prescription." "To establish such a way, where there is no proof of dedication, and where the element of dedication does not subsist, it will be necessary to prove actual public use, general, uninterrupted, continued for a certain length of time. In general, it must be such as to warrant a presumption of laying out, dedication or appropriation, by parties having authority so to lay out, or a right so to appropriate, like that of prescription or non-appearing grant in case of individuals. It stands upon the same legal grounds, a presumption that whatever was necessary to give the act legal effect and operation was rightly done, though no other evidence of it can now be produced except the actual enjoyment of the benefits conferred by it." "If such evidence of the existence of a highway is proved, the court are of opinion that it will be sufficient, independently of any such supposed dedication, and that the St. of 1846, *c.* 203, will have no application to such a case." *Jennings* v. *Tisbury*, 5 Gray, 73. And in *Hayden* v. *Attleborough*, 7 Gray, 338, it was said by Mr. Justice Metcalf, that the St. of 1846 "was passed for the purpose of altering the law as it was held in *Hobbs* v. *Lowell*, 19 Pick. 405, and preventing, thenceforth, the establishment of ways by dedication of land therefor and the assent thereto by towns." "We therefore hold that, in St. 1846, *c.* 203, a 'way opened and dedicated' means a way over land dedicated by the owner thereof to the use of the public as a way."

So in *Commonwealth* v. *Old Colony & Fall River Railroad*, 14 Gray, 93, it was held that a highway might be proved by prescription even at or near a place where a particular way was shown by record to have been established, and no allusion is made to the St. of 1846. In *Taylor* v. *Boston Water Power Co.*

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12 Gray, 415, the St. of 1846, *c.* 203 was considered, but the point decided was, that it had no application to the case of a way opened to the public and kept in repair by a private corporation, against which the plaintiff brought an action for injuries received from a defect therein. In *Holt* v. *Sargent*, 15 Gray, 97, it was held that proof of the use of a public way having been general, uninterrupted and continuous would warrant a jury in inferring that it had been laid out or appropriated to the public; citing as authority *Jennings* v. *Tisbury*, *ubi supra*.

In *Commonwealth* v. *Taunton*, 16 Gray, 228, there was evidence at the trial, in 1860, that the road had been used as a public way for more than thirty years for teams between Taunton and the neighboring towns. The presiding judge instructed the jury "that the evidence would warrant them in presuming, in the absence of all other evidence, that this road had been opened for public use, and had been adopted and accepted by the town as a public highway." The instruction evidently had reference to a way by dedication, and in connection with that instruction the judge stated the rules which related to the liability of the town to repair. There was no evidence that the way had been laid out as a highway since the St. of 1846, *c.* 203, and he made no reference to that statute. The instruction therefore was erroneous and deficient, in not stating to the jury that, while they might find such a dedication, and its adoption and acceptance by the authorities of the town, prior to the St. of 1846, yet that after this date, although dedicated by the owner and opened to the public, it could become a way only by a formal laying out by the town. This court so held; and the statement in the opinion delivered by Chief Justice Bigelow, that in the case of prescription, as well as in the case of dedication, it was necessary to show that it became a public way before the St. of 1846, went beyond what the decision required, was directly in conflict with the judgments in *Jennings* v. *Tisbury*, 5 Gray, 73, and in *Hayden* v. *Attleborough*, 7 Gray, 338, and has not been followed in the later decisions of this court.

In *Durgin* v. *Lowell*, 3 Allen, 398, it was decided that the way in question, which was opened between 1836 and 1839, and constructed and kept in repair by a private corporation, had not been dedicated to the public; and it was also held that it had

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not become a way by prescription, the presumption being that the public use had been permissive, clearly implying that, if it had been adverse, a way by prescription might have been established.

In *Commonwealth* v. *Holliston*, 107 Mass. 232, Chief Justice Chapman remarked, in delivering the opinion: "Since the St. of 1846, *c.* 203, highways cannot be established by dedication. *Commonwealth* v. *Taunton*, 16 Gray, 228. Before that time they could be thus established, as well as by prescriptive use. In *Jennings* v. *Tisbury*, 5 Gray, 73, the court say, 'that a proportion of the public ways, whether they be considered public highways or town-ways, stand upon no other title but prescription,' and that the time of prescription is now to be considered as fixed at twenty years. See also *Commonwealth* v. *Old Colony & Fall River Railroad*, 14 Gray, 93, 94." In *Tyler* v. *Sturdy*, 108 Mass. 196, after alluding to the St. of 1846, the court say, "It has been adjudged by this court that, before that statute, highways and town-ways might be established in the Commonwealth by dedication as well as by prescription." In neither of these two cases is it suggested that the St. of 1846, *c.* 203, applies to ways by prescription, as well as to ways by dedication. See also *Gould* v. *Boston*, 120 Mass. 300.

Two other cases remain to be noticed. The Norfolk and Bristol Turnpike Corporation was authorized by the St. of 1843, *c.* 54, to surrender its charter, and the towns through which it passed were authorized, within one year of the passage of the act, to lay it out as a common highway. The town of Attleborough voted to accept it as a highway, and it was so laid out by the selectmen. In *Hayden* v. *Attleborough*, 7 Gray, 338, it was assumed that the action of the town was not effectual to continue the turnpike as a highway. It was used, however, from that time as a highway until 1875; and it was held in *Richards* v. *County Commissioners*, 120 Mass. 401, that whether the action of the town was or was not legally effectual, the attempted compliance with the provisions of the St. of 1843, followed by actual, general and uninterrupted public use since that time, was enough to establish it as a highway by prescription; and it was said by the court, "It is not the case of a road opened and dedicated to the public use by the owner, to which

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the provisions of the St. of 1846, c. 203, Gen. Sts. c. 43, § 82, are applicable." This case clearly establishes that evidence of actual, general and uninterrupted public use for twenty years, between 1843 and 1875, is sufficient to establish a highway by prescription. See also *Murphy* v. *Boston*, 120 Mass. 419.

The case of *Commonwealth* v. *Matthews*, 122 Mass. 60, is a direct authority to the same point. There was no proof of any laying out of a certain street in Boston, or of its formal acceptance, but it was shown to have been a common thoroughfare for twenty years, and to have been known as Providence Street during that time; and it was held that this evidence was admissible, and that the jury would be justified in finding that the way had been located and appropriated to the public use. The presiding judge had instructed the jury that from this evidence they could infer that the way had been located and dedicated to the public use as a street; and this court decided that the word "dedicated" must be taken to mean appropriated, and not of necessity a dedication by a private proprietor within the meaning of St. 1846, c. 203. Gen. Sts. c. 43, § 82.

We are not aware of any case in which *Commonwealth* v. *Taunton*, 16 Gray, 228, has been cited as authority to the point that ways by prescription, as well as those by dedication, are within the provisions of the St. of 1846.

This review of the authorities establishes the proposition that highways may be proved in Massachusetts by prescription, in the same manner as they could prior to the St. of 1846; and we adhere to the construction of Chief Justice Shaw, that the St. of 1846 "leaves untouched the case of public ways by prescription." 5 Gray, 74.

We are also of opinion that the evidence that the wall had stood over fifty years along the curved line was competent, and it was for the jury to find whether, upon all the facts, it fronted on the highway and was a boundary thereof. Under the Gen. Sts. c. 46, § 1, such a fence may be evidence of the boundary of a way, even if a record of the laying out exists.

Exceptions overruled.

J. Brown, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* MARK DYER.

Bristol. Oct. 28, 1879. — Jan. 22, 1880. COLT & AMES, JJ., absent.

An indictment on the St. of 1875, *c.* 211, charging that the defendant "by force and intimidation did seek to prevent one A. from continuing in the employment of" a certain corporation, follows the words of the statute, and sufficiently sets out the offence intended to be charged; and allegations in the indictment, that the defendant "did unlawfully and wilfully intimidate, and did seek to intimidate" A., may be rejected as surplusage.

INDICTMENT on the St. of 1875, *c.* 211, charging that the defendant, on July 13, 1879, at Fall River, "one Horace S. Andrews did unlawfully and wilfully intimidate, and did seek to intimidate, and by force and intimidation did seek to prevent from continuing in the employment of a corporation, to wit, the Weetamoe Mills, a corporation then and there duly incorporated under the laws of said Commonwealth and having its usual place of business in said Fall River, he the said Horace S. Andrews being then and there employed by and in the employment of said corporation as a spinner in the mill of said corporation; against the peace of said Commonwealth and contrary to the form of the statute in such case made and provided."

In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment for the following reasons: "1. Because no offence is charged in said indictment substantially and formally, fully and plainly, as required by law. 2. Because the indictment contains no allegation how, by what means or in what manner the said Andrews was intimidated, nor any allegation of the acts, words or means of intimidation, nor any allegation of what was the intimidation used, to seek to prevent said Andrews, &c. 3. Because said indictment does not charge, and there is no allegation, that Horace S. Andrews was intimidated, nor that said Andrews was prevented from continuing in said employment, nor that the intimidation and force were used by the defendant, nor that the defendant did seek to prevent said Andrews from, &c. 4. Because there is no allegation in said indictment that the defendant's act, or words or manner or means used, were used by the defendant with the intent to seek

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to prevent said Andrews from continuing in the employment of the Weetamoe Mills, and there is no charge of any intent by the defendant to seek to prevent said Andrews from continuing in said employment of said mills. 5. Because there is no allegation in said indictment that the defendant did seek to prevent any person from continuing in the employment of the Weetamoe Mills."

Bacon, J. overruled the motion; the jury returned a verdict of guilty; and the defendant alleged exceptions.

E. L. Barney, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

SOULE, J. The indictment in this case contains certain unnecessary allegations. It is founded on the St. of 1875, *c.* 211, § 2, which is in these words: "Whoever shall by intimidation or force prevent or seek to prevent any other person or persons from entering or continuing in the employment of any corporation, company or individual, shall be punished therefor by a fine not exceeding one hundred dollars." The allegations that the defendant "did intimidate, and did seek to intimidate," are not allegations of any offence under the statute, and must be rejected as of no value. There remains the allegation, "by force and intimidation, did seek to prevent from continuing in the employment," &c. This allegation is in the language of the statute, and is sufficient. When an offence is created by statute which sets forth with precision and certainty all the elements of the offence, an indictment or complaint is sufficient which charges the offence in the words of the statute. *Commonwealth* v. *Raymond*, 97 Mass. 567. *Commonwealth* v. *Barrett*, 108 Mass. 302. *Commonwealth* v. *Malloy*, 119 Mass. 347. *Commonwealth* v. *Ashton*, 125 Mass. 384. See also *Commonwealth* v. *McClellan*, 101 Mass. 34. But when the words of a statute may by their generality embrace cases falling within its literal terms, which are not within its meaning or spirit, the indictment or complaint must set forth all facts necessary to bring the case within the meaning of the statute. *Commonwealth* v. *Filburn*, 119 Mass. 297.

The case at bar is within the rule first above stated. The statute under consideration sets forth with precision and certainty all the elements necessary to constitute the offence in-

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tended to be punished. The indictment, using the words of the statute, set forth the act in which the offence consists, fully and directly, without any uncertainty or ambiguity. The gist of the offence charged is the seeking to prevent one employed by a corporation from continuing in its employ, by means of intimidation and force. It is not necessary, in order to a full understanding of the offence charged, that the particular acts of intimidation and force should be alleged in detail. A person cannot be convicted unless he has endeavored to prevent a continuance of the servant in the employ of his master, by the use of unlawful force and intimidation. The motion to quash was properly denied. *Exceptions overruled.*

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COMMONWEALTH *vs.* CERTAIN INTOXICATING LIQUORS, Carl Becker, claimant.

Bristol. Oct. 28, 1879. — Jan. 22, 1880. COLT & AMES, JJ., absent.

A complaint alleged that, on September 24, 1878, intoxicating liquors were kept and deposited by A. in a certain building for sale in violation of law. The search-warrant issued under the complaint recited that the complaint was made on September 24, 1878. The jurat affixed to the complaint was dated "this twenty-fourth day of September in the year one thousand eight hundred and seventy- ." The court, to a special justice of which the complaint was addressed, was established in 1874. *Held*, that the jurat was not the only evidence of the time of making oath to the complaint; and that the record showed that the complaint was sworn to on September 24, 1878.

A warrant issued by a special justice of the First District Court of Bristol at a session thereof at Attleborough, held under the St. of 1877, c. 189, may be returned to that court sitting at Taunton.

A recital, in a notice to all persons claiming any interest in intoxicating liquors seized under the St. 1876, c. 162, that the seizure was made under a warrant issued by a district court, when in fact it was made under a warrant issued by a special justice thereof, does not invalidate the proceedings.

COMPLAINT, on the St. of 1876, *c.* 162, to a special justice of the First District Court of Bristol, alleging that, on September 24, 1878, certain intoxicating liquors were kept and deposited by Carl Becker in a certain building in North Attleborough, with the intent to sell the same unlawfully in this Common-

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wealth, and praying for a warrant to search said premises. Carl Becker appeared and claimed the liquors seized under the complaint. In the Superior Court, the claimant filed a motion to dismiss the complaint, the grounds of which appear in the opinion. The motion was overruled; and the claimant appealed to this court.

J. Brown, for the claimant.

G. Marston, Attorney General, for the Commonwealth.

SOULE, J. The search-warrant in this case recites that the complaint was made on the twenty-fourth day of September, 1878, and the complaint alleges that the liquors named in it were kept for unlawful sale on the twenty-fourth day of September, 1878, but the certificate of the magistrate that the complaint was sworn to, and of probable cause to believe it to be true, bears date of "this twenty-fourth day of September in the year one thousand eight hundred and seventy- ."

The claimant contends that the proceedings ought to be dismissed, on the ground that the complaint appears to have been sworn to in the year 1870, before the District Court, to the special justice of which it is addressed, was established. This position is not tenable. The statute requires that the complaint shall be made on oath or affirmation, and that the magistrate to whom it is made shall be satisfied that there is probable cause to believe it to be true, in order to justify the issuing of a search-warrant. St. 1876, *c.* 162, § 1. It does not provide that the only evidence of the time when the complaint is made and sworn to shall be found in the jurat affixed to it. In the case at bar, it is probable, from an inspection of the complaint, that it was not sworn to in the year 1870, because the illegal act set forth in it is alleged to have been committed in the year 1878, and because the court, to the special justice of which it is addressed, was not created till the year 1874. In the absence of other evidence as to the time when the oath was made, it would not be proper to sustain the proceedings merely on the strength of this probability. But as it further appears from the recital in the warrant, signed by the same magistrate who signed the jurat, that the complaint was made on oath on the twenty-fourth day of September in the year 1878, and the statute, in addition to requiring that the complaint be made on oath or affirmation, requires that the

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warrant be supported by the oath or affirmation of the complainants, the record contains affirmative and direct evidence that the complaint was sworn to on the twenty-fourth day of September, 1878. It becomes plain, therefore, that the apparent date of the jurat is a clerical error, for the correction of which the record furnishes ample evidence. There is no reason why this evidence should not be appealed to. The jurat and certificate of the magistrate of probable cause are important only for the purpose of showing that the requirement of the law has been complied with, and that the warrant was not issued until the oath had been administered, and the mind of the magistrate had been satisfied that there was probable cause to believe the complaint to be true. *Commonwealth* v. *Keefe*, 7 Gray, 332. The allegation in the complaint and the language of the jurat left it doubtful when the complaint was sworn to. It was sufficient for the validity of the proceedings that this matter could be made certain by reference to the recital in the warrant.

The claimant further contends that the proceedings should be dismissed, because the notice to the claimant recites that the warrant was issued by the First District Court of Bristol, at the second session thereof, and was not returned to the court at that session, but to the court at Taunton. He contends that, as the St. of 1877, *c.* 189, provides for a daily session of the court at Attleborough, to be held by one of the special justices for the transaction of criminal business, warrants issued by the court at such session cannot lawfully be returned to the court sitting at Taunton. We are not of that opinion. The provision for the session at Attleborough is not the creation of a new court; it is only an enlargement of the power of the existing court. There is but one clerk. The record is kept at Taunton, and we know of no reason why a warrant issued by the court at the special session may not properly be returned to the court at Taunton.

Besides, the St. of 1874, *c.* 293, which created the First, Second and Third District Courts of Bristol County, provides in § 5 that either of the justices of said courts may issue warrants in all proper cases. This authorizes the special justices to issue their own warrants, returnable to their respective courts. The warrant in the case at bar was the warrant of the special justice, under his hand and seal, not the warrant of the court, and was

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made returnable to the court. It was well returned to the court at Taunton. The misrecital in the notice to the claimant, as to the source from which the warrant came, is immaterial, because it was of no consequence to the claimant whether the warrant was issued by the court or by the special justice. The motion to dismiss was properly denied. *Exceptions overruled.*

COMMONWEALTH *vs.* CHESTER M. SPRAGUE.

Bristol. Oct. 28, 1879. — Jan. 24, 1880. COLT & AMES, JJ., absent.

A complaint, alleging that the defendant "did keep intoxicating liquors with intent to sell the same in this Commonwealth," he not being authorized to sell the same, sets forth an offence within the St. of 1875, c. 99.

COMPLAINT on the St. of 1875, *c.* 99, to the First District Court of Bristol, alleging that the defendant, at Attleborough, on September 24, 1878, "did keep intoxicating liquors with intent to sell the same in this Commonwealth, he, the said Sprague, not being authorized, appointed or licensed according to law to sell the same in this Commonwealth for any purpose, nor by any legal authority whatever."

In the Superior Court, the defendant filed a motion to quash the complaint, on the ground that it set forth no offence known to the law. *Pitman*, J. overruled the motion. The jury returned a verdict of guilty; and the defendant alleged exceptions.

J. Brown, for the defendant, contended that, the St. of 1869, *c.* 415, making the keeping of intoxicating liquors with intent to sell the same an offence, being repealed by the St. of 1875, *c.* 99, and the latter statute not enumerating this among the offences mentioned, the motion to quash should have been granted.

G. Marston, Attorney General, for the Commonwealth.

MORTON, J. The St. of 1875, *c.* 99, § 1, provides that "no person shall sell, or expose, or keep for sale, spirituous or intoxicating liquors, except as authorized in this act." The complaint in the case at bar alleges that the defendant, at the time and

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place named, "did keep intoxicating liquors with intent to sell the same in this Commonwealth," he not being authorized to sell the same. The allegation of the complaint is equivalent to an allegation in the words of the statute, that the defendant did at the time and place named "keep for sale" intoxicating liquors without authority. Each allegation imports that he kept the liquors with the present intent to sell them when called for by purchasers.

In *Commonwealth* v. *O'Keefe*, 123 Mass. 252, the complaint was in the same form as in the case at bar, and it was held that the allegation was substantially the same as an averment in the words of the statute, and that the defect in the form of the allegation furnished no ground for arresting judgment. Unless the two allegations are essentially the same, the defect would be equally fatal upon a motion in arrest of judgment as upon a motion to quash the complaint.

We are of opinion that the defendant's motion to quash was rightly overruled. *Exceptions overruled.*

COMMONWEALTH *vs.* SAMUEL HAMER.

Essex. Nov. 5, 1879. — Jan. 8, 1880. COLT & AMES, JJ., absent.

Under the St. of 1875, *c.* 99, § 12, authorizing the mayor and aldermen of a city, by whom a license to sell intoxicating liquors has been issued, to declare a license forfeited upon proof satisfactory to them of a violation of its conditions, after notice to the licensee and reasonable opportunity for him to be heard by them, a licensee can be convicted of keeping intoxicating liquors for sale in violation of law upon the production of the record of the mayor and aldermen, showing that, before the day named in the complaint, the board declared his license forfeited, after a hearing on a verbal complaint made to the board, the licensee being present with counsel, and after a finding that he had violated the provisions of his license.

If any notice is necessary to a licensee, that his license to sell intoxicating liquors has been revoked by the mayor and aldermen of a city, verbal notice is enough.

COMPLAINT on the St. of 1875, *c.* 99, alleging that the defendant, on September 2, 1879, at Newburyport, kept intoxicating liquor with intent unlawfully to sell the same in this Com-

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monwealth, he not being then and there authorized to sell the same.

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At the trial in the Superior Court, before *Rockwell*, J., the defendant admitted that, on the day named in the complaint, he had intoxicating liquors on hand for sale; and relied upon a license to keep for sale intoxicating liquors, granted to him by the mayor and aldermen of Newburyport, for one year from May 1, 1879.

The government introduced the records of the mayor and aldermen of that city, showing that, on August 20, 1879, after a hearing upon a verbal complaint made to the board, the defendant being present with counsel, the board found the defendant guilty of a violation of the provisions of his license, and declared the same forfeited. There was no further record of the board, and no order of the board to notify the defendant of its action, though information of such action was verbally communicated to him, nor was there any complaint in writing made to or filed with the board showing what charges of violation of his license were preferred against him.

The defendant requested the judge to rule that the government had failed to make out a case, no complaint in writing having been made or filed in the city clerk's office, or with the board of aldermen, alleging any violation of the provisions of his license, upon which he could be called to answer; that a revocation of his license, without a written complaint informing him upon what charges he was called to answer, was not sufficient; and that he was entitled to a verdict.

The judge ruled otherwise. The jury returned a verdict of guilty, and the defendant alleged exceptions.

J. G. Gerrish, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

SOULE, J. It is provided by the St. of 1875, *c.* 99, § 12, that "the mayor and aldermen or the selectmen of the city or town by which a license" for the sale of spirituous or intoxicating liquors "has been issued, after notice to the licensee and reasonable opportunity for him to be heard by them, or by a committee of their number, may declare his license forfeited upon proof satisfactory to them that he has violated, or permitted to be violated, any of the conditions thereof." By this provision the mayor and alder-

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men of the city of Newburyport were authorized, after due notice to the defendant of any charge against him of violating his license, to investigate the matter, and, if satisfied by proof that he had violated any of its provisions, to declare his license forfeited. Such action of the mayor and aldermen must appear in some form by their record, in order to its having any validity, because the record of that body is the ordinary and regular evidence of its acts. It is not enough that the record should show merely that the board determined to revoke the license, because it has not the power to do this arbitrarily, or because it has become satisfied that the license was inconsiderately issued. The power to revoke is limited by the provision of the statute to cases in which, after due notice and reasonable opportunity to the licensee to be heard, the board is satisfied by proof that he has violated or permitted to be violated one or more of the conditions of his license, and the record must show that the order of revocation is made under such circumstances that the board making it was acting within its jurisdiction. *Commonwealth* v. *Moylan*, 119 Mass. 109.

In the case at bar, the record of the mayor and aldermen shows that the board declared the defendant's license forfeited, after a hearing on a verbal complaint made to the board, the defendant being present with counsel, and after a finding that he had violated the provisions of his license. We are of opinion that this record is sufficient for the purpose. The statute does not require, in terms, that the hearing shall be had on a written complaint, nor that the complaint shall be recorded, nor that the record shall indicate the particular way in which the licensee is found to have violated his license. Nor do we see any satisfactory reason for holding that the record should be thus full. As no license can be declared forfeited till the licensee has had notice of the charge against him and an opportunity to be heard upon it, there is no danger that he will be surprised by any finding or order of the board; and as the result is the same, whatever may be the particular in which he has violated the provisions of his license, and there is no appeal from the decision of the board, the requirements of the law are satisfied if the record shows, in the general form, which was adopted in the case under consideration, that the notice to the licensee and the opportunity to be heard

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were given, and that the fact that he had violated the provisions of his license was found, before the license was declared forfeited.

The defendant admitted that he kept intoxicating liquors for sale, and attempted to justify under a license. He started with the presumption that he was not licensed. St. 1864, c. 121. This presumption could be overcome only by proof of a valid license subsisting at the time of the alleged offence. It was not overcome by the proof of a license issued which had afterward been forfeited. There is no provision of law that the forfeiture of a license shall not take effect till written notice thereof is served on the licensee. Verbal notice is enough, if any notice is necessary. *Exceptions overruled.*

COMMONWEALTH *vs.* HUGH HARKINS.

Essex. November 8, 1878; November 25, 1879. — January 20, 1880.

A person, who by false and fraudulent representations obtains the consent of a city to the entry of a judgment in his favor against it in an action then pending, and the payment of a sum of money by the city in satisfaction of that judgment, cannot be convicted of obtaining money by false pretences, under the Gen. Sts. c. 161, § 54. GRAY, C. J., AMES & SOULE, JJ., dissenting.

INDICTMENT on the Gen. Sts. c. 161, § 54, charging that the defendant, on June 9, 1877, at Lynn, "being a person of evil disposition, and devising and intending by unlawful ways and means to obtain and get into his possession the moneys of the city of Lynn, a municipal corporation, within said county of Essex, duly and legally established by the laws of said Commonwealth, and with intent to cheat and defraud, did then and there unlawfully, knowingly and designedly, falsely pretend and represent, to said city, through its agent, servant and city solicitor, Rollin E. Harmon, that said city, on the third day of September in the year of our Lord one thousand eight hundred and seventy-six, negligently suffered Union Street, a public highway and street in said Lynn, which said city was bound to keep in repair and safe for travel, to be out of repair and dangerous, that he the said

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Harkins, while travelling on said Union Street and using due care, on said third day of said September, was hurt and injured by reason of the dangerous condition of said street and highway, that before said hurt and injury he the said Harkins was well and strong, was able to labor daily, and that by reason of said hurt and injury he was disabled for many days thereafter from performing any labor whatever, and that by reason of said hurt and injury, so received as aforesaid, he had suffered great pain and inconvenience until said ninth day of said June; and he the said Harkins then and there exhibited to said Harmon, servant, agent and solicitor, as aforesaid, his the said Harkins's foot and ankle in a maimed and injured condition, and then and there falsely and fraudulently pretended and represented to said Harmon, servant, agent and solicitor as aforesaid, that said maimed and injured condition of his foot was caused by said hurt and injury received by him on said Union Street. And the said city of Lynn, then and there believing the said false pretences and representations, and being deceived thereby, and said Harmon, agent, servant and solicitor, as aforesaid, believing said false pretences and representations, so made as aforesaid, by said Harkins, and being deceived thereby, the said city of Lynn, and said Harmon, agent, servant and solicitor as aforesaid, were induced and did then and there consent and agree to the entry of a certain judgment, against said city, for the sum of, and of the value of, five hundred and eighty-seven dollars and fifty cents, which said judgment was then and there entered in pursuance of said agreement, in a certain suit, then pending in the Superior Court, civil session, for said county of Essex, in which suit said Harkins, under the name of Frank Hawkins, was plaintiff and said city was defendant; and said city of Lynn, and said Harmon, agent, servant and solicitor, as aforesaid, then and there believing said false and fraudulent representations and pretences, so made as aforesaid by said Harkins, and being deceived thereby, said city then and there paid to said Harkins the amount of said judgment, to wit, the sum of five hundred and eighty-seven dollars and fifty cents, of the property and money of said city. And the said Harkins did then and there obtain said judgment against said city of Lynn, and did then and there receive said sum of five hundred and eighty-seven dollars and fifty cents, by means of

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the false pretences and representations aforesaid, and with the intent to cheat and defraud said city of Lynn of the amount of said judgment, to wit, of said sum of five hundred and eighty-seven dollars and fifty cents. Whereas, in truth and in fact, said Harkins was not then and there hurt and injured by reason of any defect or want of repair in said Union Street, and said Harkins was not well and strong and able to labor daily before said third day of said September and before said alleged hurt and injury, and said Harkins was not disabled by reason of said alleged hurt and injury for many days thereafter from performing any labor whatever; and whereas in truth and in fact said Harkins was not then and there injured by reason of said alleged hurt on said Union Street, and he did not suffer great pain and inconvenience until said ninth day of said June; and whereas in truth and in fact said injured and maimed condition of said foot and ankle, so exhibited to said Harmon as aforesaid, was not caused by said hurt and injury on said Union Street, and in truth and in fact said Harkins was not injured or hurt on said Union Street, or in said Lynn at all; all of which the said Harkins then and there well knew; against the peace of the Commonwealth aforesaid, and contrary to the form of the statute in such case made and provided."

In the Superior Court, before the jury were empanelled, the defendant moved to quash the indictment, on the ground that it set forth no offence known to the law. *Bacon*, J. overruled the motion. The defendant was then tried, and found guilty; and alleged exceptions.

The case was argued at the bar in November 1878, by *F. W. Griffin*, for the defendant, and *C. R. Train*, Attorney General, for the Commonwealth; and submitted on briefs to all the judges in November 1879, by *Griffin*, for the defendant, and *G. Marston*, Attorney General, for the Commonwealth.

COLT, J. The defendant was indicted for obtaining money from the city of Lynn by false pretences. He moved to quash the indictment on the ground that it did not set forth an offence known to the law.

It is alleged in substance that the defendant falsely represented to the city of Lynn, through its agent, the city solicitor, that a street which the city was bound to repair had been suffered to be

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out of repair, and that the defendant, while travelling thereon with due care, was injured by the defect; that the defendant at the same time exhibited an injury to his foot and ankle, and represented that it was caused by the alleged defect. It is further alleged that the city and its solicitor were deceived by these representations, and, being induced thereby, agreed to the entry of a judgment against the city in a suit then pending in favor of the defendant in this case; and upon the entry thereof paid the amount of the same to him. It is not alleged that the suit was to recover damages on account of the defendant's injury from the alleged defect; but we assume that this was so, for otherwise there could be no possible connection, immediate or remote, between the pretences charged and the payment of the money in satisfaction of the judgment recovered.

In the opinion of a majority of the court, this indictment is defective. The facts stated do not constitute the offence of obtaining money by false pretences. The allegations are, that an agreement that judgment should be rendered was obtained by the pretences used, and that the money was paid by the city in satisfaction of that judgment. It is not alleged that, after the judgment was rendered, any false pretences were used to obtain the money due upon it; and, even with proper allegations to that effect, it has been held that no indictment lies against one for obtaining by such means that which is justly due him. There is no legal injury to the party who so pays what in law he is bound to pay. *Commonwealth* v. *McDuffy*, 126 Mass. 467. *People* v. *Thomas*, 3 Hill, 169. *Rex* v. *Williams*, 7 Car. & P. 354. A judgment rendered by a court of competent jurisdiction is conclusive evidence between the parties to it that the amount of it is justly due to the judgment creditor. Until the judgment obtained by the defendant was reversed, the city was legally bound to pay it, notwithstanding it may have then had knowledge of the original fraud by which it was obtained; and with or without such knowledge it cannot be said that the money paid upon it was in a legal sense obtained by false pretences, which were used only to procure the consent of the city that the judgment should be rendered.

The indictment alleges the fact of a judgment in favor of the defendant, which, if not conclusive as between the parties to this

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criminal prosecution, is at all events conclusive between the parties to the transaction. To hold that the statute which punishes criminally the obtaining of property by false pretences, extends to the case of a payment made by a judgment debtor in satisfaction of a judgment, when the evidence only shows that the false pretences were used to obtain a judgment, as one step towards obtaining the money, would practically make all civil actions for the recovery of damages liable in such cases to revision in the criminal courts, and subject the judgment creditor to prosecution criminally for collecting a valid judgment, whether the same was paid in money or satisfied by a levy on property.

SOULE, J. I am obliged to differ from the majority of the court, and am authorized to state that the Chief Justice and Mr. Justice Ames concur with me. As the case involves questions of importance in the administration of public justice, it has seemed to us proper to state our views of them. In doing this, it is necessary to discuss several points which are raised by the exceptions, but are not treated of in the opinion of the court, because they have become immaterial to the decision which has been reached by the majority.

The indictment sets forth that the defendant, with intent to cheat and defraud, made certain false representations and pretences, as to matters within his knowledge and relating to existing facts as well as to past transactions, concerning which neither the city of Lynn nor its agent had the means of knowing the truth, and that, by means of these representations and pretences, the city, believing them to be true, was induced to and did part with its money to the defendant. It further sets forth that the defendant received the money by means of the false pretences, and with intent to cheat and defraud the city of Lynn, and that the several representations and pretences were not true. It therefore charges an offence. *Commonwealth* v. *Hooper*, 104 Mass. 549. *Commonwealth* v. *Parmenter*, 121 Mass. 354.

The additional allegations as to the consent to the entry of judgment and the satisfaction of the judgment are merely a narration of the methods by which the parties proceeded in paying and receiving the money, and are wholly unnecessary,

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but they do not charge another offence, nor make the indictment bad for duplicity. The obtaining of the money by false pretences is the gist of the offence, not the obtaining of the judgment.

The fact that the judgment obtained by the defendant remains unreversed constitutes no objection to the indictment. It is true that, as a matter of public policy, an unreversed judgment is conclusive between the parties and their privies, in accordance with the maxim, *Interest reipublicæ ut sit finis litium.* And this principle goes so far that one cannot sustain an action against another for obtaining a judgment against him by means of conspiracy and fraud, if he had an opportunity to be heard at the trial of the cause in which the judgment was obtained. *Castrique* v. *Behrens*, 3 E. & E. 709. *Huffer* v. *Allen*, L. R. 2 Ex. 15.

But it is equally true that a judgment is conclusive only between the parties and their privies, and that strangers are not bound nor affected by it. To the indictment the Commonwealth is a party, but was a stranger to the action between the city of Lynn and the defendant, in which the judgment was recovered. That judgment is, therefore, no evidence against the Commonwealth that the defendant was entitled to recover anything of the city. It has no bearing on the case at bar, except as being a part of the machinery employed in obtaining the money wrongfully. Its existence is no bar to prevent the Commonwealth from showing, in its prosecution of crime, that it and the money were obtained by false pretences. To hold otherwise would be to provide a shield for the criminal in his own crime. There is nothing in this view of the law, which conflicts with the decision in the recent case of *Commonwealth* v. *McDuffy*, 126 Mass. 467. It was there held, that one who obtains only what is due him by false pretences commits no punishable offence. It was not held that the Commonwealth was estopped to prove the truth, by a judgment to which it was not a party. The general doctrine, that only parties and privies are concluded by a judgment, is too familiar to require the citation of authorities in its support. An application of it peculiarly pertinent to the case at bar was made in *The Duchess of Kingston's case*, 20 Howell's St. Tr. 355.

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The indictment is not defective on the ground of remoteness of the false representations from the obtaining of the money. Ordinarily the question of remoteness is one for the jury, and can be presented to this court only on a report of the evidence after a refusal by the presiding judge to rule that the evidence will not warrant a conviction. As an objection to the indictment, it is in substance that the indictment shows that the money was obtained on a valid judgment, and therefore cannot be held to have been obtained by the false pretences. But this point is not tenable. The test is the direct connection between the pretence and the payment of the money. There was no purpose in either party to the transaction that the matter should go to the extent of entering up the judgment, and rest there; the judgment was, in and of itself, of no importance. It was only a means to an end, and it was for the jury to say whether the false pretences were an inducement for the payment.

In the case of *Regina* v. *Gardner*, Dearsly & Bell, 40, and 7 Cox C. C. 136, cited by the defendant, it was held that the false pretence was exhausted by obtaining a contract for lodging, and did not extend to the contract for board also, made after the defendant had been a lodger with the prosecutor for more than a week. In *Regina* v. *Bryan*, 2 F. & F. 567, board and lodging had been obtained by means of false pretences, and, some time after the contract therefor, the prisoner borrowed sixpence of the person with whom he had made the contract and was lodging, and it was held that the money was not obtained by the false pretence.

But in *Regina* v. *Martin*, L. R. 1 C. C. 56, it was held that the question of remoteness was for the jury, and that a conviction was warranted when the prisoner had ordered a van to be made, under the false pretence that he acted for the Steam Laundry Company of Aston, which he represented to be composed of leading men of Birmingham, and before it was delivered to him countermanded the order, and afterward agreed to receive it if certain alterations were made in it, which were made, and it was subsequently delivered. In that case it is said that, in order to justify a conviction, there must be a direct connection between the pretence and the delivery of the chattel, and that whether there is such a connection or not is a question for the jury;

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and, further, that since the cases of *Regina* v. *Abbott*, 1 Denison, 273, and *Regina* v. *Burgon*, Dearsly & Bell, 11, it is impossible to contend seriously that the case is not within the statute, because the chattel is obtained under a contract induced by the false pretence.

The false representations and pretences set forth in the indictment are of such a character as to bring the transaction within the statute. It is sometimes said that a naked lie is not within the statute; and, as applied to particular cases, this is true; as when one falsely represents to a saloon-keeper that, a few days before, he gave the keeper five dollars out of which to take twenty cents in payment for drinks, and that the keeper did not return any change; *Commonwealth* v. *Norton*, 11 Allen, 266; or where one draws his check on a bank in which he has no money, and presents it at the bank for payment. *Commonwealth* v. *Drew*, 19 Pick. 179. In those cases the lie is told to one who has the same means with the liar of knowing what the fact is. In the case last cited it was said that passing a check drawn on a banker with whom the drawer has no account, and which he knew would not be paid, would be within the statute; and the English decisions are so. The difference between the two is merely that in one case the lie or false pretence is made to one who is in a situation to know the facts, and in the other to one who is not in such situation. The true rule seems to be, that a case is within the statute if the alleged false pretence is an intentionally false representation as to an existing fact or past transaction, made to one who has not the means of knowing the truth in the premises, for the purpose of inducing him thereby to part with his property.

This case comes up on exceptions to a refusal to quash the indictment, and it is argued that there was no such relation of trust and confidence between the defendant and the city of Lynn as would justify a belief in the representations made, and lay a foundation for an indictment under the statute. But, as has already been said, there are sufficient allegations to constitute a good indictment, and the question whether they were proved or not is one of evidence, and not of pleading. Moreover, it is not true, as matter of law, that one who is negotiating a settlement of an alleged claim for damages cannot bring himself

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within the statute by making false representations and obtaining money thereby. In *Regina* v. *Copeland*, Car. & M. 516, the prisoner, a married man, who had obtained a promise of marriage from a single woman which she refused to fulfil, threatened her with an action at law for breach of her promise, and added that he could thereby take half her fortune from her, and she, believing the statement and threat, paid him one hundred pounds sterling. The prisoner was convicted, and the conviction was sustained by Lord Denman and Mr. Justice Maule.

The question whether the false pretences were believed and induced the payment is for the jury. To quash the indictment on the ground that the circumstances of the transaction would not justify a conviction, would be to quash it for matters *dehors* the record.

That the wrong is a private one is no objection to the prosecution, although it has been said in many cases that the statute is not intended for the punishment of every private wrong. In all the cases above cited in which a conviction was sustained the wrong was a private one, in the same sense as in the case at bar; it is a public wrong in this, as in those cases, in that it is within the statute which provides for punishment of the wrongdoer. The purpose of the statute was to extend the punishment to cases which were not reached by the common law, and its language is broad and comprehensive. Its operation ought not to be limited by phrases of indefinite meaning, which fail to state any principle of construction. *Exceptions sustained.*

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COMMONWEALTH *vs.* MORRIS COSTELLO.

Suffolk. November 24, 1879. — January 7, 1880.

In a case of felony, not capital, the jury may be authorized by the court, without express assent of the defendant, after the case has been finally committed to them, to separate upon signing and sealing up a form of verdict, and to deliver their verdict orally upon the next coming in of the court.

In a criminal case, not capital, the jury were instructed that, if they agreed after the adjournment of the court, the foreman should sign and seal up a statement of the verdict agreed upon, and return their verdict in the morning. The jury agreed upon their verdict after the adjournment of the court, and separated. After the jury had returned into court the next morning, and the written form of verdict had been handed by the foreman to the clerk and read, the jury were asked by the clerk if they had agreed upon their verdict, to which the foreman answered that they had, and that they found the defendant guilty, and thereupon the verdict was affirmed in the usual form. *Held*, that the verdict was duly returned.

INDICTMENT on the Gen. Sts. *c.* 163, § 11, for rescuing a prisoner from the lawful custody of a police officer. After a verdict of guilty in the Superior Court, the defendant moved to set aside the verdict for the following reasons: "1. Because the proceedings in regard to the rendition of the verdict and separation of the jury were irregular and illegal. 2. Because no proper and correct verdict was rendered by the jury. 3. Because, after the case was given to the jury, and before any verdict was rendered, they had separated without the knowledge or consent of the defendant."

The motion was overruled by *Dewey*, J., who allowed a bill of exceptions, stating the facts that appeared upon the hearing of the motion, as follows:

The jury retired to consider their verdict during the afternoon session of the court, and, at the time of the adjournment of the court for the day, they had not agreed. About eight o'clock that evening they agreed upon a verdict, and so informed the officer having charge of them, and thereupon they separated for the night. At the time they retired to consider the case, the judge directed them that, if they had not agreed at the time of the adjournment of the court that day, but agreed after the adjournment, the foreman should sign a statement of their verdict as agreed, seal up the same, and return their verdict in the

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morning. The verdict, as stated in the writing returned to the court, was signed and sealed up as directed before the jury separated.

At the opening of the court the next morning, all the members of the jury and the defendant being present, the defendant, upon learning the above facts, and before the jury had returned their verdict, objected to the reception and recording of the verdict, because of the separation of the jury, without his knowledge or consent, after the case was given to them, and before rendering their verdict in court. The clerk was directed by the court to take the verdict, which was taken in the following manner: The written verdict was handed by the foreman to the clerk, and read, and the clerk inquired of the jury if they had agreed upon their verdict, to which the foreman answered they had, and that they found the defendant guilty; whereupon the clerk stated the verdict, that the jury found the defendant guilty, and asked the jury if they all so said, to which they assented.

T. Riley, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

GRAY, C. J. The offence of which the defendant has been convicted, being punishable by imprisonment in the state prison, is a felony. Gen. Sts. *c.* 163, § 11; *c.* 168, § 1. But in this Commonwealth, by long established usage, it is not essential, in the case of any offence under the degree of a capital crime, that the jury should be kept together from the time the case is opened to them until their final discharge. It is every day's practice, in cases of felonies not punishable with death, as well as of misdemeanors, to allow the jurors to separate at the intermissions of the court pending the trial. And in both classes of cases juries have been authorized by the court, without express assent of the defendant, after the case has been finally committed to them, to separate upon signing and sealing up a form of verdict, and to deliver their verdict orally upon the next coming in of the court.

In *Commonwealth* v. *Durfee*, 100 Mass. 146, a case of adultery, (which was a felony, Gen. Sts. *c.* 165, § 3,) this was assumed to be the law; and the exceptions were sustained solely because the paper signed and sealed up by the jury before they separated was not read in court, and it did not therefore appear that their

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oral verdict accorded with the result upon which they had agreed before their separation. In *Commonwealth* v. *Carrington*, 116 Mass. 37, although the conviction was of a misdemeanor only, the decision proceeded upon the broad ground that in any criminal case not capital the jury might be authorized by the court, without the consent of the defendant, to separate after agreeing upon, signing and sealing up a paper in the form of a verdict, and afterwards return an oral verdict in open court in accordance with the result so stated and sealed up; and the cases of *McCreary* v. *Commonwealth*, 29 Penn. St. 323, and *State* v. *Engle*, 13 Ohio, 490, cited in the opinion, were cases of felony. See also *Commonwealth* v. *Tobin*, 125 Mass. 203, 206; *Anon.* 63 Maine, 590.

If the court could not lawfully allow the jury to separate without the consent of the defendant, it is at least doubtful whether such consent could cure the difficulty. *The King* v. *Woolf*, 1 Chit. 401, 420; *S. C. nom. The King* v. *Kinnear*, 2 B. & Ald. 462, 464. *Peiffer* v. *Commonwealth*, 15 Penn. St. 468, 470.

In the case at bar, after the jury had returned into court, and the written form of verdict had been handed by the foreman to the clerk and read, the jury being asked by the clerk if they had agreed upon their verdict, the foreman answered, not only that they had, but also that they found the defendant guilty, and thereupon the verdict was affirmed in the usual form. This oral delivery of the verdict by the foreman as the organ of the jury in open court distinguishes the case from that of *Commonwealth* v. *Tobin*, 125 Mass. 203. *Exceptions overruled.*

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COMMONWEALTH *vs.* MOSES COLBY.

Suffolk. Nov. 24, 1879. — Jan. 12, 1880. MORTON & SOULE, JJ., absent.

A. built four houses upon a lot of land owned by him. No cellars were built under the houses, but there was a vacant space under them below the basement floors. The foundation walls ran across this space so that it was substantially enclosed by the walls, and the houses were drained by a line of cement pipe running through the space underneath the floors of all the houses and terminating in a cesspool. Stagnant water was found under the several houses, caused by a leakage or leakages in the above pipe. Four complaints were brought against A., each charging him with permitting waste and stagnant water to stand upon a distinct lot of land. At the trial, the judge declined to rule, as requested by the defendant, that there was only one lot of land and but one offence committed, but instructed the jury that it was a question of fact for them, upon the evidence, whether there was more than one lot of land. *Held*, that the defendant had no ground of exception.

FOUR COMPLAINTS, each charging the defendant with permitting waste and stagnant water to stand and remain for the space of two weeks prior to March 18, 1879, upon a lot of land owned by him, in violation of an ordinance of the city of Boston, which provides that "no person shall suffer any waste or stagnant water to remain in any cellar, or upon any lot, or vacant ground, by him owned or occupied." The first complaint described the lot as numbered one on Colby Place; the second, as lot two; the third, as lot three; and the fourth, as lot four.

At the trial in the Superior Court, on appeal, before *Pitman*, J., the evidence tended to show that the defendant, in 1871, built four dwelling-houses upon a lot of land owned by him; that no cellars were built under the houses, but there was a vacant space under them, from two to three feet below the basement floors; that the foundation walls ran across this space so that it was substantially enclosed by the walls; that the houses were drained by a line of cement pipe running through the space underneath the floors of all the houses and terminating in a cesspool; and that for about two weeks stagnant water was found under the several houses, caused by a leakage or leakages in the pipe above referred to.

The defendant asked the judge to rule that, within the meaning of the law, there was only one lot of land so far as the defendant was concerned, and but one offence was committed;

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and that, if the jury found the defendant guilty upon one complaint, he must be acquitted upon the others.

The judge declined so to rule; but instructed the jury that it was a question of fact for them, upon the evidence, whether there was more than one lot of land, and they might find the defendant guilty accordingly.

The jury returned a verdict of guilty upon all the complaints; and the defendant alleged exceptions.

N. B. Bryant, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

LORD, J. There is no question but that, when the defendant made his purchase, the land now covered by four houses was a single lot. The question to be tried was one of fact, whether the defendant had divided that lot and made of it four lots. That he might have made the one lot into four is unquestionable. If he had sold each of the four dwelling-houses to a different person, there would have been no question that his one lot would have been made into four. If these four several houses had been under lease to four different tenants at the time of the offence complained of, and about which there was no evidence, it would be equally clear that there were four distinct estates, for the condition of which each occupant would be responsible to the extent of his occupancy. It is clear, therefore, that the presiding judge could not rule as matter of law that there was but a single lot, and if he erred in not ruling as matter of law that there were four lots, and submitted that question as matter of fact to the jury, who found that in fact there were four lots, the defendant was not thereby injured.

Exceptions overruled.

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ALBERT BAKER *vs.* MILTON GAVITT.

Berkshire. Sept. 9, 1879. — Jan. 13, 1880. ENDICOTT & LORD, JJ., absent.

On the issue whether a note secured by a mortgage of land had been paid by the plaintiff, who had bought the equity of redemption and had agreed to pay the note, the plaintiff testified that he sent a draft for the amount to A. to pay the note. A. testified that he received and deposited it in a bank to his own credit. He was then permitted to testify, against the defendant's objection, that he inquired of the maker of the note where the mortgagee was, and told him that he had the money to pay the note. The maker of the note subsequently testified that he notified the mortgagee of this communication. *Held*, that the evidence objected to was made competent by the fact that it was communicated to the mortgagee; and that the order in which the evidence was put in afforded the defendant no ground of exception.

If the evidence in a case is conflicting, the presiding justice is not obliged to rule that evidence, which merely tends to show fraud on the part of a witness, is competent as affecting his credit.

A., a person who had assumed to pay a note secured by a mortgage of land, sent the money to B. with directions to pay it to the mortgagee. B. communicated the fact to C., who persuaded the mortgagee to discharge the mortgage and give up the note, and take his note and that of B. in lieu thereof. *Held*, on the issue whether the mortgage had been duly discharged and the note secured by it paid, that A. was not affected by the fraud of C.

The right of a person, who has assumed to pay a mortgage note, to pay it to the mortgagee, does not depend upon the mortgagee's agreement to receive payment from him and to release the maker.

After breach of the condition of a mortgage of land, the mortgagor paid the amount due and received a discharge of the mortgage not under seal. After this the mortgagee entered for the purpose of foreclosing the mortgage, and notified a tenant of the mortgagor not to pay rent to the mortgagor. In an action by the mortgagor on the Gen. Sts. *c.* 137, § 5, to recover possession of the land from the tenant, the latter set up the title of the mortgagee. *Held*, that the action could be maintained.

If a bill of exceptions does not show that evidence, admitted without objection, was contended to be competent on more than one issue, it is no ground of exception that the jury were instructed to consider it only as bearing upon that issue.

ACTION on the Gen. Sts. *c.* 137, § 5, to recover possession of a parcel of land in North Adams, alleged to be held by the defendant unlawfully and against the right of the plaintiff. Writ dated September 10, 1878. The answer averred that the defendant was in possession as a tenant of Betsey Kimball, and not as a tenant of the plaintiff; that Betsey Kimball was mortgagee of the premises lawfully in possession for condition broken at the time of a lease of the same by her to the defendant. At

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the trial in the Superior Court, on appeal, before *Brigham*, C. J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

F. P. Brown, for the defendant.

M. Wilcox, (*A. Potter* with him,) for the plaintiff.

COLT, J. The premises, which were leased by the plaintiff to the defendant, had been subject to a mortgage made by E. J. Carey to Mrs. Betsey Kimball, which the plaintiff, when he became owner of the equity of redemption, assumed and agreed to pay. Mrs. Kimball made peaceable entry under the statute to foreclose this mortgage, and the defendant, after the entry, paid rent to her and refused to pay it to the plaintiff; the relation of landlord and tenant was thereupon terminated by a notice to quit given by the plaintiff.

At the trial, the plaintiff, claiming that the mortgage had been paid before the entry, produced the note and also the mortgage, upon which was indorsed an acknowledgment of satisfaction, and a discharge, not under seal, signed by Mrs. Kimball, and dated before her entry was made. The question at issue was whether the note had been actually paid, and the discharge fairly obtained by the plaintiff.

The plaintiff, who lived in the State of New York, testified that he sent a draft to one Davenport, to pay the balance due on the note, and have the mortgage discharged. Davenport testified that he duly received the draft and deposited it in a bank to his own credit. He was then, under the defendant's objection, allowed to state that he asked Carey, the maker of the note and mortgage, where Mrs. Kimball was, and told him that the plaintiff had sent the money to pay the mortgage, and that it was then in the bank in his name. The defendant still insists on his objection; but the answer to it is, that this evidence was not offered to prove the fact that money had been sent to the witness as stated. That fact had been fully proved by his own testimony, and by the testimony of the plaintiff, and was not in dispute. It was offered only to show what communication took place between Davenport and Mrs. Kimball, through Carey, as to the payment and discharge of the mortgage; to show what it was that Davenport requested the latter to say, and which

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Carey himself testified he afterwards communicated to Mrs. Kimball, as requested. The evidence was made competent by the fact that what was said by Davenport was communicated to Mrs. Kimball. The order of proof in the admission of such evidence is in the discretion of the court. *Ray* v. *Smith*, 9 Gray, 141.

Under the instructions given, the jury must have found either that Mrs. Kimball actually received the money sent by the plaintiff to pay the mortgage, or that, upon the offer of the money to her without condition or restriction, she chose to treat it as in effect paid into her hands, and thereupon gave up the note and discharged the mortgage. They must have further found that the arrangement made with Carey and Davenport, by which she received their notes for the money thus paid or offered to be paid by the plaintiff, was in effect an independent loan from her to them; and that the plaintiff was in no way privy to any false or fraudulent representations by which they induced her to lend the money. There was evidence sufficient to justify these findings, and the verdict cannot be disturbed, unless the instructions requested by the defendant should have been also given in whole or in part.

The judge properly declined to rule that evidence tending to prove fraud on the part of Carey in obtaining the money from Mrs. Kimball was competent as bearing on his credibility as a witness, and that, if such fraud was proved, there was no payment. In a case of conflicting evidence the judge is not required to rule that evidence which had been put in merely tending to prove fraud in a witness is competent as affecting his credit. The credit of the witness could not be properly affected unless the fraud, upon all the evidence, was proved. As to the last part of the request, the answer is, that the fraud of any other person in obtaining the money from Mrs. Kimball was wholly immaterial to the plaintiff's rights, unless the plaintiff was a party to such fraud. The second ruling requested, that Carey was to be treated as the principal, unless Mrs. Kimball had agreed to receive payment of the plaintiff and to release Carey, was properly refused, because the right of the plaintiff to pay the note and redeem the mortgage did not depend on the mortgagee's agreement to receive payment from him and release

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the mortgagor. The real question was whether she did in fact receive payment. The third ruling, so far as it was called for by the evidence in the case, was sufficiently covered by the instructions given.

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The fourth ruling asked for, namely, that the discharge did not legally revest the title to the land in the mortgagor if the payment was made after condition broken, and that, the mortgagee being in possession, this action could not be maintained, could not be properly given. It is settled, that, upon payment after breach of condition, there is left in the mortgagee, who has not properly released and discharged his claim, a bare legal title, held in trust for the sole benefit of the mortgagor and those claiming under him, which cannot be availed of to defeat their possession of the premises. A writ of entry cannot be maintained, because no conditional judgment for the amount due can be rendered as required by the statute, and the legal title of the mortgagee held in trust for the mortgagor will not be permitted to defeat a possession which is in strict accordance with the trust. The right which is given by statute, to obtain possession by open and peaceable entry after breach of condition, can no longer exist, because that right is given only for the purpose of foreclosing a mortgage which has not been paid. *Slayton* v. *McIntyre*, 11 Gray, 271. *Fay* v. *Cheney*, 14 Pick. 399. *Wade* v. *Howard*, 11 Pick. 289. *Wolcott* v. *Winchester*, 15 Gray, 461.

It follows that, if Mrs. Kimball had no right to the possession, then she had no right to demand payment of rent, and the defendant cannot set up in defence of this action that he had, after her entry, attorned to her. The defendant went into occupation of the premises as tenant of the plaintiff. He can defend against his landlord's title only by showing that he has been ousted by a superior title, or has attorned to one having a superior title to avoid being ousted. This he fails to do, because Mrs. Kimball, to whom he attorned, had no title which could avail her to defeat the possession of the plaintiff.

The only remaining objection insisted on at the argument is to the restriction put by the judge on the use to be made of the reputed credit and financial standing of Carey and Davenport at the time of the transaction with Mrs. Kimball. The jury were told that their reputation, if known to her, was material

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evidence on the question whether it was probable that she would have taken their notes for the money then in her hands or at her disposal, and not material on the other questions in the case. But if this evidence was offered for any other purpose, it was the duty of the defendant, if he would save his exception, to call the attention of the judge to it at the time, and request a specific ruling upon it. The case does not show that the evidence was offered or intended to be used for any other purpose than that indicated by the judge. *Exceptions overruled.*

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HENRY CHILDS *vs.* COUNTY OF FRANKLIN.

Franklin. Sept. 17, 1879. — Jan. 10, 1880. AMES & ENDICOTT, JJ., absent.

Under the Gen. Sts. *c.* 43, § 22, an application for a jury to revise the judgment of the county commissioners in the assessment of damages, caused by the laying out of a way, must be made within one year from the adoption of the final order of location, unless there has been a suit instituted in which the legal effect of the proceedings is drawn in question; and an order by the county commissioners to their clerk, to draw his warrant on the treasurer of the county for the payment of damages to the persons named in it, whose land has been taken by the commissioners in laying out a way, is not an order of location.

PETITION to the county commissioners, filed November 30, 1877, for a jury to assess the damages sustained by the petitioner by the taking of his land by said commissioners in altering and relocating a highway in Deerfield. By consent of parties, the matter was referred to a committee under the Gen. Sts. *c.* 43, § 34, whose return to the Superior Court, under § 40, set forth that the highway was, after due notice, located by the county commissioners on September 27, 1876, and the location duly recorded, but no award of damages was made to any one; that, in December 1876, the highway was accepted by the county commissioners, and an order issued by them to the clerk to draw his warrant on the treasurer of the county for the payment of certain sums to various persons named, in full for all damages allowed them on account of the location of different highways in different towns. Among these names were those of two persons whose lands were taken for the highway in question, but the

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name of the petitioner did not appear. The return further stated that in the opinion of the committee the petition was not filed in season, and the petitioner was not entitled to any damages, but that if in the opinion of the court he was entitled to any damages, they assessed the damages in the sum of $120.

The Superior Court ordered judgment for the respondent; and the petitioner appealed to this court.

C. C. Conant, for the petitioner.

E. V. Wilson, (*S. O. Lamb* with him,) for the respondent.

COLT, J. Application for a jury to revise the judgment of the county commissioners in the assessment of damages, caused by the laying out of a way, must be made within one year from the adoption of the order of location, unless there has been a suit instituted in which the legal effect of the proceedings is drawn in question. Gen. Sts. *c.* 43, § 22. When a highway is laid out, the commissioners are required in their return thereof to state the damages estimated by them, and the share of each person separately. Gen. Sts. *c.* 43, §§ 13, 14. But it is provided that they shall not order such damages to be paid until the land has been entered on for the purpose of constructing the way. It has been decided that the fact that no damages are allowed in the return of location is equivalent to a statement that, in the opinion of the commissioners, no damages have been sustained. It is treated as a judgment against the claim; and if a party is aggrieved thereby, he must petition for a jury within the time limited, or be deemed to acquiesce in the judgment. *Monagle* v. *County Commissioners*, 8 Cush. 360. *Hildreth* v. *Lowell*, 11 Gray, 345, 352. The limit of one year, within which application to revise must be made, has reference to the time of making the final order laying out the road, which is required to be recorded as such. *Wood* v. *Quincy*, 11 Cush. 487, 494.

In the case at bar, the final order laying out the way was adopted by the commissioners on September 27, 1876, and duly recorded. An application for a jury might have then been made, notwithstanding the provision which forbids the issuing of an order for the payment of damages, and takes away from the landowner the right to demand the same, until the land is entered on. It has been so decided by this court. *Harding* v. *Medway*, 10 Met. 465. *Russell* v. *New Bedford*, 5 Gray, 31.

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The petition in this case was not filed until after the expiration of a year from the passing of the final order of location.

The petitioner relies on the order to the clerk, passed in December following, by which the latter was required to draw his warrant on the treasurer of the county for the payment of damages to the persons named in it. He contends that the date of this order fixes the time from which the period of limitation is to be reckoned. But this was not an order, or any part of an order, of location. It does not purport to be even an assessment of damages. It is simply an order for the payment of damages to the persons named, under § 14; an order which could not be legally passed, unless there had been a previous final order of location, accompanied by an assessment of damages, and an entry on the land for the purpose of construction. The list which accompanies the order contains the names of those who appear to be entitled to damages by the location of several different roads under several different petitions, including some who were damaged by the road here in question. The records show no assessment of damages whatever on account of the laying out of this road; and the order for the payment of damages to any one seems to have been unwarranted and irregular. But whether it were so or not, the result, as to the petitioner and his rights, is not affected thereby. See *Goddard* v. *Worcester*, 9 Gray, 88. *Judgment affirmed.*

PETER A. PAGE *vs.* AARON R. MORSE.

Hampshire. Sept. 18, 1878. — Jan. 7, 1880. ENDICOTT & SOULE, JJ., absent.

If an infant becomes a partner with another, puts a sum of money into the business under an agreement to share in the profits, and does work for the partnership, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or for the labor performed, in the absence of an express promise to pay him therefor.

CONTRACT on an account annexed, containing two items, one for 500 days' labor at one dollar per day, the other for $100, money had and received.

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At the trial in the Superior Court, before *Allen*, J., it appeared that the plaintiff, who was an infant, entered into partnership with the defendant, at the solicitation of the latter, in keeping a shop; that they carried on the business from September 1874 to April 1876; and that the plaintiff put $100 into the partnership as his share, and worked in the shop.

The plaintiff contended that the arrangement was that the defendant was to pay him a dollar a day independently of the partnership; and that, as a partner, he could now disaffirm the partnership, and, as a creditor, recover of the defendant what his services during the continuance of the partnership were fairly worth. The defendant denied that he ever agreed to pay the plaintiff one dollar a day; but contended that it was agreed that the plaintiff should be paid a dollar a day out of the partnership business; and that he was not liable in this action on a *quantum meruit* for services performed by the plaintiff for the partnership. There was evidence that the plaintiff's services were worth one dollar per day.

It appeared that the partnership matters were not settled; that the business had been sold out to one H. G. Wells, who gave a note payable to the defendant's order, (the reason for so making it payable being disputed,) and that this note, and also the books of the partnership, had since that time been in the possession of the plaintiff. The defendant testified that the plaintiff had always refused to let him take the books since the sale; and the plaintiff testified that he did once so refuse, but that at another time before the action was commenced he told him he might go up to his house and get them. The books and the note were produced at the trial by the plaintiff, he having had notice to produce the books. There was no other evidence of his disaffirmance of the partnership than his bringing the suit and saying in court that he disaffirmed it, and at the trial telling the defendant to take the books and note.

The plaintiff asked the judge to rule as follows: "If the plaintiff performed the labor at the instance of the defendant, he is entitled to recover whatever it was agreed between the parties he should have. If the plaintiff performed the labor, and there was not an absolute contract by the defendant to pay him for

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such services, he can recover as much as his services were fairly worth. If the defendant promised to pay the plaintiff a dollar a day out of the business, and the plaintiff performed the labor by reason thereof, the defendant is liable to the plaintiff in this action therefor. If the plaintiff paid into the business $100 at the defendant's request, though put in by virtue of an agreement that he would share in the profits, yet, if the plaintiff has avoided the contract, he is a creditor of the defendant to that extent, and can recover what he has so paid."

The judge declined so to rule; but ruled that the plaintiff could recover for his labor only in case the jury found that the defendant absolutely promised to pay him at all events; and that the plaintiff could not recover any money put into the business under an agreement to share in the profits.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

T. G. Spaulding, (*W. G. Bassett* with him,) for the plaintiff.

H. H. Bond, for the defendant.

GRAY, C. J. This is not a case in which an infant plaintiff has paid money or delivered property to the defendant or performed services for him. It does indeed appear that the plaintiff entered into partnership with the defendant at the solicitation of the latter in the business of keeping a shop, that they carried on the partnership for a year and seven months during the plaintiff's minority, and that he worked in the shop. As to the sum of one hundred dollars which the plaintiff seeks to recover back, the bill of exceptions merely states that he put it into the partnership; there is nothing to show that it was ever in the separate hand or control of the defendant, and it must therefore be taken to have been, like other property of the partnership, in the possession of the two jointly; and its expenditure or loss in the course of the partnership business does not render the defendant liable to make it good to the plaintiff. *Moley* v. *Brine*, 120 Mass. 324. So the work done by the plaintiff, having been done for the partnership and not for the defendant alone, no promise of the latter to pay the plaintiff for it can be implied, and the jury have negatived any express promise to pay him.

Exceptions overruled.

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HENRY B. ROGERS *vs.* HUBBARD M. ABBOTT & another, & trustee.

Hampshire. Sept. 16, 1879.—Jan. 12, 1880. AMES & ENDICOTT, JJ., absent.

Upon the issue of the validity of a mortgage to A. upon personal property of B., in whose possession it was attached by a creditor, and A. summoned as trustee, under the Gen. Sts. *c.* 123, § 67, an instrument signed by A. and B. when the mortgage was made, and as part of the same transaction, reciting that A. held the mortgage for himself and in trust for others, to secure them severally from loss on account of their indorsements of B.'s notes, a schedule of which was annexed, is admissible to show the consideration for the mortgage, and that the transaction was not fraudulent and void as against creditors.

A mortgage of personal property, given to secure the mortgagee against liability as indorser for the mortgagor, is valid as against an attaching creditor of the mortgagor, although the liability of the mortgagee does not become absolute, and has not been paid until after the attachment.

At the trial of the question of the validity of a mortgage on personal property, attached in the hands of the mortgagor, in which the mortgagee is summoned as trustee, under the Gen. Sts. *c.* 123, § 67, the sum "justly due" upon the mortgage, to be ascertained by the court, is that sum which will fully secure the mortgagee against all contingent future liabilities covered by the mortgage.

COLT, J. Personal property in the possession of the principal defendants, but subject to a mortgage to Samuel L. Parsons, was attached by the plaintiff, and under the provisions of the statute Parsons was summoned in the same action as trustee of the defendants. Gen. Sts. *c.* 123, §§ 67–71.

The validity of the mortgage was established by the verdict of the jury in a trial on issues framed by the court. It is made the duty of the court, in such case, to ascertain the amount due, and to fix a time within which the attachment shall become void and the property be restored, unless the plaintiff pays or tenders to the mortgagee the amount found due.

Two exceptions were taken in the course of the trial before the jury. One was to the admission of a writing which was signed by the defendants and also by Parsons, when the mortgage was made, and as part of the same transaction, by which it was declared that Parsons held the mortgage for himself and in trust for two others, to secure them severally from loss on account of their indorsements of the defendant's notes, a schedule of which was thereto annexed. But this evidence was clearly admissible, as showing the actual consideration for the note and

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mortgage, and as also showing that the transaction was not fraudulent and void as against creditors. *Commercial Bank* v. *Cunningham*, 24 Pick. 270. *Gardner* v. *Webber*, 17 Pick. 407. *Hanson* v. *Herrick*, 100 Mass. 323. *Hills* v. *Farrington*, 6 Allen, 80.

The other exception taken at the trial was to the refusal to rule that the mortgage was void as against the plaintiff, if it was given to indemnify Parsons for indorsing notes of the defendants which had not then matured and which did not mature and were not paid until after the attachment. But it is well settled that a mortgage given to indemnify one against his outstanding liabilities as an indorser for the mortgagor is a valid security for such liabilities, and cannot be defeated by an attachment made before the liability becomes absolute and has been paid by the mortgagee. The mortgagee is entitled to the full benefit of his security, as against the attaching creditor.

In *Haskell* v. *Gordon*, 3 Met. 268, where there was a simple attachment, without the trustee process, of personal property, mortgaged to secure the mortgagee from liabilities assumed as indorser for the mortgagor, it was said that there were great practical difficulties in carrying out fully the provisions of the statute, in cases of mortgages given to secure the performance by the mortgagor of future collateral acts, or to secure future contingent liabilities; and that these difficulties might be such, in peculiar cases, as to render it impossible for the creditor so far to comply with the duty devolving on him, after demand by the mortgagee, as to be able to retain his attachment of the property. But it was added, that this objection could not operate to prevent the attachment being made. And, when made, the creditor must pay or tender the amount for which the property is liable, when demanded, or lose his attachment. The statutes do not authorize the substitution of any other security for protection against a future contingent liability, and the only mode in which the creditor can retain his attachment is by paying or tendering the amount for which the property is contingently liable. *Bicknell* v. *Cleverly*, 125 Mass. 164. *Codman* v. *Freeman*, 3 Cush. 306. All this is equally applicable to attachments made under the statutes first above cited, when the mortgagee is summoned as trustee; the validity of the mortgage is tried by the jury; and the sum justly due is ascertained by the court,

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instead of being left to the statement contained in the demand by the mortgagee. The sum justly due is that sum which will fully secure the mortgagee against all the contingent future liabilities covered by the mortgage. The court so found in this case, and the plaintiff's request, made after the verdict of the jury, that the court should find that the amount due was only the amount of a small note due from one of the defendants to Parsons, was rightly refused.

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At the argument of this case, the plaintiff called attention to the fact that the record, as disclosed by the bill of exceptions, does not show that the court found the exact amount due on the mortgage, and then ordered the creditor to pay the same within a time named. But no such point appears to have been made at the trial, and the exceptions taken related to the specific rulings already considered, and not to the general conclusion discharging the trustee. *Exceptions overruled.*

E. E. Webster, for the plaintiff.

J. C. Hammond, for the defendants.

New Haven & Northampton Company *vs.* James Campbell.

Hampshire. Sept. 16, 1879. — Jan. 24, 1880. Ames & Endicott, JJ., absent.

A declaration contained two counts, alleged to be for the same cause of action. The first count was in tort in the nature of trover, for the conversion of ten barrels of flour. The second count was in contract, alleging that the plaintiff had in his possession as a common carrier fifteen barrels of flour transported by him and consigned to the defendant; that he permitted the defendant to take five barrels, claiming and notifying him that the plaintiff would hold the remaining ten barrels until the freight and advances due to him were paid; and that the defendant afterwards took and carried away the ten barrels, thereby becoming liable to pay the plaintiff the amount due him for such freight and advances. *Held*, that the two counts were properly joined; and that it was within the discretion of the court to determine whether the plaintiff should elect upon which count he would go to the jury.

The delivery, by a common carrier to a consignee, of a part of goods transported by the former, without payment of freight and advances, does not discharge the lien of the carrier upon the remainder of the goods for the whole amount of charges, unless it was the intention of the parties to do so; and this is a question of fact for the jury.

A question not raised at the trial is not open upon a bill of exceptions.

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MORTON, J. The declaration contains two counts, alleged to be for the same cause of action. The first is in tort, in the nature of trover, for the conversion of ten barrels of flour. The second is in contract, alleging in substance that the plaintiff had in its possession as a common carrier fifteen barrels of flour transported by it and consigned to the defendant; that it permitted the defendant to take five barrels, claiming and notifying him that it would hold the remaining ten barrels until the freight and advances due to it were paid by him; and that the defendant afterwards took and carried away the said ten barrels, thereby becoming liable to pay the plaintiff the amount due it for such freight and advances. The plaintiff's real cause of action was that the defendant carried away the flour without paying the amount of the lien thereon. If he took it with the knowledge that the plaintiff claimed a lien and looked to him for the payment of the freight and charges, a promise to pay would be implied, upon which an action of contract might be maintained. If he took it without such knowledge, and without any waiver of the lien by the plaintiff, he would be liable in trover. The plaintiff, deeming it doubtful to which class his cause of action belonged, might join a count in tort with a count in contract under the Gen. Sts. *c.* 129, § 2. *Sullivan* v. *Fitzgerald*, 12 Allen, 482. The two counts being properly joined, it was within the discretion of the court to determine whether the plaintiff should elect upon which count he would go to the jury. *Atwater* v. *Clancy*, 107 Mass. 369. The defendant contends that the counts were inconsistent, because the measure of damages is different under each. It may or may not be different. If the flour was worth more than the amount of the plaintiff's lien, the measure of damages would be the same under each count. If it was worth less, the measure under the count in trover would be the value of the flour, while under the count in contract it would be more, viz. the amount of the lien. Even if the flour was worth less, there is no difficulty or embarrassment in submitting both counts to the jury at the same time, with instructions that, if the contract is proved, their verdict should be for the amount of the lien, but, if it is not proved, and the tort is proved, the verdict should be for the value of the flour. There is no such inconsistency between the two

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counts as existed in *Clapp* v. *Campbell*, 124 Mass. 50, cited by the defendant. In that case, one count was in tort for the conversion by an attaching officer of the plaintiff's goods; the other was in contract for money had and received by the officer upon a sale of the goods; the count in contract could not be maintained at all except upon the ground that the plaintiff had waived the tort; the two could not be submitted to the jury at the same time, because they had no right to consider the count in contract unless the plaintiff had first made his election to waive the tort. In the case at bar, we are of opinion that the exception to the refusal of the court to order the plaintiff to elect between his two counts cannot be sustained.

As to the remaining part of the case, we have difficulty in ascertaining from the bill of exceptions what questions of law precisely were intended to be submitted to us. The defendant asked the court to rule that "the lien attaches only to the particular goods; that is, a lien cannot attach to the ten barrels for freight on the entire car-load. If the evidence fails to show what part of the freight was for the ten barrels, the plaintiff cannot recover." The bill of exceptions then proceeds: "The court declined so to rule, and did rule substantially that the plaintiff's lien attached to the fifteen barrels received by it for the entire sum due the plaintiff for freight of the fifteen barrels and for charges and expenses paid by it upon receiving the goods, and that the plaintiff might have a lien upon the ten barrels remaining after delivery of the five barrels to the defendant for the whole sum due the plaintiff for freight and charges and expenses paid as aforesaid unless the plaintiff had waived or released its lien."

The defendant contends in this court that the Superior Court should have ruled that the lien could not attach to the ten barrels for freight on the entire car-load, a large part of which was delivered at New Britain to Clapp, the original consignee of the whole. But it does not appear that this question was raised at the trial.

The bill of exceptions states that Clapp, the original consignee, received the car-load at New Britain, and consigned and sent fifteen barrels to the defendant, "charges to follow"; and the bill to Clapp, which was in evidence, was for the transportation of forty barrels of flour, and six tons of feed, "15 bbls. sent to

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Plainville with charges." The expression "charges to follow" standing alone is obscure, but we think it sufficiently appears from the bill of exceptions that all parties assumed at the trial that, by the agreement of the parties interested, the lien upon the whole car-load followed and attached to the fifteen barrels sent to the defendant. The request of the defendant and instructions given in reply thereto were directed, not to the question whether the plaintiff had a lien upon the fifteen barrels for the freight and charges upon the whole car-load, but to the point as to what was the effect upon such lien of the delivery to the defendant of five barrels out of the fifteen. Upon this point, the ruling that the plaintiff might have a lien upon the ten barrels remaining, for the whole sum due for freight and advances upon the fifteen barrels, unless it had waived or released its lien, was correct.

The whole lien attaches to each and every part of the goods subject to it. If not discharged or waived, it remains attached to whatever part of the property may remain within the possession of the carrier. *Ware River Railroad* v. *Vibbard*, 114 Mass. 447. *Lane* v. *Old Colony & Fall River Railroad*, 14 Gray, 143. A delivery of part of the property does not necessarily discharge the lien, either in the whole or *pro tanto*. It releases the part delivered from the lien, but does not discharge the part remaining from the burden of the whole lien, unless it was the intention of the parties to do so. *Lane* v. *Old Colony & Fall River Railroad*, *ubi supra*. And this is ordinarily a question of fact for the jury. In the case at bar, it was for the jury to decide whether the delivery of the five barrels under the order from Clapp, and the sending the bill to Clapp, was a waiver by the plaintiff of its lien upon the flour. This question was submitted to them under instructions which were not objected to, and the defendant upon this part of the case has no ground of exception.

The defendant now contends that no verdict could be rendered on the count in tort, because there was no evidence of the value of the flour. Without conceding the soundness of his position, it is enough to say that this question was not raised at the trial, and it cannot be raised for the first time in this court.

Exceptions overruled.

A. J. Fargo, for the defendant.

W. G. Bassett, for the plaintiff.

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JOSEPH P. CHILDS *vs.* F. W. ANDERSON.

Hampden. Sept. 24, 1878. — Jan. 3, 1880. AMES & SOULE, JJ., absent.

C. performed labor and furnished materials under a contract with B., for an entire price, in the erection of four buildings, one of which was on land owned by B., one on land owned by A., and the others on land the ownership of which did not appear. He then filed a petition, under the Gen. Sts. *c.* 150, as amended by the St. of 1872, *c.* 318, to enforce a lien on the house and land of A. for the labor performed by him on that house, and at the trial showed what such labor was worth. *Held*, that the petition could not be maintained.

LORD, J. The petitioner seeks to establish a lien upon the building of the defendant, under the provisions of the Gen. Sts. *c.* 150, as amended by the St. of 1872, *c.* 318. The contract under which the labor was performed or furnished was an entire contract made with one Black, and, so far as the respondent's interests are concerned, it may be presumed that the contract was made with his consent. By that contract, the petitioner, was to do work and furnish materials for an entire price, in the erection of four different buildings, one a house belonging to Black, who made the contract with him, one a house belonging to the respondent, the third a house, and the fourth a barn, the ownership of which last two structures does not appear by the bill of exceptions except that they were not owned by the respondent. In the preparation of the bill of exceptions it is undoubtedly true that very many facts were understood by the presiding judge and the counsel which cannot be gathered from the record. Whether the land, upon which these several buildings were or were to be, was in several contiguous parcels, or whether they were in different localities, cannot be discovered from the bill of exceptions. Whether any, and how much, labor was performed upon any other building than that of the respondent, does not appear, except as may be inferred from the fact that the petitioner testified "that he kept a daily account of labor performed upon each house and of the material furnished upon each house when the work was going on." Whether any work was done upon the barn does not appear, unless it appears that nothing was done from the phrase "the brick barn on Bliss Street named in said contract was to have been built upon land

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in which the defendant had no interest." Whether the conveyance of the land on the west side of Hawley Street, which by the contract was to be a part of the consideration for the labor and materials under the contract, was actually made, does not appear, unless we take the statement of counsel at the argument. We must however deal with the questions as they are presented by the bill of exceptions. By that, it appears that the land of the defendant was selected from the entire land embraced within the contract, and it is attempted to attach to that a separate and independent lien for the labor performed upon that particular house. This, we think, cannot be done.

In *Wall* v. *Robinson*, 115 Mass. 429, it was decided that where labor is performed or furnished under an entire contract in the erection or repair of several buildings owned by the same person, and situated on the same lot, a lien attaches upon the whole estate, although the contract specifies separate amounts for the work to be done on each house. In *Batchelder* v. *Rand*, 117 Mass. 176, the same rule was held to apply where the land was conveyed in separate lots, or designated as separate lots on a plan; one parcel being upon one street, another upon another, but contiguous to each other in the rear, though the buildings were separate, one standing upon each lot so conveyed. As, however, we understand the claim of the petitioner, it is that where any labor is performed upon any building, the law creates a lien upon such building for such labor, notwithstanding it was done under an entire contract for an entire price for labor and materials; that the St. of 1872 intended to disregard all matters of contract, and create a lien for labor done upon any building irrespective of the contract under which it was done. We cannot adopt such construction of the statute; it is obviously inconsistent with the phraseology, as well as with the purposes of the act, and the rights of the parties.

The real question between the parties is simply whether the St. of 1872 intends to abrogate all contracts upon the subject of labor and materials performed and furnished under whatever agreement, and, by its own force, to create a lien upon any building for labor performed upon it, the price of which is to be *quantum valebat*, with the only qualification that the whole amount paid shall not exceed the contract price; or whether it is sim-

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ply an extension of existing provisions of law, by which, regarding the contract between the parties as valid and in force, means are to be afforded to the party performing or furnishing labor to create a lien therefor under such contract, and consistently with its provisions, and in no respect limiting or controlling its terms. Inasmuch as in our view the latter is the true construction of the statute, and as none of the steps have been taken necessary to establish a lien under the provisions of law relating to liens thus created, and as the whole proceeding is based upon the construction of the statute first suggested, it is very clear that no lien has been created upon this separate distinct parcel of land independently of the lien which the law authorized the petitioner under his contract to create, and therefore the refusal of the court to rule that no lien existed upon this parcel of land was erroneous, and the *Exceptions must be sustained.*

H. Morris & A. M. Copeland, for the respondent.

M. P. Knowlton, for the petitioner.

F. E. Gray *vs.* William James & another.

Hampden. Sept. 24, 1879. — Jan. 10, 1880. Endicott & Lord, JJ., absent.

A sub-contractor for building a church drew an order on the person with whom he made the contract, payable to A. "from percentage retained on work." The order was accepted, "payable when the work is accepted by the church." Before the order was accepted, the tower of the church was found to be defective, and was taken down, and its completion had been abandoned by the mutual consent of the church society and the contractor; but the society then contended that the defect was owing to the fault of the contractor, and retained a large sum of money which by the terms of the contract would have been payable on the completion of the work. *Held*, in an action on the order by A. against the acceptor, that, if the defect was owing to this cause, and not to a defect in the plan, the action could not be maintained, although the society, before the action was brought, occupied and used the building.

Contract upon two orders one dated July 12, 1875, and the other September 13, 1875, drawn on the defendants by John O'Flaherty, payable to the plaintiff "from percentage retained on work on Episcopal Church," and accepted on March 28, 1876.

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by the defendants, "payable when the work is accepted by the church." After the former decision, reported 126 Mass. 110, the case was tried in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff put in evidence tending to show that Charles L. Shaw had a contract for building an episcopal church in Springfield; that the defendants contracted with Shaw for the masonwork and materials; and O'Flaherty contracted with the defendants for the performance of part of their work; that the work covered by the defendants' contract, as well as by O'Flaherty's, had progressed to the completion of the church except the tower, which was built to about two thirds its height, when, on December 3, 1875, it was ascertained that the tower was defective, and thereupon the work on it was suspended; that a short time afterwards, the tower being deemed unsafe, the church society caused it to be taken down, and took possession and disposed of the materials; that the taking down of the tower as far as deemed necessary was completed about January 3, 1876, and it had since remained in the condition in which it was then left, except that, in finishing the church for occupancy, it was roofed over; that before the acceptance of the orders the completion of the tower had been abandoned by the mutual consent of all parties; that no steps had been taken after the defect was discovered, either by the defendants or the society, for the further prosecution of the work, at the time the orders were accepted or since, nor has any request been made therefor.

It was also in evidence that the work done by O'Flaherty, which was left after the tower was taken down, estimated at contract price, was about $9000; that if the spire had been completed, O'Flaherty's contract would have amounted to about $12,000; and that O'Flaherty had been paid about 80 per cent. for all the work done by him, from month to month, as the work progressed; and that if O'Flaherty was liable for the defects in the tower, he had been fully paid all he would be entitled to under the contract.

When the defect in the tower was discovered, a question arose as to who was responsible for the defect, it being in dispute whether it resulted from poor material, improper workmanship, or a defect in the plan. The plaintiff's evidence tended to show

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that the materials furnished and the workmanship were in accordance with the plans and specifications; that as the work progressed they were from time to time approved by the architect and were satisfactory to the superintendent appointed by the church, and fully up to the terms of the contract. The defendants offered evidence to the contrary. The plaintiff conceded, however, that the church society had contended that the work upon the tower was not properly done, and not according to the contract, and had withheld from the contractor, who had withheld from the defendants a sum amounting to about $6000, on account of said alleged defect, which sum has been ever since withheld and never has been paid. The plaintiff also offered evidence tending to show that, after the abandonment of the work upon the tower, the rest of the church was completed by the contractor; that he was paid therefor, except the amount withheld as aforesaid, which was about the same as the amount due from the defendants estimated at contract price at the time work upon the tower was stopped; that about May 1, 1876, the society took possession of the church, and has ever since used and occupied the same for the purpose for which it was built, and has had entire control of the same; but when the society took possession of the church, the wardens stated to the contractor that the occupancy so taken was to be without prejudice to their rights with reference to the alleged defects, to which the contractor assented; that, in 1877, Shaw went into bankruptcy; and the proof of debt sworn to and offered for allowance by the defendants against his estate, wherein they contended there was due to them from Shaw the full amount, estimated at contract price, of all the work and material furnished by them, including that for the tower and the amount due for work done and materials furnished by O'Flaherty, was put in evidence.

The plaintiff asked the judge to rule as follows: "The taking possession, by the church, of the work as it stood at the time of making of the acceptance, it being before the commencement of this action, entitles the plaintiff to recover. The limitation upon the acceptance relates only to the time of payment, and if a reasonable term elapsed after the acceptance of the order for the church to accept the work, before bringing this suit, the plaintiff is entitled to recover."

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The judge declined so to rule; and, upon the question of possession, ruled that the facts connected with the taking possession of the church were evidence for the jury to consider upon the question of acceptance, giving them further instructions upon the question of what would or might constitute an acceptance, to which no exceptions were taken; and, at the request of the plaintiff, further instructed them that, if they found that the work upon the church was done in accordance with the terms of the contract, and that the defect in the tower was owing to defects in the plan and was not owing to any improper workmanship, or any improper material put in, by the defendants or O'Flaherty, so that, as between them and the society, the contractors were entitled to their pay under the contract, then, as matter of law, the conduct of the society in taking possession and occupying the church must be deemed to be an acceptance by them of the work which was done as and for a fulfilment of the contract, and the plaintiff would be entitled to recover upon these orders. The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

G. Wells, for the plaintiff.

M. P. Knowlton, for the defendants.

COLT, J. When this case was before this court at a previous term, a new trial was ordered, because there was found to be a question of fact, material to the rights of the parties, which had not been passed upon. 126 Mass. 110. That question was, whether the imperfection in the construction of the tower of the church, on account of which the society refused to accept the church edifice as a full performance of the contract for its construction, was attributable to the fault of the contractor, or to a defect in the original plan, for which the contractor was not responsible. It has now been settled by a verdict in favor of the defendants, under instructions from which it is clear the jury must have found that the imperfect construction complained of was caused by improper workmanship, or improper materials furnished by the contractor.

A question is now raised as to the true interpretation of the defendants' contracts of acceptance, upon which this action is brought. These acceptances are indorsed upon two orders drawn by O'Flaherty in favor of the plaintiff in July and Sep-

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tember 1875, each made payable "from percentage retained on work." Both orders were accepted in March 1876 by the defendants, "payable when the work is accepted by the church." It is contended by the plaintiff, that payment of the orders is not made to depend upon the completion of the building contract, or upon the payment by the society of the balance due upon it; that by a fair construction of the contracts of acceptance, the payment upon them is to be made, when the society takes possession of the unfinished church edifice, in such manner as to give the defendants a right to recover upon a *quantum meruit* for the work and materials of which the society had received the benefit. The argument is, that, as both parties had abandoned the completion of the tower when the orders were accepted, it could not have been intended by them to limit the time of payment to the acceptance of the work as a complete fulfilment of the building contract. There would be some force in this, if the failure on the tower was at that time understood and agreed between the parties to be due to the fault of the contractor, and not to a fault in the plan. But it was not so understood; on the contrary, the case finds that the matter was in dispute between them. If the fault was not in the contractor, then the possession taken by the society would, notwithstanding its protest, make it liable for the full contract price, and constitute an acceptance within the meaning of the contract with the defendants. The jury in this case might have found such an acceptance, under the instruction given, and have returned their verdict for the plaintiff, instead of a verdict for the defendants.

The more reasonable construction of the contracts in question is that the defendants' promises to pay were conditioned upon an express acceptance of the work under the contract, or upon an acceptance implied from the possession and occupation of a building, for the failure to complete which according to contract the defendants were not at fault. The interpretation contended for by the plaintiff is inconsistent with the terms of the orders themselves, which are both made payable out of the percentage retained by the society, which we understand to be that portion of the contract price usually retained for the last payment, as a guaranty for the full performance of the contract.

Exceptions overruled.

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William Roche vs. Hampden Savings Bank.

Hampden. Sept. 24, 1879. — Jan. 12, 1880. Endicott & Lord, JJ., absent. Soule, J., did not sit.

If two tenants in common of land mortgage it, and the mortgagee sells the land, under a power of sale contained in the mortgage, for more than the mortgage debt, and pays the surplus proceeds to one of the mortgagors, who has paid out, in interest, insurance and taxes, not only his own part of these expenses, but, on account of his cotenant, a sum greater than the latter's proportion of the surplus proceeds, the mortgagee is not liable to an action for money had and received by the other for his share of such proceeds.

Contract for money had and received. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts, the substance of which appears in the opinion.

J. M. Ross, for the plaintiff.

J. M. Stebbins, for the defendant.

Colt, J. The defendant sold land under a power of sale in a mortgage to it from John Roche and the plaintiff. By the terms of the mortgage, what remained of the proceeds of the sale, after paying the mortgage debt and all expenses, was to be paid by the defendant to the mortgagors or their legal representatives. John Roche and the plaintiff were tenants in common, having an equal interest in the mortgaged premises. The money was borrowed for their joint benefit, and they were equally bound to pay the debt with interest, and to pay the taxes and insurance on the property. John paid in interest, taxes and insurance more than his share of the common burden, and the plaintiff owed him for money so paid more than his share of the surplus remaining in the hands of the defendant after applying the proceeds of the sale to the payment of the mortgage debt. It is clear that, under these circumstances, the defendant rightly paid the whole of the surplus to John.

When one of two tenants in common pays the mortgage of both, he acquires a lien on his cotenant's share of the mortgaged property, which he holds as security for the amount paid in excess of his share of the mortgage debt. *Sargent* v. *M'Farland*, 8 Pick. 500. It is a settled principle of equity, that one who assumes more than his share of the common burden is subrogated

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to the rights of the mortgagee to hold without any assignment or act of transfer as quasi assignee for the purpose of compelling contribution. *Lamb* v. *Montague*, 112 Mass. 352.

At the time when the sale in this case was made, John Roche owned an undivided half of the premises subject to the mortgage to the defendant, and had a valid lien for advances upon the other half for more than it was worth subject to the mortgage. This is proved by the fact that one half of the surplus was not sufficient to pay those advances. The plaintiff was not equitably entitled to any part of the surplus. The whole belonged equitably to John, for the money takes the place of the land and is subject to the same equitable claims. In an action for money had and received, the defendant will be protected in its payment of the fund to the equitable owner. *O'Connell* v. *Kelly*, 114 Mass. 97. It has received no money which in equity and good conscience it ought to pay over to the plaintiff. In other words, John Roche had acquired an equitable lien for advances on the plaintiff's share of the land mortgaged, which was not worth and did not sell for enough to pay the mortgage and discharge that lien; so that the whole surplus, after paying the mortgage, belonged to John, as representing only his own interest in the land. *Judgment affirmed.*

EMILY R. ROLLINS *vs.* ALEXANDER MARSH.

Worcester. Oct. 1, 1879. — Jan. 12, 1880. ENDICOTT & LORD, JJ., absent.

A contract by a guardian for the support and care of his ward binds the guardian personally, and not the ward.

A writ against A. "as he was the guardian of" B., is against A. personally, and the words "as he was the guardian," &c. may be rejected as surplusage.

If two persons enter into a written contract, which one refuses to fulfil, and the other makes a new contract with him, which operates as a rescission of the original contract, the new contract is founded upon a sufficient consideration.

CONTRACT in two counts. The first count was on an account annexed for board, lodging and care furnished Lucy A. Rollins, an insane person, of whom the defendant was guardian. The

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second count was on a written contract, by the terms of which the plaintiff was to furnish Rollins with board, lodging and care during her natural life, in consideration of the use of certain real estate and personal property belonging to Rollins. The writ, dated November 23, 1877, was against the defendant, "as he was the guardian of Lucy A. Rollins."

Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

The defendant was appointed guardian of Lucy A. Rollins, an insane person, in March, 1874. The defendant, on March 20, 1874, made with the plaintiff the written contract declared on; and the plaintiff then entered into possession of the real and personal estate therein named, and continued in possession thereof until April 1, 1877. The plaintiff assumed the care and support of Rollins on March 20, 1874, under the contract, and continued such care and support until December 11, 1876, when Rollins, with the consent of the plaintiff, left for a visit to her daughter, and died while thus absent, on October 27, 1877. The plaintiff contended that, a few weeks after March 20, 1874, she found the support and care of Rollins more onerous and expensive than she had anticipated, and more than it had previously been; that she requested the defendant to remove her, and declined to continue her future care unless the defendant would make a further compensation therefor; and that the defendant thereupon agreed to make her such further compensation as should be right. The making of any such contract was denied by the defendant.

The defendant contended that the plaintiff could not maintain an action in its present form against him for the care and support of his ward; that, if any contract was made by him as guardian, this action could not be maintained; that the remedy was either by an action against the ward or her administrator, or on the bond given by the defendant as guardian; and that there was no consideration for a new agreement while the written one was in force, for the care and support of the ward during her life.

The jury returned a verdict for the plaintiff; and the judge reported the case for the determination of this court. If the action could be maintained, judgment was to be entered on the verdict; otherwise, the verdict was to be set aside.

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W. A. Gile, for the defendant.

B. W. Potter, for the plaintiff.

SOULE, J. Guardians of minors, spendthrifts, or insane persons do not become owners of the property which is placed under their charge. The title thereto remains in the wards. The guardians have only a naked power, not coupled with an interest. The debts of the ward remain his debts, and can be recovered by suit against him, not by suit against the guardian. *Brown* v. *Chase*, 4 Mass. 436. *Simmons* v. *Almy*, 100 Mass. 239. Such suit may be defended by the guardian in behalf of the ward. The guardian cannot bind the person or estate of his ward by contract made by himself. Such contract binds him personally, and recovery for breach of it must be had in an action against him. *Hicks* v. *Chapman*, 10 Allen, 463. *Bicknell* v. *Bicknell*, 111 Mass. 265. *Wallis* v. *Bardwell*, 126 Mass. 366. He cannot escape liability on such contracts by reciting that he makes them in his official capacity; and it is immaterial, in a suit brought against him thereon, whether he is described by his official title or not. The judgment in either case must be against him personally, and the description has no legal effect. It may be disregarded as surplusage. It is immaterial, therefore, that the cause of action is described in one count as a contract made by the defendant, and in another as a contract made by the defendant in his official capacity. The legal liability being the same in whichever form the contract is made, there is no inconsistency in the counts.

Accordingly, in *Thacher* v. *Dinsmore*, 5 Mass. 299, the action was brought on two promissory notes, by which the defendant "as guardian to A. L., an insane person," promised to pay the plaintiffs or order one sum on a day certain and another on demand. There were two additional counts on the same notes, in which the promises were alleged to have been made by the defendant without adding his capacity of guardian, and a verdict having been found for the plaintiffs on the general issue pleaded, judgment was rendered upon it. Chief Justice Parsons, in giving the opinion of the court, said: "If an action is maintainable against any person, it must be the defendant; for the guardian of an insane person cannot make his ward liable to an action as on his own contract, by any promise

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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 as guardian cannot vary the form of action; but it is for his own benefit, that, on payment of the notes, he may not be precluded from charging the moneys paid to the account of his ward." See also *Forster* v. *Fuller*, 6 Mass. 58; *Sumner* v. *Williams*, 8 Mass. 162; *Fiske* v. *Eldridge*, 12 Gray, 474.

The writ against the defendant in the case at bar orders the sheriff to attach the goods and estate of "Alexander Marsh, as he was the guardian of Lucy A. Rollins," and to summon "the defendant" to appear, &c. This is a writ against the defendant personally, and is the sufficient foundation for a judgment against him. As has already been seen, a suit on a demand against a ward must be brought against the ward, not against the guardian, and the form of writ used when a suit is brought against an administrator on a contract made by his intestate is not appropriate. In such case, the order in the writ is to attach the goods and estate which were of the intestate, in the hands of the administrator. Such form is necessary there, because a judgment when obtained is to be paid out of the estate of the intestate, the title to which is in the administrator, not out of the administrator's own estate, and the writ must indicate whose estate is to be attached, if any. This form is not necessary in the case of a ward, because the title to the estate remains in him, and does not pass to his guardian. The words "as he was the guardian," &c. have no legal effect in the writ, and may be disregarded as surplusage.

The original contract made by the defendant for the support of his ward was his own contract, and the subsequent arrangement made for further compensation to the plaintiff, was his own contract, on which he alone, if any one, was liable to the plaintiff. This clearly follows from the doctrine of the cases above cited. The defendant contends that this subsequent

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arrangement did not impose any liability on him, because it was without consideration. The parties had made a contract in writing with which the plaintiff had become dissatisfied, and which she had informed the defendant that she should not fulfil unless the terms were modified. If she had abandoned her contract, he might have made a new arrangement with some one else for the support of his ward, and enforced whatever remedy he had for the breach against the plaintiff. Instead of this, he made a new contract with her, which operated as a rescission of the original agreement. Meanwhile the plaintiff had continued in the performance of her original agreement, which was recognized by both parties as subsisting and binding, till it was rescinded by the making of the new one. The release of one from the stipulations of the original agreement, is the consideration for the release of the other; and the mutual releases are the consideration for the new contract, and are sufficient to give it full legal effect. *Cutter* v. *Cochrane*, 116 Mass. 408. The action can be maintained, and, according to the terms of the report, there must be *Judgment on the verdict.*

EMORY D. LOTHROP *v.* HIGHLAND FOUNDRY COMPANY.

Worcester. Oct. 2, 1879. — Jan. 12, 1880. ENDICOTT & LORD, JJ., absent.

A conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvent law of the Commonwealth, while the United States bankrupt act of 1867 was in force, is a sufficient cause for instituting proceedings in insolvency against the debtor after the repeal of the bankrupt act.

A petition for a warrant to seize the estate of an insolvent debtor, under the Gen. Sts. *c.* 118, § 103, which alleges that he has made a mortgage of his personal property to secure the payment of a preëxisting debt to the mortgagee, with intent to secure to the latter a preference, and to defraud his creditors, the debtor being at the time insolvent and having reasonable cause to believe himself insolvent, need not allege that the mortgagee knew or had reasonable cause to believe that the debtor was insolvent.

PETITION IN EQUITY to this court, under the Gen. Sts. *c.* 118, § 16, to stay proceedings in which the court of insolvency had issued a warrant against an insolvent debtor upon the petition

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of a creditor, which was filed September 16, 1878, under the Gen. Sts. c. 118, § 103, and alleged that the debtor on August 31, 1878, made two mortgages of his personal property to secure the payment of preëxisting debts to the mortgagees, with intent to secure to them a preference, and to defraud his creditors, the debtor being at the time insolvent and having reasonable cause to believe himself insolvent.

The petition to this court alleged that the court of insolvency had no jurisdiction of the case: 1st. Because, at the time of the alleged making of the mortgages, the insolvent laws of Massachusetts were not in force, and the acts complained of were not in violation of any law then of binding force in this Commonwealth. 2d. Because the original petition was defective, in not setting forth that either of the mortgagees knew or had reasonable cause to believe that the debtor was insolvent at the time of making the mortgages to them.

The petition to this court was dismissed, with costs, by *Colt*, J., and the petitioner appealed to the full court.

T. G. Kent, for the petitioner.

H. J. Boardman & C. Blodgett, for the respondent.

GRAY, C. J. The principal question in this case is whether a conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvent laws of the Commonwealth, while the recent bankrupt act of the United States was in force, is a sufficient cause for instituting proceedings in insolvency against the debtor since the repeal of the bankrupt act. This question appears to us to be substantially determined by the judgments heretofore delivered by this court as to the effect of the bankrupt act of 1841 upon the insolvent law of 1838.

The first insolvent law of Massachusetts was passed on April 23, 1838, and took effect on August 1 of the same year. St. 1838, c. 163, § 26. The United States bankrupt act of 1841 was passed on August 19, 1841, and took effect from and after February 1, 1842. U. S. St. August 19, 1841, § 17. By the St. of Massachusetts of 1842, c. 71, it was enacted that the insolvent law of 1838 (except the provision for discharging attachments by giving bond) "shall be suspended so long as the bankrupt law of the United States shall continue in force; provided, that noth-

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ing in this act contained shall affect any proceedings which may be pending under the provisions of the act hereby suspended, when this act shall take effect." This statute, though passed on March 3, yet, as it did not expressly prescribe the time when it should go into operation, did not take effect until thirty days afterwards. Rev. Sts. *c.* 2, § 5. But it was held by this court that the bankrupt act of 1841, by its own force, suspended the operation of all state insolvent laws applicable to like cases; and therefore that proceedings in insolvency instituted on March 3, 1842, (while that bankrupt act was in force, though before the St. of 1842, *c.* 71, took effect,) were unauthorized and void, if the debtor and his property were subject to the operation of the bankrupt act, although no proceedings under that act had been had against him. *Griswold* v. *Pratt*, 9 Met. 16.

The bankrupt act of 1841 was repealed by act of Congress of March 3, 1843. This court held that an attachment made while the bankrupt act of 1841 was in force, and the insolvent law of 1838 was suspended, was dissolved by an assignment of the debtor's estate under the insolvent law on proceedings instituted after the repeal of the bankrupt act; and Chief Justice Shaw said: "The insolvent law, during its suspension, existed to many purposes. It was suspended only during the existence of another system of paramount authority, designed for the accomplishment of the same purpose, namely, a general and equal distribution of the property. When, therefore, the operation of this suspending law ceased, the original act was reinstated in active operation, and took effect from its original enactment." *Ward* v. *Proctor*, 7 Met. 318.

In *Atkins* v. *Spear*, 8 Met. 490, it was contended that certain transfers, assignments and payments, made by a debtor while the bankrupt act of 1841 was in force and the insolvent law suspended, invalidated a certificate of discharge under proceedings in insolvency commenced after the repeal of the bankrupt act. Mr. Justice Dewey, in delivering the judgment of the court, said that, upon the repeal of the bankrupt act, "the insolvent law of Massachusetts was revived, and with its revival all the limitations and restrictions upon the right to a discharge revived, although the acts had occurred during its suspension;" and that therefore, if the alleged acts of the defendant were within the

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cases specified in the insolvent law of 1838, or the statutes supplementary thereof, as avoiding a discharge, then they would have that effect, but not otherwise. He then proceeded to examine the various acts relied on, and to show that none of them contravened the provisions of the insolvent laws, — which would have been wholly unnecessary if no acts whatever, done while the bankrupt act was in force and the insolvent laws suspended, could have been deemed to have been prohibited by the insolvent laws.

In *Austin* v. *Caverly*, 10 Met. 332, Chief Justice Shaw referred to *Ward* v. *Proctor* and *Atkins* v. *Spear*, above cited, as establishing that, upon the repeal of the bankrupt act of 1841, "the insolvent law of 1838 went into renewed and active operation, to be construed according to the terms of its original enactment."

It may also be observed that fraudulent conveyances made after the bankrupt act of 1841 was passed, but before it took full effect so as to suspend the operation of state insolvent laws, have been held to afford grounds for impeaching a certificate of discharge obtained, or for allowing the property conveyed to be recovered back by an assignee appointed, under proceedings in bankruptcy instituted after the bankrupt act took full effect. *Swan* v. *Littlefield*, 4 Cush. 574. *Day* v. *Bardwell*, 97 Mass. 246, 255, and cases cited.

The recent bankrupt act of the United States was enacted on March 2, 1867, and did not take full effect, so as to suspend the operation of the insolvent laws of the Commonwealth, until June 2, 1867. *Day* v. *Bardwell*, 97 Mass. 246. It was repealed by the U. S. St. of June 7, 1878, which took effect on September 1, 1878. The omission of the Legislature of the Commonwealth to make any regulation whatever as to the suspension or the revival of the operation of the insolvent laws, by reason of the contemplated or the actual enactment or repeal of the last bankrupt act, can hardly be explained on any other hypothesis than that it was considered to be settled by the judgments of this court, that no such legislation was necessary, either to suspend the operation of the insolvent laws so long as the bankrupt act continued in force, or to revive the operation of all the provisions of the insolvent laws, as if they had never been suspended, so soon as the bankrupt act was repealed; and

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that the effect, and the only effect, of the bankrupt act upon the insolvent laws was to suspend, so long as it was in force, the right to institute proceedings under those laws in cases within its provisions. In view of the course of legislative action and of judicial decision on the subject, it would be most unreasonable to conclude that fraudulent preferences made since the passage of the insolvent laws and of the bankrupt act should not be reached by the provisions of either.

The objection that the petition to the court of insolvency is defective, for want of an allegation that the mortgagees knew or had reasonable cause to believe that the debtor was insolvent, cannot be sustained. The *dicta* of Chief Justice Shaw in *Ex parte Jordan*, 9 Met. 292, on which this objection is founded, were unnecessary to the decision of that case, and are controlled by the opinion subsequently delivered by him in *Thompson* v. *Stone*, 8 Cush. 103, as well as by the express provision of the St. of 1856, *c.* 284, § 29, which the Commissioners on the General Statutes indicate no purpose to abrogate. The difference in the language of the different sections of *c.* 118 of the Gen. Sts. manifests the intention of the Legislature that, in order to enable the assignee to maintain an action under § 89 to recover back the property conveyed, it should be necessary to prove knowledge or reasonable cause to believe, on the part of those receiving or benefited by the conveyance, that the debtor was insolvent or in contemplation of insolvency at the time of making it; but that the liability of the debtor to proceedings in insolvency under § 103, like his right to a certificate of discharge under § 87, should depend solely on his own intent and purpose and cause of belief, or, in other words, upon the question whether he, and not upon the question whether any other person, has done an act in fraud of the insolvent laws. And the petition to the court of insolvency in this case is in the form which has been generally used under those statutes. See Cutler's Insolvent Laws (3d ed.) 125; (4th ed.) 193.

Decree affirmed.

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ABRAHAM BURLINGAME *vs.* MARY FOSTER.

Worcester. Oct. 1, 1879. — Jan. 19, 1880. ENDICOTT & LORD, JJ., absent.

The maker of a promissory note payable to the order of F. applied to a broker to negotiate a loan of money on the note and on other security. The broker applied to B., who agreed to lend the money if the security was all right, and requested the broker to make inquiries and report particulars as to the sufficiency of the security. The broker procured F.'s indorsement on the note, and B. lent the money. *Held*, in an action on the note by B. against F., that there was no evidence that the broker acted as the agent of B. in procuring F.'s indorsement; and that evidence of the conversation between F. and the broker, at the time F.'s indorsement was procured, was inadmissible in defence.

Where the indorser of a promissory note resides in a town in which there are two post-offices, of which fact the holder of the note is ignorant, a notice of the dishonor of the note, addressed to the indorser at the town generally, is sufficient, unless he proves that he is accustomed to receive his letters at one of the offices only, and that the holder of the note might have ascertained that fact by reasonable inquiry.

CONTRACT upon a promissory note for $400, dated June 1, 1876, signed by Charles F. Pike, payable at a bank in Worcester to the order of the defendant, and by her indorsed. Answer: 1. That the note was indorsed at the plaintiff's request, without consideration, solely for the accommodation of the plaintiff, and to render the note negotiable, and under an agreement that the defendant should not be held liable thereon. 2. That the defendant had not due notice of the dishonor of the note. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

William E. Huse, a broker in Worcester, testified that Pike applied to him for a loan of $400, and offered as security a mortgage on his machinery in Natick, and the further security of the defendant's indorsement of a note, for the loan; that the witness then asked the plaintiff if he would lend the money; that the plaintiff replied that he would, if the security was all right; that the witness then went to Natick, and found the machinery there as represented by Pike, and had the records examined as to Pike's title thereto; that he then returned to Worcester, and had the records examined as to the title of the defendant in the real estate owned by her; that he then reported to the plaintiff that the security was all right; that the plaintiff then said he would

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lend the money; that Pike then signed the note in suit, and executed to the plaintiff a mortgage on his machinery; that the witness then took the note to the defendant in West Rutland, and obtained her signature on the back thereof; that he then took the note and mortgage to the plaintiff, who gave him a check for $400; that he got the money on the check and gave it to Pike; and that he was acting as agent of Pike in this transaction, and not as agent of the plaintiff.

The plaintiff was called as a witness, and corroborated the testimony of Huse; and testified that Huse was not acting as his agent, and did nothing at his request. The plaintiff further said he would not deny that, at a former trial of this case, he testified that Huse went to Natick and examined the property and Pike's title thereto, and went to Rutland for the defendant's signature, at his, the plaintiff's request.

Daniel Foster testified that he heard the plaintiff's testimony at a former trial of this case; that the plaintiff then said that he requested Huse to go to Natick and examine the records of the town-clerk's office, and bring a copy if all right, and that he did so; and he requested Huse to bring a copy from the registry of deeds as to the defendant's estate, and that he told Huse, if he would furnish a note with the defendant's indorsement and the mortgage, he would let him have the money.

The defendant testified that Huse was an entire stranger to her at the time he obtained her signature to the note; that she never had talked with Pike about signing a note; and that she never had heard anything about the note previously to signing it.

The above was all the evidence offered to show that Huse was agent of the plaintiff. She then offered to prove that she indorsed the note at the request and for the accommodation of the plaintiff, for the purpose of rendering the note negotiable, and under the agreement that she should not be held liable thereon; and, for that purpose, offered in evidence the conversation between Huse and herself at the time he obtained her signature to the note, contending that Huse was acting as agent of the plaintiff. The judge excluded this evidence, on the ground that Huse was acting as the agent of Pike, and not of the plaintiff.

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Upon the question of notice, the notary, who protested the note for non-payment at maturity, testified that he sent notice of dishonor by mail from Worcester, addressed to the defendant at Rutland, by direction of the plaintiff; and that he did not know the defendant's residence, nor that there were two post-offices in the town of Rutland. The plaintiff testified that, when the note became due, he inquired of Huse where the defendant lived, and was told at Rutland; that he thereupon directed the notary to send the notice to Rutland; that he made no further inquiry of any one as to the post-office address of the defendant; and that he did not know there were two post-offices in Rutland. The defendant offered evidence tending to show that she had lived in West Rutland for thirty years; that there had been a post-office there for nearly ten years; that a daily mail went from Worcester directly to West Rutland; that, ever since the establishment of the post-office in West Rutland, she and the other members of her family had received all their letters from that office, and that was her post-office address; that she lived about a mile from the West Rutland office, and about two and one half miles from the Rutland office; and that she never received any notice of the protest of this note. It appeared in evidence that the West Rutland post-office was in the town of Rutland, which contained about five hundred inhabitants, that, at the time this notice was sent, there were three post-offices in Rutland; and that the defendant very seldom received letters through the mail; and there was no evidence that she or her post-office address was known to any one in Worcester.

The defendant asked the judge to instruct the jury as follows: "It was the duty of the plaintiff, or notary, to make reasonable inquiries to ascertain the residence of the defendant, to ascertain at what post-office the defendant was accustomed to receive her letters, if there was more than one post-office in Rutland, and then address and forward the notice by mail to such post-office as that it would be most likely to reach her certainly and promptly; and if the jury are satisfied that the defendant was accustomed to receive her letters only from the West Rutland post-office, and are further satisfied that the defendant did not receive the notice of protest in the ordinary time, and in due course of mail, then the notice sent to Rutland is insufficient.

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and the verdict must be for the defendant, unless the plaintiff satisfies the jury that reasonable inquiries were made to ascertain at what post-office the defendant was accustomed to receive her letters, and that the notice was sent in accordance with the information received after such reasonable inquiries."

The judge declined to give the instructions requested, and, after instructing the jury generally upon the question of notice, instructed them that it was the duty of the plaintiff and notary to make reasonable inquiries to ascertain the residence of the defendant; that if the only information they had was that her post-office address was Rutland, and had no information that there were two post-offices in Rutland, and the notice was sent to Rutland in due season, it would be sufficient to charge the defendant as indorser, unless the defendant satisfied the jury that she was accustomed to receive her letters only from the West Rutland post-office, and further satisfied them that this fact could, upon reasonable inquiry, have been ascertained at Worcester, where the notice was mailed.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. B. Harding, for the defendant.

F. T. Blackmer, for the plaintiff.

AMES, J. It was correctly ruled at the trial that there was no evidence that Huse was acting as agent for the plaintiff. He had applied to the plaintiff to lend the sum of $400 on Pike's note with the defendant's indorsement, with the further security of a mortgage of certain machinery belonging to Pike; and to this application the plaintiff had replied that he would lend the money, provided the security was "all right." Upon receiving this answer, Huse made inquiry as to the sufficiency of the proposed security, and reported to the plaintiff that all was right. The application to the plaintiff was made by Huse on behalf of Pike, and the securities agreed upon were furnished by Pike, and placed by the broker Huse in the plaintiff's hands. We find nothing in the evidence reported that has any tendency to show that Huse was acting as agent for any person except the borrower. If the plaintiff requested Huse to make inquiries and to report particulars as to the sufficiency of the proposed securities, it would not alter the true character of the transaction. We see

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no ground therefore for the admission of extrinsic evidence by which the defendant could control the effect of her written contract. *Prescott Bank* v. *Caverly*, 7 Gray, 217. *Tower* v. *Richardson*, 6 Allen, 351.

The ruling of the presiding judge, as to the duty of the notary and the plaintiff in regard to forwarding notice to the defendant by mail, was in accordance with the rule laid down in *Morton* v. *Westcott*, 8 Cush. 425, and *Cabot Bank* v. *Russell*, 4 Gray, 167, and was all that the defendant was entitled to.

Exceptions overruled

JOHN D. PERRY *vs.* JAMES W. BIGELOW.

Worcester. Oct. 1, 1879. — Jan. 19, 1880. ENDICOTT & LORD, JJ., absent.

In an action on a promissory note payable at a time certain, parol evidence is inadmissible to show that it was not intended as a note, but merely as a memorandum, or that certain certificates of stock, described in the note as collateral security, should operate as payment of the note at maturity, if not paid before.

CONTRACT on the following promissory note signed by the defendant and indorsed by the payee: "$5000. St. Louis, Mo., January 11, 1877. Four months after date I promise to pay to Frank T. Iglehart, cashier, or order, at the banking-house of Bartholow, Lewis & Co., in St. Louis, Mo., five thousand dollars for value received, negotiable and payable without defalcation or discount, and with interest from maturity at the rate of ten per cent per annum, I having deposited with him as collateral security the following described certificates of the capital stock of the Scotia Lead Mining Company, No. 40 for 25 shares, 41 for 25 shares, 42 for 25 shares, 43 for 50 shares, 44 for 130 shares and 39 for 25 shares, aggregating 280 shares. And hereby authorize him to sell the same at public or private sale or otherwise at his option, on the non-performance of this promise, without notice, and authorize him to use, transfer or hypothecate the same at his option, he being required, on payment of the amount loaned as specified herein, and at any time before said collateral security shall have been sold, to surrender the same."

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Trial in the Superior Court, before *Dewey*, J., who reported the case for the consideration of this court in substance as follows:

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The defendant offered to show that, on January 11, 1877, the parties made an oral contract, by which the plaintiff was to let the defendant have $5000 in money, less the interest for four months, and the defendant was to transfer to the plaintiff certain shares of the Scotia Lead Mining Company, and at the end of the four months the defendant was to have the right to have the stock back by paying the $5000, and, if he did not do so, the plaintiff was to have the stock absolutely, and the defendant was not to pay the $5000; that the parties were at the banking-house, of which the plaintiff was president, and he suggested that he would like to have it appear as a bank transaction, and accordingly went to the adjoining room, where was the cashier, and returned to the defendant with the note declared on; and that the same was then duly executed by the defendant and delivered to the plaintiff, who paid him $5000, less four months' discount. It was agreed that the note was made payable to the cashier for the accommodation of the plaintiff; and that neither the bank nor the cashier had any interest therein.

The plaintiff contended that the above offer of proof was not competent. The judge so ruled; and directed a verdict for the plaintiff for the amount of the note less $280, for which it was agreed the stock was sold by the plaintiff after the maturity of the note. If the ruling was correct, judgment was to be entered on the verdict; otherwise, the verdict to be set aside and a new trial granted.

F. T. Blackmer, for the defendant.

W. S. B. Hopkins, for the plaintiff.

AMES, J. The defendant's written contract was a negotiable promissory note, requiring him to pay a certain sum of money at a definite time. The evidence which he sought to introduce was for the purpose of showing that this written contract was not the real contract between the parties; that the note was merely a memorandum; and that certain certificates of stock described in the note as collateral security should operate as payment of the note at its maturity, if it were not previously paid. This evidence could not be received without doing violence to the rule

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that oral evidence cannot be admitted to alter a written contract, or to annex to it a condition or defeasance not appearing in the contract itself. *Adams* v. *Wilson*, 12 Met. 138. *St. Louis Ins. Co.* v. *Homer*, 9 Met. 39. *Allen* v. *Furbish*, 4 Gray, 504. It is needless to multiply citations on so familiar a rule of evidence.

Judgment on the verdict.

GEORGE S. SMALL *vs.* LEVI HOWARD.

Worcester. Oct. 2, 1879. — Jan. 19, 1880. ENDICOTT & LORD, JJ., absent

In an action against a physician and surgeon for not properly treating a wound on the plaintiff's wrist, there was evidence that the wound was a very severe one, and required a considerable degree of skill in its treatment; that the defendant lived in a small country town, and had no experience in surgery beyond that usually had by country surgeons; that an eminent surgeon lived within four miles of the defendant, and the plaintiff was physically able to have visited any other surgeon than the defendant, if so directed, but no such direction was given him. At the request of the plaintiff, the judge instructed the jury that, if the defendant had not the requisite skill and experience to treat the wound, he should have temporarily dressed it, and recommended the plaintiff to a more skilful surgeon; and also instructed the jury, against the plaintiff's objection, that the implied contract of a physician or surgeon was that he possessed that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession, having regard to the advanced state of the science of surgery; that the defendant was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons in large cities, and making a specialty of the practice of surgery; that the rule applicable to the case was not applicable to physicians and surgeons alone, and was not confined to other members of the learned professions; but it was equally applicable to all persons holding themselves out as possessing special skill in the business in which they were engaged; that a civil engineer, watchmaker, mechanic or blacksmith was subject to the same rule of law. The judge declined to instruct the jury, as requested by the plaintiff, that it was incumbent on the defendant to possess the degree of skill and learning possessed by well-educated surgeons; and that the average degree of skill and learning possessed by the surgeons of this Commonwealth was not necessarily all the skill and learning which it was incumbent on the defendant to possess. *Held*, that the plaintiff had no ground of exception.

TORT against a physician and surgeon for malpractice in dressing and caring for a wound upon the plaintiff's wrist. Trial in

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this court, before *Colt*, J., who allowed a bill of exceptions in substance as follows:

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The wound was made by glass, and, as the defendant testified, the cut throughout the whole inside of the wrist extended to the bone, severing all the arteries and tendons. The testimony of experts on both sides was, that the wound was a very severe one and required a considerable degree of skill in its treatment. The defendant was a physician and surgeon in Chelmsford, a country town in this Commonwealth, of about twenty-five hundred inhabitants, and had no experience in surgery beyond that usually had by country surgeons. There was evidence that an eminent surgeon resided within four miles of the defendant; that the treatment of the defendant extended over about ten days, and the plaintiff during all this time was physically able to have visited any other surgeon, if so directed, which was not done. One of the experts called by the plaintiff testified, that he did not think the average country surgeon would be likely to possess the requisite skill to care for this wound. The evidence of the experts was conflicting, some testifying that the wound was properly treated, others the contrary.

The judge instructed the jury in substance as follows: "A physician or surgeon without a special contract with his patient, is never considered as warranting a cure. His contract, as implied by law, is: 1. That he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession, having regard to the present advanced state of the science of surgery. 2. That he will use reasonable and ordinary care and diligence in the treatment of the case committed to him. 3. That he will use his best judgment in all cases of doubt as to the best course to pursue in his treatment of the case. The defendant, undertaking to practise as a physician and surgeon in a town of comparatively small population, was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities, and making a specialty of the practice of surgery. He is not responsible for want of success, unless it is proved to result from

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want of ordinary care and attention, and then only to the extent of the injury caused by his want of skill and neglect, not for the whole consequences of the particular original injury or disease. He is not presumed to engage for extraordinary skill or extraordinary care and diligence. He is not responsible for errors in judgment, or mere mistakes in matters of reasonable doubt and uncertainty, provided he exercises ordinary skill and diligence. The rule applicable to this case is not a rule of law applicable to physicians and surgeons alone, nor is it confined to other members of the learned professions, but it is equally applicable to all persons who hold themselves out as possessing special skill in the transaction of the business in which they are engaged. A civil engineer, a watchmaker, mechanic or blacksmith, for instance, is subject to the same rule of law.

At the plaintiff's request, the jury were instructed that, if the defendant had not the requisite skill and experience to treat the wound, he should have temporarily dressed it, if necessary, and recommended the plaintiff to a more skilful surgeon.

The plaintiff objected to the instructions given, only in so far as the degree of skill, learning and experience required of the defendant was concerned, contending that a higher degree thereof was required of the defendant than above laid down; and relied entirely on the defendant's lack of skill, learning and experience.

The plaintiff also asked the judge to instruct the jury that "it is incumbent upon the defendant to possess the degree of skill and learning possessed by well-educated surgeons;" and "that the average degree of skill and learning possessed by the surgeons of this Commonwealth is not necessarily all the skill and learning which it is incumbent on the defendant to possess." The judge declined to give these instructions.

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

G. A. Torrey, for the plaintiff. 1. The defendant, by undertaking, as a surgeon, to treat the plaintiff's wound, was bound to possess that reasonable degree of skill, learning and experience requisite to insure a proper treatment of the case, and to know enough to be able to judge whether he was competent to undertake the treatment of so severe a wound; if he was not, it was

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his duty to render the necessary temporary care, and to send the plaintiff to a surgeon having proper qualifications. It was entirely immaterial that the defendant resided a few rods within the line of a country town. He would not have been subject to a different rule had he moved into the city of Lowell during the treatment of the plaintiff's case. The jury, in estimating what qualifications are necessary, have a right to consider the average skill, learning and experience of the profession, properly so called, that is, of well-educated physicians and surgeons, exclusive of quacks and mountebanks. Under the instructions given, the only question for the jury was whether the defendant was up to the average of all those who practise the profession in the country. The instructions given do not discriminate between a severe and an ordinary injury. Had this been a most difficult and dangerous case of amputation, which no country surgeon could attempt without rendering himself morally guilty of murder, the defendant, if an ordinary country surgeon, (which is practically equivalent to no surgeon at all,) under the instruction of the court, would have been justified in undertaking it.

2. The jury should have been instructed that the defendant was bound to possess at least the average skill of well-educated surgeons; or, at least, the skill of the average surgeons in the whole Commonwealth, and not merely that of those in the country towns. The rule laid down by the court lowers the standard of learning and skill required for the practice of medicine and surgery, by admitting, as a component factor, the ignorant and unskilful, and thereby endangers the safety of the unlearned, who are little able to judge of the acquirements of a professional man, and is not in accordance with the authorities. *Leighton* v. *Sargent*, 7 Foster, 460. *Landon* v. *Humphrey*, 9 Conn. 209. *Wilmot* v. *Howard*, 39 Vt. 447. *Hathorn* v. *Richmond*, 48 Vt. 557. *Utley* v. *Burns*, 70 Ill. 162. *Barnes* v. *Means*, 82 Ill. 379. *Branner* v. *Stormont*, 9 Kan. 51. *Carpenter* v. *Blake*, 17 N. Y. Sup. Ct. 358. *Heath* v. *Glisan*, 3 Oregon, 64. *Gallagher* v. *Thompson*, Wright, 466. *McCandless* v. *McWha*, 22 Penn. St. 261. *Haire* v. *Reese*, 7 Phila. 138.

The true rule is, that the surgeon contracts that he has the requisite skill to treat the wound properly, or to be aware that he cannot do it, and, in estimating this degree of skill, the

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standard of the ordinary professional man of education and experience is to be the guide for the jury. If he has not the requisite qualification he must so state, and then, if the patient sees fit to trust him, he can operate with safety. *Patten* v. *Wiggin*, 51 Maine, 594. *Lanphier* v. *Phipos*, 8 Car. & P. 475. *Rich* v. *Pierpont*, 3 F. & F. 35.

H. B. Staples, for the defendant.

AMES, J. The complaint of the plaintiff is, that, in the treatment of the wound under which he was suffering, the defendant did not furnish that degree of skill, learning and experience which was required of him, and which, in undertaking the case, he impliedly bound himself to furnish. It is not contended that he engaged to furnish extraordinary skill, or that he warranted a cure, but that in undertaking the case he held himself out as being a man of reasonable and ordinary skill and experience in his profession as a surgeon. His contract, as implied by law, is, so far as this point is concerned, that he possesses that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession. *Leighton* v. *Sargent*, 7 Foster, 460. It must be the ordinary skill, learning and experience of the profession generally. *Wilmot* v. *Howard*, 39 Vt. 447. And, in judging of this degree of skill in any given case, regard is to be had to the advanced state of the profession at the time. *McCandless* v. *McWha*, 22 Penn. St. 261.

The instructions which were given upon this subject were in conformity to these principles, and the jury were distinctly told, that, in their estimate of the reasonable skill ordinarily possessed by others in the profession, regard was to be had to the present advanced state of the science of surgery. The plaintiff, however, complains that the rule, as given by the presiding judge, lowers the standard of learning and skill required for the practice of medicine and surgery, by including in the expression, "others in the profession," all the mountebanks, ignorant pretenders, and impostors who undertake the practice of medicine and surgery as their ordinary calling. The judge in his charge was speaking of the "profession," of the "advanced state of the science of surgery," and of the "learned professions." These terms clearly imply study, education and special preparation. They have no application to persons who, without education, and nothing to

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guide them but some pretended inspiration of their own, usurp the name and seek to assume the character of physicians and surgeons. The instruction upon this general subject was safer and more accurate than that requested by the plaintiff. "The degree of learning, skill and experience ordinarily possessed by the profession," is a more distinct and less speculative and misleading form of expression than "the skill and learning possessed by well-educated surgeons." The instructions requested by the plaintiff were therefore properly refused. The jury could hardly have supposed that the skill required of the defendant was merely the average skill of all practitioners, educated and uneducated, permanent and occasional, regulars and interlopers alike.

One other point remains to be considered. It is a matter of common knowledge that a physician in a small country village does not usually make a specialty of surgery, and, however well informed he may be in the theory of all parts of his profession, he would, generally speaking, be but seldom called upon as a surgeon to perform difficult operations. He would have but few opportunities of observation and practice in that line such as public hospitals or large cities would afford. The defendant was applied to, being the practitioner in a small village, and we think it was correct to rule that "he was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons practising in large cities, and making a specialty of the practice of surgery."

At the plaintiff's request, the court ruled in substance that, if the case was one which the defendant was not qualified to undertake, he should have referred the plaintiff to a more skilful surgeon. The remark of the presiding judge, that the rule as to ordinary skill applied equally to mechanical operations and employments not included within the range of the learned professions was merely an illustration, and could not have misled the jury. No wrong was done to the plaintiff in the trial, and the

Exceptions are overruled.

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INHABITANTS OF TEMPLETON *vs.* AUSTIN C. STRATTON.

Worcester. Oct. 2, 1879. — Jan. 19, 1880. ENDICOTT & LORD, JJ., absent.

On a complaint, under the Gen. Sts. *c.* 70, § 5, by a town against a father for the support of his adult pauper daughter, it may properly be found that he is of "sufficient ability" to contribute to such support, where the value of his entire property, above his debts, is between $5000 and $6000, notwithstanding he is in poor health, unable to do hard work, has a wife and infant child dependent upon him, and his income, although he has lived in a prudent manner, is, and has been for some years, less than his expenses.

COMPLAINT, filed May 2, 1878, under the Gen. Sts. *c.* 70, § 5, to obtain from the defendant contribution towards the support of his adult daughter, Josephine Stratton, an imbecile and pauper. Trial in the Superior Court, without a jury, before *Pitman*, J., who found the following facts:

Josephine Stratton has been for many years supported in whole or in part by the plaintiff town, and is thirty-five years of age. The defendant was formerly a farmer, and more recently a pedler, and lived in Templeton until about the time this complaint was filed, when he moved to Harvard. For some years he was a widower, and Josephine was his only living child. In 1877, he married again, and now has an infant child. No claim was ever made on him by the plaintiff for the support of Josephine until this complaint. At about eighteen years of age, Josephine was sent to an insane asylum, and after some years was transferred to the almshouse and has been continually supported as a pauper, the respondent in all that time contributing in the gross but about $30 for her support. The respondent is now the owner of a farm in Harvard, a small house in Templeton, a pasture in Petersham, with some personal property, his whole property amounting to between $5000 and $6000 above his debts, at a cash valuation in the present market. He is in poor health and unable to do hard work, being obliged to carry on his farm by hired help. His wife is a feeble woman, not able to accomplish much for the support of the family. For some years he has run behindhand from $50 to $100 per year, his income being insufficient to provide for his needs, and he has been obliged to expend to the amounts stated from his capital; and this is the

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case now. He lives in a prudent and careful manner, and is not in any way chargeable with extravagance. The amount of money sought to be recovered by this complaint was properly expended by the plaintiff town within six months prior to the filing of the complaint; and the actual expense of supporting the pauper is $1.66 per week, at the poor-farm in Templeton, where she is supported.

The defendant asked the judge to rule that the intent of the Gen. Sts. *c.* 70, §§ 4–11, is to enable towns to relieve themselves in whole or in part from the expense attending a statute obligation to support paupers; and that the complainant must show clearly that the respondent is of sufficient ability to contribute to such support without crippling himself in the discharge of his other obligation to his wife and minor child, or in his own reasonable maintenance according to his station in life and his needs, without exhausting or impairing the principal of his property.

The judge declined so to rule; but ruled that it was for the court to decide, under all the circumstances of the case, whether the respondent was of sufficient ability to contribute towards the support of his pauper daughter; that while it must appear that such contribution would not cause present deprivation of reasonable and comfortable support of the respondent and his family, or interfere with the fulfilment of his obligations to others, yet the fact that such contribution might impair his capital was not of itself a sufficient reason why such contribution should not be ordered; that the question was one of present ability; and that the court was not bound to calculate remote and uncertain results depending in part upon unforeseen contingencies, especially as the statute provided for the future revision and alteration of any decree that might be made.

The judge found that the allegations of the complaint were maintained, and assessed against the respondent the sum of $50 towards the support of the pauper, to the time of the assessment, June 18, 1879, and the sum of $1.50 per week, from and after July 1, 1879, to be paid quarterly, with the costs of this complaint. The respondent alleged exceptions.

W. S. B. Hopkins, for the respondent.

F. P. Goulding, (*S. Cady* with him,) for the complainant.

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AMES, J. By the terms of the Gen. Sts. c. 70, §§ 4–6, the defendant was liable on this process, if found to be of sufficient ability, and in proportion to his ability, to be assessed a reasonable sum for or towards the support of the pauper, to the time of the assessment, and a further weekly sum towards her future support. The statute furnishes no definition of the words "sufficient ability." Each case of the kind must depend upon its own special circumstances, and to a large extent also upon the discretion of the court. The only question of law presented by this bill of exceptions is as to the correctness of the interpretation applied to the words "of sufficient ability," by the presiding judge.

It was correctly ruled that it was a question of present ability, not ability to pay the assessment under all the uncertain contingencies which might happen in the future. It was to be judged of with reference to the existing state of things, and to the present state of the defendant's property and debts, his income and probable earnings, and his present reasonable expenses. It is to be remembered that, under § 11 of the statute, the court has power, on application, to revise and alter the assessment, if in course of time it shall be found to be burdensome and oppressive.

Under a similar statute in New Hampshire, it was decided, in *Dover* v. *McMurphy*, 4 N. H. 158, that a farmer whose real estate was worth from one thousand to eighteen hundred dollars, whose personal estate was valued at from two hundred to five hundred dollars, and whose debts were seven hundred dollars more than the debts due to him, was not to be considered as of sufficient ability to be a proper subject of this process. The court in its decision says that, under such an assessment, his income would be insufficient for his support, and therefore he should be excused from that additional burden. In *Hillsborough* v. *Deering*, 4 N. H. 86, it also says, in substance, that a farmer ought not to be called on in this manner, who cannot from his farm, with his own labor and the assistance of his family, maintain himself, his wife and children, and pay the interest of his debts. And in *Colebrook* v. *Stewartstown*, 10 Foster, 1, the rule is stated to be, that, if a father cannot afford the required contribution without reducing his property below the amount required, with his

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labor, to afford a comfortable support to his family, and thus hazarding their comfortable support for the future, he is to be excused. But we do not understand that there is any decision of that court, to the effect that a man's income is the only thing to be considered in judging of his ability.

The rule which the respondent requested the court to adopt, in our judgment, goes beyond these decisions of the New Hampshire court, and would restrict this statutory liability to such persons only as have a surplus income over and above their own reasonable maintenance, according to their respective stations and needs. The court was right in refusing to adopt this ruling. We cannot agree that, in the case of a man whose property at a cash valuation in the present market exceeds his debts by between five and six thousand dollars, the amount of his income is necessarily the decisive test of his ability to pay such an assessment. It is easy to suppose a case in which a man might have large possessions, although the immediate income might be small. It was correctly ruled, therefore, that if the required contribution "would not cause present deprivation of reasonable and comfortable support of the respondent and his family, or interfere with the fulfilment of his obligations to others, yet the fact that such contribution might impair his capital was not of itself a sufficient reason why such contribution should not be ordered." *Exceptions overruled.*

MARY E. PIERCE, guardian, *vs.* JOANNA K. PRESCOTT.

Worcester. Oct. 3, 1878; Jan. 9, 1879. — Jan. 20, 1880.

A. died intestate leaving personal property, which was divided in equal shares between his widow and two minor children, a boy and a girl. The boy died under age and unmarried, and his estate, under the Gen. Sts. c. 91, § 1, *cl.* 6, descended to his sister, of whom the mother, who had married again, and who had two children by her second husband, was appointed guardian. The administrator of the boy's estate presented a petition to the Probate Court having jurisdiction of the parties, for a decree of distribution among his next of kin, representing that they were the mother, the sister and the two children of the half blood, and praying that the balance in his hands might be decreed among said persons or such others as might be proved to be entitled thereto. On this petition, after due notice, the court ordered the balance to be distributed among

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the persons named in the petition, which was accordingly done. Subsequently, the Probate Court ordered the guardian, in her final account with her ward, to charge herself with the amount thus received by her from her son's estate. *Held*, on appeal to this court, that the decree of distribution could not be impeached in this proceeding, nor except on a direct petition to review it; but that it was open to the ward to contend that the guardian, having full knowledge that the son's estate was derived by inheritance from his father, although she had no actual knowledge of the provisions of the statute of distributions, was guilty of negligence in allowing the decree of distribution to be made, and in not appealing therefrom, and should therefore be charged, not only with the amount personally received by her, but also with the amounts paid to the children of the half blood.

A guardian charged in her account the price of a piano purchased for her ward, a minor daughter. It appeared that the piano was purchased with the ward's money and was a suitable thing for her to have; that, after the ward was married, the guardian refused to let her have the piano, and, at the hearing before the judge of probate, when told that the item would not be allowed, unless she would state that she would give up the piano, refused to answer. *Held*, that the item was properly disallowed.

Whether a guardian should be allowed a general commission in addition to a charge for special services depends largely upon how he has managed the estate, and whether it has been kept invested by itself.

APPEAL by Mary E. Pierce, guardian of Joanna K. Prescott, from a decree of the Probate Court, requiring her to charge herself in her final account with certain sums of money not included therein, and disallowing certain alleged credits. Hearing before *Endicott*, J., who reported the case for the determination of the full court. The facts appear in the opinion.

J. Hopkins, for the appellant.

W. W. Rice & F. T. Blackmer, for the appellee.

COLT, J. The decree appealed from required the appellant to charge herself as guardian with money received from the administrator of the estate of her son, Edward N. Cutler. The latter died under age, not having married, and possessed at the time of his death of an estate, which came to him wholly by inheritance from his deceased father, William N. Cutler, the former husband of Mrs. Pierce. The amount in question was paid under a decree of distribution of the Probate Court in 1870, made upon the petition of the administrator of Edward N., which set forth the names of the supposed next of kin, with their places of residence and relationship to the deceased, and prayed that a distribution of the balance in his hands might be decreed by the court to be made among the persons named, or such others as might be proved to be entitled thereto according to law. Mrs.

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Pierce, the mother, was stated to be one of the next of kin. Annexed to that petition was an affidavit of the administrator, that the representations contained in it were true according to his best knowledge and belief; due notice to all parties interested was ordered and service thereof duly made. The intestate at the time of his death, and all parties represented to be interested, including Mrs. Prescott, were residents of the county; and no question is now made but that the Probate Court had jurisdiction of the subject-matter and of the parties, and that its jurisdiction was exercised in a legal manner. The decree of distribution was made as asked for, to the parties named as next of kin, and the money was paid by the administrator to Mrs. Pierce, to be held by her in her own right.

It is conceded that Mrs. Prescott after the death of Edward N. was the only living child of William N. Cutler, and it is contended that, as the property of which Edward N. died possessed, came from his father, Mrs. Prescott is now entitled, notwithstanding the decree of the Probate Court, to the whole of the estate of Edward N., under that clause of the statute which provides, by way of exception to the general rule, that the estate which comes to a deceased child by inheritance from a deceased parent shall descend in equal shares to the other children of the same parent, when the child dies under age and not having married; Gen. Sts. *c.* 91, § 1, *cl.* 6; and that the guardian should now be charged with it in her account. It is evident that this clause of the statute was overlooked by the administrator in drafting the petition on which the decree of distribution was made.

Upon the entry of the appeal in this court, the case was referred, by the consent of parties, to a master, to report the facts and his findings thereon, and the evidence requested by either party. The master found that the guardian was not bound to account for the amount received under the decree. The appellee excepted to this finding.

1. The decree of distribution was the decree of a court of competent jurisdiction, proceeding to a judgment in a manner authorized and required by law, upon the evidence then before it, after due notice to all parties interested. It was the decree of a court now by the St. of 1862, *c.* 68, made a court of record. The immediate, direct and sole purpose of the judgment was to

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ascertain and determine who were the persons entitled to a distributive share; to that end it was necessary to ascertain who were next of kin, and whether the estate to be divided came from the father of the intestate. These were questions of fact, as well as law, and cannot be treated in any just sense as incidental and collateral only to the judgment to be rendered. They were the very thing adjudicated.

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The power to grant administration, and to pass all decrees necessary in the settlement of the estates of deceased persons, is within the peculiar and appropriate jurisdiction of the probate courts of this Commonwealth. In England the same jurisdiction was formerly exercised by the ecclesiastical courts, and in *Barrs* v. *Jackson*, 1 Phillips, 582, where this question was much discussed, Lord Lyndhurst held that the sentence of an ecclesiastical court, in a suit for administration which turned upon the question who were next of kin to the intestate, was conclusive upon that question in a subsequent suit in the Court of Chancery, between the same parties, for distribution. In *Allen* v. *Dundas*, 3 T. R. 125, payment to an executor named in a forged will, which had been proved and allowed in the prerogative court, was held a good payment in an action to recover the debt, brought by an administrator appointed after the proceedings had been set aside, because the spiritual court had jurisdiction over the subject-matter, and every person was bound to give credit to the probate till vacated. This rule is also recognized in more recent cases. *Spencer* v. *Williams*, L. R. 2 P. & D. 230. *Wytcherley* v. *Andrews*, L. R. 2 P. & D. 327.

The conclusive effect of the judgments of probate and other courts, exercising similar powers, upon all matters within their jurisdiction, is generally maintained in the several states. We refer to a few of the cases only. *Thompson* v. *Thompson*, 9 Penn. St. 234. *Peebles' appeal*, 15 S. & R. 39. *Colton* v. *Ross*, 2 Paige, 396. *Probate Court* v. *Van Duzer*, 13 Vt. 135. *McFarland* v. *Stone*, 17 Vt. 165. *Tebbets* v. *Tilton*, 4 Foster, 120. *Clark* v. *Pishon*, 31 Maine, 503. *Broderick's will*, 21 Wall. 503.

The law is so laid down by this court, although it is sometimes said, as if in qualification of the rule, that, although the Probate Court has jurisdiction over the subject-matter, yet, if it clearly exceeds its powers or does an act prohibited by law, its decree

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may be avoided in collateral proceedings, as well as by appeal, but this is only one way of saying that where the jurisdiction of the court over the subject-matter is in any particular limited, then its decree is not binding, if it oversteps the limits fixed. *Jenks* v. *Howland*, 3 Gray, 536. It is not in such case the indiscreet exercise of a power granted, but the doing of an act for which no power is given, or which is expressly prohibited. *Smith* v. *Rice*, 11 Mass. 507. *Jochumsen* v. *Suffolk Savings Bank*, 3 Allen, 87, and cases there cited.

In *Loring* v. *Steineman*, 1 Met. 204, it was decided that a decree of distribution by the Probate Court, after such notice as is prescribed by statute, or, if no statute requires notice, after such notice as the court in its discretion shall think proper to order, is so far conclusive as to protect the administrator, acting in good faith, in conforming to it, and further that it is the duty of that court to ascertain who are the persons entitled to distribution, and to decree distribution to them by name. In deciding these questions, said Chief Justice Shaw, "the court must be governed by those rules of evidence, and those presumptions of fact from circumstances, which are resorted to by all other tribunals in determining questions of fact." The possibility of mistake, he declared, cannot prevent the judgment from being so far conclusive as to protect all who are compelled to act under it. The distribution of an intestate estate was said to be analogous to proceedings *in rem*. The subject-matter, that is to say, the property, is within the jurisdiction of the court; and the judgment, by determining who are entitled to distributive shares, and extending to the entire estate, is necessarily conclusive, because nothing further is left to be distributed. And in the recent case of *White* v. *Weatherbee*, 126 Mass. 450, a decree of distribution was declared to be an adjudication, in a proceeding in which the administrator was a party, which determined the amount to be paid and the person to whom it was to be paid; it was the administrator's duty to pay according to the decree; as to him the question was *res adjudicata*, and his failure to pay was a breach of the administration bond for which his sureties were liable.

2. It is contended in behalf of the ward, Mrs. Prescott, that the decree of the Probate Court, charging the guardian in this

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case with the amount in controversy, upon a finding that its former decree was made under a mistake of fact, is in itself a sufficient revocation of that decree to make its proceedings in this case valid.

The Probate Court without doubt has an extensive power, upon proper application and upon due notice to all interested, to correct its own errors and mistakes in favor of parties, who, without fault, are injured thereby. This power was asserted and maintained upon a full discussion of the authorities in *Waters* v. *Stickney*, 12 Allen, 1. When the proceedings are interlocutory, or are still before the court, as where an estate is still unsettled, it might be proper upon application to correct mistakes when it could be done without ultimate prejudice to the rights of parties interested.

This case does not require us to consider the proper limits of this power; for it cannot be exercised except upon a direct petition for the review of the decree complained of, and upon notice to all the parties having acquired rights under that decree. It cannot be reversed in another proceeding between different parties, and as incidental to the settlement of an account between those parties, simply by an order that the guardian should account for the money received by her as the distributive share of an estate already settled.

3. It is further contended, in behalf of the ward, that, by the appeal here taken, the guardian's whole account is opened, (see *Willey* v. *Thompson*, 9 Met. 329,) and that she should now be charged, not only for the amount actually received from the administrator, but also for the amount paid by him, under the same decree, to the half-brothers of the intestate; upon the ground that the guardian, as matter of law, was guilty of negligence, in not bringing to the notice of the court facts of which she had knowledge, and upon proof of which the whole estate would have been decreed to the ward and paid to her as guardian.

It appears from the master's report, that the guardian had full knowledge that the estate of Edward N. Cutler, distributed by the administrator under this decree, was that portion of his father's estate which came to him at his decease, but had at the time no actual knowledge of the provisions of the statute

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of distributions; that the administrator was a lawyer in good standing; that the guardian took no active part in procuring the decree, and has taken no steps to have it revoked. The master found that she was not guilty of any negligence, and had not failed to perform any duty relative to the procurement of the decree.

In the opinion of the court this finding of the master is not warranted by the facts reported. In obtaining possession of the ward's estate, as well as in its preservation and disposition, a guardian is held to the same degree of responsibility as is imposed upon executors, administrators, and trustees. *French* v. *Currier*, 47 N. H. 88. It is his duty to recover all the property of his ward which comes to his knowledge, whether in possession or in action. He must use due diligence to discover its existence. He is bound to use that care and prudence which competent and faithful men employ in their own business. If he has knowledge of all the facts upon which the title of his ward depends, then it is a breach of duty on his part, not to assert and enforce that title. It is an obligation assumed by accepting the guardianship, for the neglect of which the guardian cannot excuse himself by pleading ignorance of the law on which the rights of his ward depend. If the estate suffers loss by such ignorance, the guardian is chargeable with it on the ground of constructive negligence. In *Schultz* v. *Pulver*, 11 Wend. 361, it was decided that, if debts collectible are not collected within a reasonable time, the executor or administrator is liable, although no improper motives are imputable to him; he is chargeable with them as assets which have come to his knowledge. In *Lowson* v. *Copeland*, 2 Bro. Ch. 156, an executor was charged with a bond debt for neglecting to take legal steps to collect it, in consequence of which it was lost, although it was contended with much reason that there was no actual negligence. In *Caffrey* v. *Darby*, 6 Ves. 488, trustees were charged with a loss occasioned by their negligence in not collecting a debt, although it was conceded by counsel and the court that they had not been influenced by improper motives. The Master of the Rolls declared that "it would be very dangerous, though no fraud could be imputed to the trustees and no kind of interest or benefit to themselves was looked to, to lay down this principle, that trus

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tees might, without any responsibility, act as these did" In *Leslie* v. *Baillie*, 2 Yo. & Col. Ch. 91, it was assumed that an executor was bound to know the laws of his own country, although not those of a foreign country. And in *Boulton* v. *Beard*, 3 De G., M. & G. 608, a trustee was held responsible for the misapplication of money paid in good faith under the advice of counsel. See also Perry on Trusts, § 927; *Forward* v. *Forward*, 6 Allen, 494; *Phillips* v. *Frye*, 14 Allen, 36; *Harding* v. *Larned*, 4 Allen, 426.

In the case at bar, the guardian, knowing all the facts upon which the ward's title depended, allowed a decree of distribution to be made in 1870, in violation of the plain provisions of the statute, which decree deprives the ward of her property, giving it to the guardian herself and her children by another husband. From this decree she did not appeal, and has taken no steps to secure its revocation. It cannot be said that the guardian, however innocent of fraudulent purpose, was not chargeable with failure to perform her duty in securing the rights of the ward.

4. As to the claim of the guardian for allowance on account of a piano purchased for the ward, there was evidence before the master, that it was bought with the money of the ward, and that it was a suitable and proper instrument for the ward to have, having reference to her situation and circumstances in life. But it appeared that, after the ward was married and went to live with her husband, she demanded the piano, which she desired to use, and the guardian refused to give it to her, although she had a suitable place in which to keep it. And, at the hearing before the judge of probate, the guardian refused to answer the question whether she would give up the piano if the item should be allowed; and at the close of the hearing, also, although informed by the judge that he should refuse to allow the item unless she would state that she would give up the piano, she still declined to answer. This is strong evidence that the piano was purchased by the guardian as her own property, and is wholly inconsistent with the good faith of the alleged purchase for the ward. The question was whether the piano ever became the property of the ward; and upon that question we see no good reason to reverse the finding of the justice of this court sustaining the exception to the report of the master allowing this item.

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5. The only other point discussed at the argument relates to the amount of compensation to be allowed to the guardian for services rendered. The master has found that all the property was not invested; that what was invested was in her husband's name, and that the guardian refused to state where it was now invested. He also found that certain amounts should be allowed for special services, and no more. No question of law is raised upon the facts found by the master. Whether a guardian should be allowed a general commission in addition to his charges for special services, depends largely upon how he has managed the estate, and whether it has been kept invested by itself. *Blake* v. *Pegram*, 109 Mass. 541, 557. We see no reason to disturb the decision of the justice of this court overruling the guardian's exception to the master's report on this point.

The result is, that the first exception to the master's report is sustained, and his finding that the guardian was not bound to account for the sum received under the decree of distribution is set aside; and the case must stand for hearing before a single judge to determine whether a further hearing shall be had before him or before a master upon the question of her liability to that extent, and whether the guardian is chargeable for the sums paid by the administrator to other persons under the decree of distribution. *Decree accordingly.*

REBECCA B. ALDRICH, administratrix, *vs.* INHABITANTS OF BLACKSTONE.

Worcester. Oct. 2, 1879. — Jan. 24, 1880. ENDICOTT & LORD, JJ., absent.

Under the Gen. Sts. *c.* 70, the overseers of the poor of a town have authority to bind the town by a contract for support to be furnished in another town to a pauper whose settlement is in the former town, but who, at the time the contract for his support is made, is too ill to be removed to the town of his settlement.

A contract made on the Lord's day by the overseers of a town for the relief of a sick pauper is not in violation of the Gen. Sts. *c.* 84, § 1.

CONTRACT. The declaration alleged that one George Freeman, a poor and indigent person, having a settlement in and being

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chargeable to the defendant town, fell into distress and was afflicted with a dangerous and loathsome disease, which prevented his removal and required extra care and nursing, at the house of the plaintiff's intestate; that the overseers of the poor of the defendant town assumed in its behalf the care, relief and support of Freeman, and in behalf of the defendant contracted with the plaintiff's intestate to take the care of, and to support and nurse the said Freeman, for such compensation as should be reasonable and such as the services required and the said support should be fairly worth, and for such expense or pecuniary loss as might be incurred in the premises; that the plaintiff's intestate in his lifetime did support and care for Freeman, under and by virtue of said contract, during and through said sickness, and did incur expense in such service, support and care, the items of which were set forth in detail, amounting in all to $712, from July 23 to August 27, 1877. Trial and verdict for the plaintiff for $265 in the Superior Court, before *Dewey*, J., to whose rulings the defendant alleged exceptions, the material parts of which appear in the opinion.

J. Hopkins, (*F. N. Thayer* with him,) for the defendant.

W. S. B. Hopkins, for the plaintiff.

MORTON, J. In this case, the following facts are established by the verdict. On July 23, 1877, one Freeman, who was a pauper having his settlement in the town of Blackstone, and who was then in the employ of Aldrich, the plaintiff's intestate, who lived in Uxbridge, was taken sick with a dangerous disease. Aldrich furnished him the necessary relief, and, in the week following, notified the overseers of the poor of Uxbridge of the condition of Freeman, and that he stood in need of relief. On August 4 following, the overseers of Uxbridge sent a notice in due form to the overseers of the poor of the town of Blackstone, who, on August 5, which was Sunday, went to the house of Aldrich in Uxbridge, examined the condition of the pauper, found that he was so dangerously sick that he could not be removed, and thereupon made the contract for his relief and support upon which this suit is brought. The principal question is, whether the overseers had the power to make this contract so as to bind the town.

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The provisions of our laws as to the support of paupers are mainly contained in the Gen. Sts. *c.* 70. By § 1, it is made the duty of every city and town to "relieve and support all poor and indigent persons lawfully settled therein, whenever they stand in need thereof." By § 2, it is provided that "the overseers of the poor shall have the care and oversight of all such poor and indigent persons so long as they remain at the charge of their respective cities or towns, and shall see that they are suitably relieved, supported and employed, either in the workhouse or almshouse, or in such other manner as the city or town directs, or otherwise at the discretion of said overseers." By the subsequent provisions, it is made the duty of the overseers to furnish relief to all persons found in their town, having settlements in other places, when they fall into distress and stand in need of immediate relief, in which case the expenses incurred may be recovered of the town of the pauper's settlement, if notice is duly given, except that the town liable is not required to pay more than one dollar a week for the support, if it causes the pauper to be removed within thirty days after receiving such notice. Gen. Sts, *c.* 70, §§ 12, 14. By these provisions, the overseers are made a board of public officers, who have the care and oversight of the paupers, and, by necessary implication, they have the power to bind their town by any contracts made within the scope of their authority.

By § 1, it is the immediate duty of a town to relieve its paupers whenever they stand in need thereof. This duty, in the case of paupers who fall into distress in another town, is not postponed by the provisions of § 14, the object of which is to furnish a reasonable time, after notice, to make inquiry as to the settlement of the pauper and to take measures for his removal, and in the meanwhile to limit the liability of the town. In the case at bar, when the overseers of Blackstone received notice that Freeman, known to be one of their paupers, had fallen into distress in Uxbridge, it was their duty to furnish him relief at once. It would have been unjust to lie by for thirty days, and thus throw upon the town of Uxbridge the expense, over one dollar per week, of supporting the pauper, which under the circumstances of the case must necessarily be considerable. The overseers of Blackstone recognized this duty, and at once took the care and oversight

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of the pauper. If they had immediately removed him to Blackstone and made provisions for his relief there, it cannot be doubted that the town would be liable for the expenses, however large. But they found that he could not be moved without danger to his life, and thereupon they made a contract for his support in Uxbridge.

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We are of opinion that this contract was made in the performance of their duties, and is therefore within the scope of their authority and binding upon the town. The authority given to overseers is very broad; they are to see that the poor are suitably relieved, either in the workhouse or almshouse or in such other manner as the town directs, "or otherwise at the discretion of said overseers." In this case, the only suitable relief possible was that furnished by the overseers. There is nothing in the statute which expressly or by implication restricts the power of the overseers to furnishing relief within the limits of their town. The right and propriety of supporting paupers outside the limits of the town, if within the Commonwealth, under special circumstances is recognized in several cases in this court. *Marlborough* v. *Rutland*, 11 Mass. 483. *Smith* v. *Colerain*, 9 Met. 492. *Smith* v. *Peabody*, 106 Mass. 262. In the case last cited, it was adjudicated that the overseers were not bound to retain the poor under their charge within the city limits, but might provide for them elsewhere in a suitable place within the limits of the Commonwealth. The question of the liability of the city for the support of the paupers elsewhere was not directly raised, but the necessary inference from the decision is that it would be so liable.

The defendant also contends, that, as the contract sued on was made on Sunday, it was in violation of the Gen. Sts. *c.* 84, § 1, and therefore cannot be enforced. But it was a work of necessity or charity within the exception of the statute. It was the duty of the overseers to make immediate provision for the relief of a sick and suffering pauper under their care, and the performance of that duty was not a violation of the letter or spirit of the statute. *Exceptions overruled.*

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JAMES M. WATSON & others *vs.* HORACE H. WATSON.

Plymouth. Oct. 15, 1878. — Jan. 12, 1880. AMES, ENDICOTT & SOULE, JJ. absent.

A person accepting and holding a beneficial interest under a will cannot, either in equity or at law, assert an independent title in other property against the will. But if, after having received a legacy in ignorance of this rule, he, immediately upon being informed of the rule, and before any other person's rights have been affected, returns the legacy to the executor, and gives him notice that he elects not to take it, the rule does not apply.

PETITION by James M. Watson, Edward W. Watson and Albert M. Watson, for the partition of certain lands on Clark's Island in the harbor of Plymouth, formerly owned by the grandfather of the petitioners, who was the great-grandfather of the respondent, and who died intestate; and which by various conveyances had become the common and undivided property of the petitioners and of an uncle of theirs, in the following proportions: James, six forty-eighths; Edward, seven forty-eighths; Albert, six forty-eighths; and the uncle, twenty-nine forty-eighths; and so continued at the death of the uncle, who left a will, which was duly admitted to probate on October 9, 1876, and contained the following provisions:

"8. I give to my nephew, Edward W. Watson, the sum of fifty dollars, and my old easy-chair.

"9. I give to my nephew, James M. Watson, my boat called the Albert Mortimer, and her outfit. Also one bedstead, one mattress, two pillows, two sheets, two blankets, one large silver spoon, two wooden chairs, one cane-bottom roundabout, the furniture which belonged to his aunt, Eliza, six hens and a cockerel, and one cow called the Marshfield cow. I also give, devise and bequeath to the said James M. Watson my share in the salt-marsh lot at the Gurnet, and all my right, title and interest in and to two acres and twenty rods of land on said Clark's Island, lying in the cedar field, so called, and adjoining his homestead; to have and to hold the same to him, his heirs and assigns, in fee simple forever.

"10. I give, devise and bequeath to my great-nephew, Horace Herbert Watson, grandson of my brother, John Watson, ten

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acres of pasture land on said Clark's Island, on the northeast side of the cedar field, and adjoining the same; the lines thereof to run parallel with said cedar field, to be fenced by him at his own expense; to have and to hold the same to the said Horace Herbert Watson, his heirs and assigns absolutely and in fee simple forever. I also give to said Horace Herbert one large silver spoon.

"11. I give to my nephew, Albert Mortimer Watson, all my farming utensils, live stock, and crockery ware, not hereinbefore disposed of, absolutely and for his own use."

"13. I give, devise and bequeath to my said nephew, Albert Mortimer Watson, the elder of that name, the use, income and improvement of all my real estate situated on said Clark's Island, saving and excepting herefrom the parcels of land herein before devised to James M. Watson and Horace Herbert Watson by articles 9 and 10 respectively; to have and to hold the same for and during the term of his natural life," with remainder to his son, Albert M. Watson, Jr., in fee.

The petitioner Albert was also appointed executor of the will, and took out letters testamentary, but has settled no account in the Probate Court.

All the petitioners received the legacies, and James entered upon the lands devised to him, under the will, except that Edward did not receive the chair bequeathed to him; and at the time of receiving the legacies, and entering upon the lands, they were aware of the provisions of the will, but were ignorant of the alleged rule of law that, if any person shall take any beneficial interest under a will, he shall be held thereby to confirm and ratify every other part of the will; and they received the legacies, and entered upon the lands, in ignorance of the law, and without consulting counsel.

The petitioners were first informed of that rule of law, about the middle of November 1877, by their counsel, after an interview between him and the counsel for the respondent, by whom he was informed that he contended that such was the law; whereupon Edward, to whom no land was devised under said will, immediately returned the legacy received by him to the executor, with this statement in writing and signed: "I have just been informed that I cannot claim rights as a tenant in

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common of the land claimed by Horace H. Watson, if I conclude to take the legacy of fifty dollars. I therefore notify you of my election not to take the legacy."

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In the petition, the petitioners respectively claimed the shares belonging to them at the death of their uncle as above stated, and Albert also claimed a life estate in the share belonging to the uncle, and it was alleged that Albert's son was entitled to the remainder in this share. Notice was issued to Albert's son, and a guardian *ad litem* appointed for him; and to Horace H. Watson, who filed an answer, denying that the lands described in the petition were owned in common by the petitioners, and alleging that ten acres thereof, being those described in the tenth article of the will, were owned by him in severalty.

At February term 1878, the case was submitted by all the parties to the judgment of the Superior Court, upon the facts above stated, with this memorandum above the signature of the petitioners' attorney: "The petitioners do not hereby waive the right hereafter to elect, upon a decision of the law, if they should desire." *Allen*, J. gave judgment for the respondent Horace H. Watson as to the parcel claimed in his answer; and judgment for the petitioners for partition of the residue of the land. The petitioners appealed to this court.

C. G. Davis, for the petitioners.

A. Mason, for the respondent.

Gray, C. J. The principle on which the respondent relies was thus stated by Chief Justice Shaw: "It is now a well settled rule in equity, that, if any person shall take any beneficial interest under a will, he shall he held thereby to confirm and ratify every other part of the will, or, in other words, a man shall not take any beneficial interest under a will, and at the same time set up any right or claim of his own, even if otherwise legal and well founded, which shall defeat or in any way prevent the full effect and operation of every part of the will." *Hyde* v. *Baldwin*, 17 Pick. 303, 308.

In this Commonwealth, it has been decided, in accordance with the opinions of Lord Mansfield, Lord Loughborough and Lord Redesdale. that the rule holds good at law as well as in equity. *Smith* v. *Smith*, 14 Gray, 532. *Brown* v. *Brown*, 108 Mass. 386. *Hapgood* v. *Houghton*, 22 Pick. 480, 483. *Doe* v. *Cavendish*, 3

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Doug. 48, 55; *S. C.* 4 T. R. 741, 743, note. *Wilson* v. *Townshend*, 2 Ves. Jr. 693, 696. *Birmingham* v. *Kirwan*, 2 Sch. & Lef. 444, 450. Were it not so, there were few cases in which it could have been enforced at all before the St. of 1857, *c.* 214, conferred upon this court full chancery jurisdiction.

But the doctrine, whether applied in practice on the common law or on the equity side of the court, depends not upon technical rules, but upon principles of equity and justice, and upon actual intention. An election made in ignorance of material facts is, of course, not binding, when no other person's rights have been affected thereby. So if a person, though knowing the facts, has acted in misapprehension of his legal rights, and in ignorance of his obligation to make an election, no intention to elect, and consequently no election, is to be presumed. This has been settled in England by a long series of authorities, of which it is sufficient to cite a few. *Pusey* v. *Desbouvrie*, 3 P. Wms. 315. *Wake* v. *Wake*, 1 Ves. Jr. 335; *S. C.* 3 Bro. Ch. 255. *Padbury* v. *Clark*, 2 Macn. & Gord. 298; *S. C.* 2 Hall & Tw. 341. *Spread* v. *Morgan*, 11 H. L. Cas. 588, 602, 611, 615. See also *Stratford* v. *Powell*, 1 Ball & Beatty, 1; *Briscoe* v. *Briscoe*, 1 Jon. & Lat. 334; *S. C.* 7 Irish Eq. 123; *Sweetman* v. *Sweetman*, I. R. 2 Eq. 141. In *Reed* v. *Dickerman*, 12 Pick. 146, 151, and in *Delay* v. *Vinal*, 1 Met. 57, 65, the rule was so stated, and not denied, but the facts did not call for its application.

Where the law allows the probate of a will in either of two forms — in common form, *ex parte*, upon being presented by the executor; or in solemn form, upon the application of any person interested and notice to all others — a person who has received a legacy under a will proved in common form is permitted, on tendering back the amount to the executor, or bringing it into court, to contest the validity of the will, and compel it to be proved in solemn form. *Bell* v. *Armstrong*, 1 Add. Eccl. 365, 374, and cases cited. *Hamblett* v. *Hamblett*, 6 N. H. 333. *Holt* v. *Rice*, 54 N. H. 398.

In *Hyde* v. *Baldwin*, 17 Pick. 303, where the holder of land under a mortgage title disposed of it by will as if it were his absolute estate, and bequeathed his personal property to the mortgagee, the latter was not allowed to maintain a bill in equity to redeem the mortgage, because, as Chief Justice Shaw

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said, "by accepting and retaining the bequest made him in the will, he has manifested his election to hold under the will," and therefore, by the principle of equity already stated, "would be precluded from setting up a legal or equitable claim of his own, the assertion of which would defeat a provision of that will, under which he claims and has received, and now holds and intends to hold, a beneficial bequest."

In *Smith* v. *Smith*, 14 Gray, 532, in which a testator, who had conveyed lands by deed to one person, devised part of the same lands to another, and the rest thereof, with other land, to the grantee; and it was held that the latter could not, when sued at law by the first devisee, set up in opposition to the will a title under the deed; it appeared by the defendant's own admissions, and by the verdict of the jury under the instructions given them, that he, with a full opportunity to judge and full knowledge of the nature of the estate and its situation, had accepted and was determined to hold all the estate devised to him by the will, and had acted upon that purpose, so that it was established that he had elected to take the estate devised to him; and he intended to hold under the deed, only if the law allowed him to claim under both.

In *Brown* v. *Brown*, 108 Mass. 386, the point adjudged was, that in order to prove an election between a life estate previously existing and a provision made by will, it was necessary to show an intelligent acceptance of the latter, and that there would be no intelligent acceptance thereof if the person accepting had not mental capacity to understand what the life estate was, or what the provision was, and to consider or compare to some extent the advantages of the two; and the further ruling of the court below, that it was not necessary that there should have been a knowledge that the acceptance of the one was a renouncing of the other, does not appear to have been objected to at the trial, and, being in favor of the party against whom the verdict was returned, was not and could not be drawn into judgment in this court.

In the present case, the testator and the three petitioners being the owners as tenants in common of the land of which partition is sought, the testator devised ten acres thereof by metes and bounds to the respondent. This devise is, of course,

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ineffectual as against the cotenants, unless they have confirmed it. *Peabody* v. *Minot*, 24 Pick. 329. *Sullivan* v. *Holmes*, 8 Cush. 252.

The testator also made bequests to each of the petitioners. To the petitioner James he gave his interest in other two acres and twenty rods of the same estate, and in another lot of land, as well as certain chattels; to the petitioner Albert, an estate for life, with remainder to his son in fee, in all the testator's real estate not included in the devises to the respondent and to James, and certain chattels absolutely; and to the petitioner Edward, a legacy of fifty dollars. All the petitioners received these legacies, and James entered upon the lands devised to him, with knowledge of the provisions of the will, but in ignorance of the rule of law stated in *Hyde* v. *Baldwin*.

Upon being informed of that rule, James and Albert took no steps to restore to the executor the personal property which they had received, or otherwise to renounce their claims under the will; but, two or three months afterwards, submitted their right to maintain this petition to judgment upon these facts. So far as they are concerned, the case is not distinguishable from *Hyde* v. *Baldwin* and *Smith* v. *Smith*, and there is no error in the judgment of the Superior Court. The validity of that judgment upon the case so submitted is not affected by their having asserted that they did not waive the right hereafter to elect.

But as to Edward the case stands differently. Immediately upon being informed of the rule of law, little more than a year after the probate of the will, and before the executor had settled any account in the Probate Court, or the position of any other person had been changed, he returned his legacy to the executor, and gave him notice that he elected not to take it. He cannot therefore be held to have made such an election as should deprive him of the right under his independent title to partition of the whole estate, not excepting the parcel claimed by the respondent. *Judgment accordingly.*

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MALACHI H. WHITE *vs.* ABISHA H. CHASE.

Bristol. Oct. 28, 1879. — Jan. 8, 1880. COLT & AMES, JJ., absent.

The record of a judgment in an action of trespass *quare clausum fregit*, if the question of title was put in issue, tried and passed upon, is admissible in a subsequent writ of entry between the same parties to recover the same land; and, if the pleadings in the former action do not alone show upon what ground the judgment was based, this may be shown by parol evidence.

WRIT OF ENTRY to recover a parcel of land in Dartmouth. Plea, *nul disseisin*, with a disclaimer as to a part of the demanded premises; and a specification that the title to the rest of the premises was put in issue and tried in a former action between the same parties. At the trial in the Superior Court, before *Pitman*, J., the jury returned a verdict for the tenant; and the demandant alleged exceptions. The facts appear in the opinion.

H. J. Fuller, for the demandant.

G. Marston & W. Clifford, for the tenant.

MORTON, J. The admissibility of the record of the former judgment between these same parties depends upon the question whether the issue upon which the present case turns was in fact litigated and decided in the former suit. It is true that an action of tort in the nature of trespass *quare clausum fregit* does not necessarily involve anything more than the right of possession, that the title or seisin may not be in issue, and that the judgment in such action is conclusive only upon the matter adjudged, which is the right of possession. *Johnson* v. *Morse*, 11 Allen, 540. *Morse* v. *Marshall*, 97 Mass. 519. But the trial of an action of trespass may turn upon the question of title, and if that question is put in issue, tried and passed upon by the jury or court or a referee, the verdict or finding, and judgment following it, are competent evidence of that fact in a subsequent writ of entry between the same parties, even if it does not operate as a conclusive estoppel. *Eastman* v. *Cooper*, 15 Pick. 276. *Dutton* v. *Woodman*, 9 Cush. 255. *Sawyer* v. *Woodbury*, 7 Gray, 499. *Burlen* v. *Shannon*, 99 Mass. 200.

The former suit, the record of which was admitted in evidence against the demandant's objection, was an action of trespass

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between the same parties. The answer of the defendant therein alleged soil and freehold in himself, and denied all the allegations of the declaration. The action was then referred under a rule of court, the referee made an award in favor of the defendant, which was returned into court and accepted, and judgment rendered thereon. The pleadings alone do not show upon what ground the judgment was based; but it was competent for the tenant to prove, by parol testimony or otherwise, that the fact of title was tried and passed upon by the referee and made the basis of his finding. For this purpose, the finding of the referee that the land in controversy was conveyed to the defendant by Davis Collins in 1860 was admissible. It tended to show that the ground upon which his decision proceeded was that the title was in the defendant, and not in the plaintiff. *Evans* v. *Clapp*, 123 Mass. 165.

Presuming, as we must, that the presiding justice gave proper instructions as to the effect of the evidence admitted, we are of opinion that neither of the demandant's exceptions can be sustained. *Exceptions overruled.*

GEORGE H. GERRISH & another, executors, *vs.* NEW BEDFORD INSTITUTION FOR SAVINGS.

Bristol. October 22, 1878; October 29, 1879. — January 10, 1880.

In an action by the executor of A. against a savings bank to recover money deposited by A., it appeared that, after depositing in his own name and on his own account all that he was allowed to by the rules of the bank, A. made three other deposits as trustee, one of which was in trust for his only son by name, and the others in trust for his two grandchildren by name; that for these deposits he took separate bank books containing entries of the same, which after his death were found among his effects, having never been delivered to the persons named or to any one else for them; and that A. continued during his lifetime to collect, receipt for and use, as his own, all dividends declared upon these deposits. A by-law of the bank provided that "no person shall receive any part of the principal or interest, without producing the original books, in order that such payments may be entered thereon;" and another by-law provided that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." The son and grandchildren of A., who appeared as claimants

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of the money under the St. of 1876, c. 203, § 19, offered to prove, in addition to the facts above stated, that A. had said to each of them, at different times, "that he had put this money in the bank for them; that he wanted to draw the interest during his lifetime; and that after he was gone they were to have the money." *Held*, that the evidence offered was admissible; and that, upon all the evidence, a jury would be justified in finding that A. had fully constituted himself a trustee for the claimants.

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COLT, J. The executors of John B. Dornin seek to recover of the defendant bank money deposited by him. It appears that, after depositing in his own name and on his own account all that he was allowed to by the rules of the bank, he made three other deposits as trustee, one of which was in trust for his only son by name, and the others in trust for his two granddaughters by name. For these three deposits he took separate bank books containing entries of the same, which after his death were found among his effects, having never been delivered to the parties named or to any one else for them. The testator continued while living to collect, receipt for and use as his own, all dividends declared upon these deposits.

Under the provisions of the St. of 1876, *c.* 203, § 19, the son and grandchildren are made defendants in this action, and appear as claimants of the money.

A by-law of the bank provides that "no person shall receive any part of the principal or interest, without producing the original books, in order that such payments may be entered thereon." And another by-law declares that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." It is also now provided by statute that, when a deposit is made in trust, the name and residence of the person for whom it is made shall be disclosed, and the deposit shall be credited to the depositor, as trustee of such person; and when no other notice of the terms of the trust shall have been given in writing, the deposit or any part thereof may be paid, in the event of the death of the trustee, to the person for whom the same was made. St. 1876, *c.* 203, § 20.

At the trial, the claimants offered to prove, in addition to the facts stated, that the testator had said to each of them, at different times, "that he had put this money in the bank for them; that he wanted to draw the interest during his lifetime;

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and that after he was gone they were to have the money." And the question submitted by this report is whether, upon this evidence, the claimants would be entitled to the money in dispute; in other words, whether, upon this evidence, it can be properly found that the testator created himself trustee of the several funds for their use and benefit.

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It is not enough that the testator manifested an intention to create the trust and make the gift at some future time. The act of transfer relied on must be fully and completely executed. When there is a formal instrument creating a trust in real estate, it is said that delivery of the writing is not in all cases necessary to its validity. It is a question of fact whether the trust has been perfectly created, and, upon that question, the delivery or non-delivery of a written declaration is a significant fact of greater or less weight according to circumstances and according to the nature of the writing relied on as a declaration of trust. If the alleged trust arises from a mere gift of personal property, delivery of the writing by which it is declared is perhaps of less importance, and the court will consider all the facts showing the intention of the donor. It must always appear, however, from the written or oral declarations, from the nature of the transaction, the relations of the parties and the purpose of the gift, that the fiduciary relation is completely established. *Urann* v. *Coates*, 109 Mass. 581.

There is in the case at bar no formal written declaration. But no particular form of words is required to create a trust in another, or to make the party himself a trustee for the benefit of another. It is enough for the latter purpose if it be unequivocally declared in writing, or orally if the property be personal, that it is held in trust for the person named. *Ex parte Pye*, 18 Ves. 140. *Wheatley* v. *Purr*, 1 Keen, 551. *M'Fadden* v. *Jenkyns*, 1 Hare, 458, and 1 Phillips, 153. *Milroy* v. *Lord*, 4 De G., F. & J. 264. When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery.

The decisions in both the English and American courts in these cases are not entirely uniform. The difficulty is in the application of the rule to the varying facts of each case. In *Brabrook* v. *Boston Five Cents Savings Bank*, 104 Mass 228,

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where one deposited his own money in his own name as trustee for another, but retained the bank book, and never gave to the alleged donee any notice of the deposit; and there was evidence that it was made in that mode in order to evade a by-law of the corporation, which prohibited so large a deposit in the name of one person, it was decided by this court that the facts agreed showed no intention on the part of the depositor to transfer to the plaintiff a present title to the property. The decision was upon a case stated, and much reliance was placed upon the fact that the whole transaction was a voluntary act, to which the plaintiff was in no way party or privy, and of which she had no notice. It was said that "even if the form of the deposit is to be taken as conclusive proof of the existence of such an intention in his mind, the execution of that intent was not so far complete as to operate to pass the title," but that it appeared "that the form of the deposit was adopted for the sole purpose of evading a by-law of the bank and a provision of the statutes limiting the amount that could be received from any one depositor to one thousand dollars." The case of *Clark* v. *Clark*, 108 Mass. 522, which was held to be governed by *Brabrook's case*, was like that case in the fact that the claimant was not a party to the transaction, and had no notice or knowledge of the deposit until after the death of the depositor.

In each of those cases, the evidence relied on failed to disclose the nature or extent of the fiduciary relation intended to be assumed by the party making the deposit. The entries in the bank books were alike consistent with a trust to collect and pay over only the income of the fund for a definite period; or with a trust by which the principal sum vested in the donees, with an immediate or future right to all the income; or with a mere naked trust, by which an immediate title to the money and all its future income vested in them. The money in each case belonged to the depositor, who was under no previous obligations to hold it for the claimants, and, above all, the claimants were not made parties to the transaction, and had no knowledge or notice of it. The transaction, so far as it tended to create a trust, was in each case incomplete. It failed to show that the depositor did not intend to keep the money in his own hands, and indicated that, while he lived, he did intend that no one

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should take from him any interest in it, either immediately or on the happening of some future event. The entries in the bank books did not possess the character of completed and fully executed declarations of trust. So in *Cummings* v. *Bramhall*, 120 Mass. 552, where a testator transferred certain bank shares to himself as trustee for his two daughters, but retained control of the shares, and appropriated the dividends, and neither daughter knew of the transfer, it was held that there was no completed gift. See also *Powers* v. *Provident Institution for Savings*, 124 Mass. 377.

In *Milroy* v. *Lord*, above cited, it was declared by Lord Justice Turner to be well settled that, in order to make a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary in order to transfer the property and render the settlement binding upon him; that he may do this by an actual transfer of the property to the person for whom he intends to provide; and it will be equally effectual if he transfers it to a trustee, or declares that he himself holds it in trust for the purpose named. And in *Warriner* v. *Rogers*, L. R. 16 Eq. 340, it is said that, in order to give validity to a declaration of trust in these cases, it is necessary that the donor or grantor should have absolutely parted with his property and have effectually put it out of his power, at least in the way of interest. See also *Richards* v. *Delbridge*, L. R. 18 Eq. 11.

In the case at bar, the claimants offered to prove declarations of the testator made to them at different times in language which fairly implied that he intended to give to them an immediate equitable title in the principal fund, reserving only the income for life. These declarations define the nature of the trust assumed, and show that a testamentary disposition of the property was not intended. See *Davis* v. *Ney*, 125 Mass. 590.

At the trial, this evidence was rejected, because, in the opinion of the judge, the testator had not done what was necessary to create a trust. But whether he had done enough depended, as we have seen, on whether his conduct and declarations manifested a completed and executed intention in regard to it. Notice to the donee is indeed not necessary when other acts or declarations of the donor are sufficient and complete in themselves; but,

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where the transaction is capable of two interpretations and the settlement is merely voluntary, it is plain that notice given by the donor to the donee of the existence of the trust would in most cases be decisive on the question of intention. It takes the place of that delivery which is necessary to perfect a gift of personal property. It is not only satisfactory evidence of an executed intention, but it is a declaration in the nature of an act necessary to complete the transaction and create the trust.

In *Ray* v. *Simmons*, 11 R. I. 266, where money was similarly deposited, the fact that notice was given to the plaintiff was relied on as showing that the trust was completely constituted. In *Minor* v. *Rogers*, 40 Conn. 512, notice given to the parents of an infant of a deposit in trust for him was treated as evidence of an executed gift. And the New York Court of Appeals, differing from the view of this court, recently decided that an entry in a savings bank pass-book was alone sufficient to constitute a valid trust against legal representatives, although the donor received the income during life and the donee knew nothing of the deposit. *Martin* v. *Funk*, 75 N. Y. 134. See also *Taylor* v. *Henry*, 48 Md. 550; *Stone* v. *Bishop*, 4 Clif. 593.

Upon all the evidence, including that which was excluded but which should have been admitted, a majority of the court is of opinion that a jury would be justified in finding that the testator had fully constituted himself a trustee for these claimants; and, according to the terms of the report, the entry must be

New trial granted.

G. Marston, for the plaintiffs.

E. Robinson, for the claimants.

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EDWARD BARRETT & others *vs.* JOHN McHUGH.

Bristol. Oct. 28, 1879. — Jan. 16, 1880. COLT & AMES, JJ., absent.

In an action by A. against B. for goods sold and delivered, it appeared that the goods were delivered to C. and were charged to C. on A.'s books of account. A.'s evidence was to the effect that B. said he would be responsible for and pay C.'s bills; that after the goods were delivered B. said it would be all right; that after suit was brought B. said he considered himself responsible to a certain time, but not afterwards. A witness for the plaintiff testified that the plaintiff said B. promised to pay the bill if C. did not. The defendant testified that he only promised to pay if C. did not. *Held*, that the evidence would warrant the finding that B. was liable as an original promisor.

CONTRACT for goods sold and delivered. Answer: 1. A general denial. 2. The statute of frauds.

At the trial in the Superior Court, before *Rockwell*, J., it was admitted that the goods were sold and delivered to Mrs. Dewire, under the circumstances hereinafter stated; and that the plaintiffs' books showed that the goods were charged to her, and that what payments had been made were made by her.

Nicholas T. Geagan, one of the plaintiffs, testified as follows: "The defendant came and said he had a person whom he wanted to get a store for. I said we could not trust strangers. The defendant then said that all persons he sent he would be responsible for, and pay their bills. I said, if he would do that, he could have the goods."

Marcus M. Leonard testified that he was employed by the plaintiffs at the time the goods were sold, and delivered the goods to Mrs. Dewire; that the defendant asked him if he had left the goods there, and he said it would be all right.

Stephen Cuttle testified that he was employed by the plaintiffs at the time the goods were sold; that the defendant came to the store and said, "Mrs Dewire is coming; let her have what goods she wants, and I will be responsible for them; I will be accountable for her debt."

Edward Barrett testified that the defendant, after the suit was commenced, said he considered himself responsible until the 10th or 12th of August, and at that date he told somebody not to give Mrs. Dewire any more goods on his account.

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John D. Touhey testified that the bill against the defendant was given to him for collection; that the defendant said he was responsible for a certain time, and that he did not hold himself responsible for any goods given to Mrs. Dewire after that time; one of the plaintiffs said in his office, that the defendant promised to pay the bill, if Mrs. Dewire did not.

The defendant testified that, in June 1876, he brought Mrs. Dewire to the plaintiffs' shop; that, at the time, he was a grocer, and, the hot weather coming on, he concluded to go out of the meat business; that Mrs. Dewire was at the time a customer of his, and he recommended her to the plaintiffs, and said, "Give her what goods she wants, and, if she don't pay you, I will;" that no person ever spoke to him about this bill until after Mrs. Dewire's death; that he never promised Geagan or Cuttle that he would be responsible. On cross-examination, he testified as follows: "I think I did have that conversation with Barrett, and may have said to him that I told somebody not to give Mrs. Dewire any more goods, but did not tell anybody so. I did not know but that I was responsible until August; but not after that time."

The judge found on this evidence, as matter of fact, that there was an original promise by the defendant to pay for the goods, and that the goods were delivered upon this promise.

The defendant requested the court to rule, as matter of law, that upon the evidence, admitting what the plaintiffs said was true, there was no original promise, and the plaintiffs could not recover.

The judge refused so to rule, and ordered judgment for the plaintiffs; and the defendant alleged exceptions.

J. W. Cummings, for the defendant.

A. J. Jennings, (*J. M. Morton, Jr.* with him,) for the plaintiffs.

MORTON, J. This case is governed by *Heywood* v. *Stiles*, 124 Mass. 275. There was evidence, proper to be considered by the presiding justice who tried the case without a jury, tending to show that the goods for which this suit is brought were sold upon the sole credit of the defendant, and that he was liable as an original promisor, and not as a guarantor. Upon this question, the finding of the justice is conclusive, and we cannot revise it.

Exceptions overruled.

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LYMAN W. DAGGETT *vs.* PATRICK TRACY.

Bristol. Oct. 28, 1879. — Jan. 17, 1880. COLT & AMES, JJ., absent.

At the trial of a writ of entry dated in 1878, it appeared that the tenant went into possession of the demanded premises in 1873, under an oral agreement with the demandant for a deed, upon payment of a certain sum with interest, and all taxes assessed thereon until the money was paid, but no time was named for the payment; that it was also agreed that the tenant should fence the land at his own expense; that the fence was built, a well was dug, and a house and barn erected by the tenant; that the house was afterwards mortgaged by the tenant as personal property, which mortgage was subsequently assigned to the demandant, who foreclosed the same, and the barn was afterwards removed; and that the tenant never paid or tendered any part of the principal and interest, nor did he pay the taxes assessed upon the land since the oral agreement was made. *Held*, that the tenant had no legal title to the premises, nor any title which he had reason to believe good, under the Gen. Sts. *c.* 134, § 19; and was not entitled to compensation for improvements made by him upon the premises.

WRIT OF ENTRY, dated April 15, 1878, to recover a parcel of land in Attleborough. Plea, *nul disseisin*. The tenant also filed a claim for improvements. In the Superior Court, after a finding for the demandant, the case was referred to an assessor to hear and report the evidence upon the claim for improvements. Upon the facts reported by the assessor, which appear in the opinion, the Superior Court ordered judgment for the tenant for improvements; and the demandant appealed to this court.

J. Daggett & J. H. Dean, for the demandant.

S. R. Townsend, for the tenant.

ENDICOTT, J. We are called upon to decide whether, upon the facts reported, the tenant in this action is entitled, as matter of law, to compensation for the value of buildings or improvements made or created upon the demanded premises, on the ground that he holds them under a title which he had reason to believe good. Gen. Sts. *c.* 134, § 19.

The tenant went into possession in April 1873, under an oral agreement with the demandant for a deed upon payment of $325, with interest at the rate of six per cent, and all taxes assessed thereon until the money was paid; but no time was named for the payment. It was also agreed that the tenant should fence the land at his own expense. The fence was built, a well was

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dug, and a house and barn erected by the tenant. The house was mortgaged by the tenant in August 1873, as personal property, which mortgage was afterwards assigned to the demandant, who has since foreclosed the same; and, before the date of the writ in this action, the barn was removed. The tenant has never paid any part of the $325, and interest; and there is no evidence that he ever tendered the same, or was ready to carry out his agreement to pay the money; nor has he paid the taxes assessed upon the land since the oral agreement was made.

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Upon these facts, it cannot be contended that the tenant had any legal title to the premises; *Saunders* v. *Robinson*, 7 Met. 310; nor had he any title whatever which he could in good faith have had reason to believe good. Gen. Sts. *c.* 134, § 19. It may be that he would have been entitled to a conveyance, if he had actually paid the purchase money within a reasonable time, and had complied with the other terms of the oral agreement; or if there had been part performance on his part, within the principles laid down in *Potter* v. *Jacobs*, 111 Mass. 32. It must be presumed that he knew that performance of the oral contract on his part was necessary to give him any title, but he failed to comply with it in any particular, and there was no basis whatever upon which he could found an actual belief that he had a good title. It may also be observed, that his mortgage of the house as a chattel, and his removal of the barn, are utterly inconsistent with the theory that they were made part of the real estate under the belief that he had a good title.

The case does not come within the provisions of the Gen. Sts. *c.* 134, § 19. See *Saunders* v. *Robinson*, 7 Met. 314; *Baggot* v. *Fleming*, 10 Cush. 451; *Plimpton* v. *Plimpton*, 12 Cush. 458, 467; *Haven* v. *Adams*, 8 Allen, 363; *O'Brien* v. *Joyce*, 117 Mass. 360, and cases cited.

The tenant is therefore not entitled to any compensation for improvements made or created on the demanded premises, and there must be *Judgment for the demandant.*

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REBECCA McCOWAN *vs.* GEORGE DONALDSON.

Bristol. Oct. 28, 1879. — Jan. 19, 1880. COLT & AMES, JJ., absent.

If a husband buys a chattel for his wife as her property at a certain price, part of which he agrees to pay by releasing a debt due him from the seller, and the balance of which his wife pays, receiving at the same time from the seller a bill of parcels stating a sale from the seller to her for the price agreed, the title to the chattel is in the wife; and she may maintain an action of replevin for it.

REPLEVIN of a cow. The answer denied the plaintiff's title. Trial in the Superior Court, before *Pitman*, J., who reported the case for the consideration of this court, in substance as follows:

The plaintiff, to prove her title, called her husband, who testified that, in March 1876, he bought, for $75, a cow and two calves, one of which had become the cow in question, of Ralph King, for the plaintiff, his wife, as her property; that he agreed to cancel or release a debt of $40 then due from King to him, and his wife was to pay the balance, to amount to the sum of $75, which was to be the price of the cow and calves; that she did pay the said balance of $35, and received from King at the time the following bill of parcels or memorandum: "Freetown, March 10, 1876. Sold to Rebecca McCowan one cow and two calves for the sum of seventy-five dollars. Received payment. Ralph King."

This was all the evidence offered by the plaintiff to prove her title; and the judge thereupon ruled that, as matter of law, the title was not in the plaintiff, and directed a verdict for the defendant. If the ruling was erroneous, the verdict was to be set aside, and a new trial granted; otherwise, judgment on the verdict.

J. M. Morton, Jr., for the plaintiff.

M. G. B. Swift, (*H. K. Braley* with him,) for the defendant.

GRAY, C. J. In this Commonwealth, a married woman, though she cannot acquire property by contract or gift directly from her husband, may acquire it either by purchase or by gift from a third person, and may assert her rights therein by a suit in her own name against any person but her husband. Gen. Sts. c. 108,

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§§ 1, 3. St. 1874, *c.* 184, §§ 1, 3. *Degnan* v. *Farr*, 126 Mass. 297. She may make such purchase, either by her own act, or through her husband or any other person as her agent. If the purchase is made in her behalf, and the property is transferred by the seller to her, the fact that the husband himself pays part of the price to the seller does not make the sale from the latter to the wife a gift from the husband to her of the property sold. *Adams* v. *Brackett*, 5 Met. 280. *Fisk* v. *Cushman*, 6 Cush. 20.

In the case at bar, the husband testified that he bought the cattle for his wife as her property at a certain price, part of which he agreed to pay by releasing a debt due him from the seller, and the rest of which the wife was to pay and did pay, receiving at the same time from the seller a memorandum or bill of parcels stating a sale from the seller to her for the price agreed. It was admitted at the argument that, upon this report, the property is to be assumed to have been delivered to the wife. That the husband, in saying that he bought the cattle "for his wife as her property," meant that he acted as her agent in the purchase, and not that he bought the property himself in order to give it to her, is made plain by his further statement that he agreed she should pay, and that she did actually pay, part of the price, which clearly implies that his position in the matter was that of an agent assuming and authorized to bind his principal to do something, and not that of a husband buying property for a present to his wife. The ruling that, as matter of law, the title was not in the plaintiff, was therefore erroneous, and the verdict directed for the defendant must be set aside.

The case differs in its facts from those on which the defendant relies, of *Towle* v. *Towle*, 114 Mass. 167, and *Hawkins* v. *Providence & Worcester Railroad*, 119 Mass. 596.

In *Towle* v. *Towle*, the action was brought by the wife on promissory notes received by the husband in payment for a sale by him of his own goods, (without any consideration moving from her,) and, at his request, made payable to her and delivered by him to her for the purpose of making an absolute gift to her of the notes. It was held that these facts, taken most favorably to the wife, showed a voluntary gift to her from the husband, by which she did not, under the Gen. Sts. *c.* 108, acquire the sole and separate property, free from his control, which

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would enable her to maintain an action thereon in her own name during his lifetime; and the court reserved its opinion on the question, whether, if the case had arisen under the St. of 1874, the conclusion would have been the same.

In *Hawkins* v. *Providence & Worcester Railroad*, the property in question was bought by the wife with money, either given to her by her husband or taken by her from a fund which wholly belonged to him, although it included money previously added by her to the fund from her own earnings, but which, not being distinguishable from the rest of the fund, had ceased to be her separate property. See *Kelly* v. *Drew*, 12 Allen, 107; *M'Cluskey* v. *Provident Institution for Savings*, 103 Mass. 300, 306.

New trial granted.

YAEGER MILLING COMPANY *vs.* DANIEL BROWN & another.

Bristol. Oct. 29, 1879. — Jan. 19, 1880. COLT & AMES, JJ., absent.

A. sent goods to B., to be purchased by him or sold on A.'s account, as B. should elect. In an action of replevin by A. against B. for the goods, A. put in evidence tending to show admissions on the part of B. that he received the goods on consignment merely. *Held*, that B. was properly allowed to testify that, when he received A.'s letter, he decided to purchase the goods.

REPLEVIN of 95 barrels of flour. The assignee in bankruptcy of the defendants appeared, and in his answer denied the plaintiff's title and right of possession of the property replevied, and alleged that the same was the property of the defendants.

Trial in the Superior Court, without a jury, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

On October 19, 1877, the plaintiff, without receiving an order from the defendants, with whom it had had dealings for several years, sent to them 100 barrels of flour, and the following letter of that date: "We have a hundred bbls. of choice 4 ace flour, and as freights will advance to-morrow, and it will cost 32 c. more to ship, we thought best of giving you the benefit of our old contract, and ship 100 bbls. @ 7.35, which is somewhat

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lower than we quoted it last. We presume you can use the flour, and it is certainly considerably lower than you will be able to purchase it hereafter, but if not agreeable you may sell it for our acct., taking of course into consideration the advance in freights. Please protect on 45 days' draft, with B. lading, for $625." The draft for $625 was for the price of the flour less the freight, which the defendants were to pay, and was sent for acceptance and collection through a bank in Fall River, where the defendants did business, and was presented to and accepted by the defendants on October 27, but was never paid by them, and was afterwards protested by the plaintiff when due. A bill of lading accompanied the draft, and was delivered to the defendants at the time of the acceptance of the draft; and the defendants took possession of the flour, and it was in their store when replevied. The plaintiff paid the freight on the flour, after this action was brought.

The plaintiff introduced expert testimony to show a general custom among wholesale dealers in flour to draw on the consignees of consigned flour at the time of shipment for a part of the value of the consigned goods, and that in some instances, under special circumstances, consignors draw for the whole value; but there was no general custom shown to this effect.

The plaintiff also introduced the deposition of John Crangle, one of its officers, who testified to two conversations with David F. Brown, one of the defendants, in which Brown said, that he had sold five barrels of flour on account of the plaintiff, and held the other ninety-five barrels as consigned flour, and had always held it as such; and that one of these conversations was had in Boston a few days before the defendants' failure, and the other in Fall River on the day of their failure. This testimony was corroborated by J. H. Knowles, a salesman in the employment of the plaintiff.

David F. Brown testified for the defendants, and denied the above statements of the plaintiff's witnesses, and said that the flour was received by him on October 30, 1877, though he had accepted the draft three days before. He was then asked the following question, which was admitted against the plaintiff's objection: "At the time you received the flour, did you decide whether to purchase it or receive it on consignment." The

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witness answered, "I did decide, and took it on purchase." The witness also showed his invoice book, and testified that the flour was entered as purchased at the time it was received; that he could not tell when he had sold the five barrels, as he had on hand other similar flour at the time; and that, a day or two after receiving the plaintiff's letter, he decided to purchase the flour.

The judge ordered judgment for the defendants; and the plaintiff alleged exceptions to the admission of the evidence objected to.

M. Reed, for the plaintiff. The defendant Brown had no right, on direct examination, to testify to mental processes or conclusions. He was allowed to state, first, that he decided to purchase the flour when he received it; and, secondly, that he decided to purchase the flour a day or two after receiving the plaintiff's letter. Such testimony was improperly allowed. The admission of testimony as to the acts of the defendant Brown is not objected to. That objected to is in the nature of an admission of the defendant in his own favor. His decision was not communicated to the plaintiff, and was known to no one beside the witness himself, until testified to in court, except so far as his acts indicated it.

J. M. Morton, Jr., for the defendants.

LORD, J. The only question for trial in the court below was whether the plaintiff sold, and the defendants bought, the flour replevied, or whether the plaintiff as consignor sent the flour to the defendants, who received it as consignees. From the plaintiff's letter it appears that the flour was sent to the defendants for them to exercise their election whether to purchase or to receive it on consignment. That was a fact to be determined by the presiding judge upon the evidence. The evidence was conflicting. The defendant Brown was permitted to testify that he elected to receive it as purchaser, and this evidence was objected to; and the competency of that evidence is the only question raised on this bill of exceptions. Its competency is too plain for discussion. There was no question of mental processes of the defendant, but simply a question of fact whether he did or did not at the time exercise his election, and accept the flour as purchaser. The finding of the presiding judge is conclusive of the fact; and that finding, having been made upon competent testimony, must stand. ***Exceptions overruled.***

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LYDIA B. DEAN *vs.* ABRAM SKIFF.

Bristol. Oct. 29, 1879. — Jan. 19, 1880. COLT & AMES, JJ., absent.

In an action by a woman for breach of a promise of marriage, alleged to have been made in 1875, rescinded by mutual consent in 1878, and renewed the same year, the answer admitted the making of the contract in 1875 and its rescission, but denied its renewal. *Held*, that the plaintiff had no ground of exception to the rejection of evidence, offered by her, that in 1839 and 1840 she and the defendant were attached to each other, but not engaged to be married; that each soon after married another person; and that, while so married, there were friendly relations between them.

In an action for breach of a promise of marriage, the plaintiff's evidence tended to show a written contract, a subsequent rescission of it by mutual consent, and an oral renewal of it. The jury were instructed that evidence of an express promise of marriage was not necessary to prove a contract to marry; that the renewing of a contract to marry, which has been once released, must be proved by the same evidence, in kind and amount, required to prove an original and the same promise to marry by and between the same parties. *Held*, that the instruction was not open to the criticism that it required the new promise to be in writing.

In an action on a promissory note, by which the defendant agreed to pay the plaintiff a certain sum the day he was married, it appeared that the parties, on the day of the date of the note, signed another paper by which they agreed to live together so long as they should live, and to marry as soon as they should think it safe on account of an old engagement of the defendant; and there was evidence that the agreements were afterwards rescinded by mutual consent, and the defendant married the person to whom he had been formerly engaged. The plaintiff asked the judge to rule, that, if a valuable consideration was shown, this was sufficient, however inadequate; that this with the consideration of love and affection would be a valid consideration. The judge declined so to rule, and instructed the jury that, if the note was made and delivered in consideration of an existing promise of marriage, and an agreement that he would pay the amount stated, as a penalty for not fulfilling that promise on his marriage to another, there was a legal consideration for the note, and the plaintiff might recover, if it was not subsequently released. *Held*, that the plaintiff had no ground of exception.

A man signed and delivered a promissory note, by which he agreed to pay a woman a certain sum on the day he was married. On the same day, both signed an agreement by which they agreed to live together and to take care of each other as long as they should live, and to marry as soon as they should think it safe on account of an old engagement of the man. Subsequently, after a full conference, the following papers written by a magistrate at the dictation of the woman, were signed: 1st, a receipt by the man in full of all services rendered by him to the woman; 2d, a release of the man by the woman from the promise of marriage, and an agreement not to interfere with his marrying any one else, by bringing suit against him; 3d, a receipt by the woman of the man, in full to date, for her services as housekeeper. *Held*, in an action by the woman against the man for breach of the two agreements first made, that

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she had no ground of exception to the submission of the question to the jury whether these agreements were not intended by the parties to be annulled by those subsequently made.

If the parties to an executory contract of marriage mutually release each other from its performance, and subsequently enter into a new contract of marriage, this does not annul the release of the former contract.

A man and a woman executed a written agreement by the terms of which they agreed to live with each other as long as they both should live, to take care of each other, and to marry as soon as they should think it safe on account of an old engagement. Subsequently the woman released the man from the promise of marriage, and agreed not to interfere with his marrying any one else. The man thereupon married another woman. *Held*, that the release was necessarily an abrogation of the former contract.

CONTRACT in three counts. The first count alleged that the plaintiff and the defendant mutually agreed and promised to marry each other; that the plaintiff had always been ready to marry the defendant, but the defendant refused to perform his promise.

The second count alleged that the defendant entered into the following contract with the plaintiff: "Long Plain, Sept. 4, 1875. For value received, I promise to pay Lydia B. Dean one thousand dollars the day I am married. Abram Skiff;" that the defendant had, since the date of said contract, married a person other than the plaintiff, whereby the defendant owed the plaintiff the sum of $1000, and interest thereon.

The third count alleged that the defendant entered into the following contract with the plaintiff, signed by both parties: "Long Plain, Sept. 4, 1875. This is an agreement between me, Abram Skiff, and Lydia B. Dean, that we have agreed this day, the fourth day of Sept. 1875, to live with each other as long as we both live, I, Abram Skiff, to take care of her, Lydia B. Dean, in sickness and health. I, Lydia B. Dean, to take care of Abram Skiff in sickness and health, and do his house-work the same as his wife, and buy and sell the same as his wife, and to marry each other as soon as we think best and safe on account of an old engagement;" that the plaintiff had ever since been ready and willing to comply with, and conform to, the terms thereof, and nad complied with, and conformed to, the terms thereof, so far as she was allowed to do by the defendant; that on or about January 25, 1878, the defendant, with the plaintiff's consent, did annul a part of said contract, to wit, the part set out in these

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words: "and to marry each other as soon as we think best and safe on account of an old engagement;" that the plaintiff and defendant, after said January 25, mutually promised to marry each other, and did so far renew the contract of September 4; that the plaintiff has always been ready and willing to marry the defendant, but the defendant refused to perform his promise, and had, since said promise was made, married another person; that the defendant had refused to comply with and perform his contract of September 4, in every part thereof; that the plaintiff had been ready and willing to perform said contract, and had complied with and performed the terms of said contract, in every part, so far as she had been allowed to do by the defendant.

The answer admitted the making of a contract of marriage, as alleged in the first count; and averred that subsequently the plaintiff absolved, exonerated and discharged the defendant therefrom; and that the contract was rescinded by the plaintiff and defendant. The answer also denied the genuineness of the defendant's signature to the contract set up in the second count; alleged that, if written by the defendant, it was procured by the plaintiff's fraud; and that the contract was without consideration. The answer to the third count contained a general denial, and specifically denied the genuineness of the defendant's signature to the contract set up in that count; alleged that, if written by the defendant, it was procured by the plaintiff's fraud; denied that the contract was modified as alleged; and averred that, if there was any contract of marriage in modification of the written agreement, the defendant was discharged therefrom by the plaintiff.

Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

The plaintiff's evidence tended to prove that she and the defendant became acquainted in 1839; that subsequently they each married another person, and that the plaintiff's husband died July 30, 1873, and the defendant's wife before 1875.

The plaintiff then, for the purpose of showing the probability that in 1875 the defendant and plaintiff, being then unmarried, would make a contract of marriage, and as competent evidence to support all of the three counts of the declaration, offered evidence tending to show that in 1839 and 1840 the plaintiff and the defend-

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ant were unmarried and attached to each other, but not under any engagement of marriage, and that during their married life the plaintiff saw the defendant, and that there were friendly relations between the plaintiff and her husband, and the defendant and his wife, during their married life, and that calls were exchanged between them. The judge excluded this evidence.

The plaintiff also offered evidence tending to prove that in May 1875 their acquaintance was renewed, at the defendant's house in Acushnet, and the defendant agreed with the plaintiff that she should keep his house; that thereupon she came to the defendant's house in Acushnet from Taunton and became his housekeeper; that in June 1875 the defendant informed the plaintiff that he had put an end to an engagement to marry, which he had made with one Lucinda Taber, and he agreed to marry the plaintiff, and arrangements were made by them for their marriage at Taunton, whither she went for that purpose in July 1875; that afterwards they agreed to defer their marriage, at the defendant's suggestion, by reason of fear on account of the old engagement, and the plaintiff returned to Acushnet as the housekeeper of the defendant in July 1875; that the defendant afterwards made divers statements and promises to the plaintiff as to what he would do for her, in case of his death, and in consequence of deferring their marriage, and in consideration of her services in keeping his house, and, after many talks of that kind, signed the papers declared on in the second and third counts of the declaration, which were drawn by the plaintiff, and the plaintiff thereafterwards continued to live with the defendant as his housekeeper, according to the terms of the paper declared on in the third count, until January 26, 1878, when the defendant required her to leave his house, and refused to further support her.

The defendant, admitting by his answer and by his counsel that there was an implied promise to marry the plaintiff prior to January 26, 1878, offered evidence tending to prove that he never made any express or specific promise to marry the plaintiff; that he only agreed that, if she was a good housekeeper, was a suitable person for a wife, and he liked her, he might some time marry her; that he never signed the papers declared on in the second and third counts, knowing their contents, and never made any such contracts with the plaintiff, and that he could not write any.

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thing but his name; but he admitted the signatures to be his own handwriting, and offered evidence to show how the plaintiff had procured his name to be written on these papers when nothing was written above his name.

The plaintiff then put in evidence four papers, all dated, Acushnet, January 25, 1878. The first, signed by the defendant, purported to be a receipt of $24 from the plaintiff, for board of one Elmer L. Bouldy. The second, also signed by the defendant, was as follows: "This is to certify that I have received this day the sum of one dollar in full of all services rendered to Mrs. Lydia B. Dean for the term of two years and eight months last past, and for the moving of my goods to Taunton, including horse hire." The third, signed by the plaintiff, was as follows: "This is to certify that I, Lydia B. Dean, single woman, now resident of Acushnet, in the county of Bristol and Commonwealth of Massachusetts, release Abram Skiff, of Acushnet, from promise of marriage to or with me, and will not in any way interfere with his marrying to other parties by bringing suit or otherwise against him." The fourth, also signed by the plaintiff, was as follows: "Received of Abram Skiff the sum of one hundred dollars in full of my services as housekeeper during the term of two years and eight months last past, namely, commencing May 16, 1875, to date."

These papers were drawn by Benjamin White, a magistrate, after a long and full conference of both the plaintiff and the defendant concerning their affairs in his presence, and by the dictation of the plaintiff after the defendant had left. They were afterwards read by the plaintiff to the defendant, and were severally signed by them the day following, after which the $100 named in the last paper was received by the plaintiff. The plaintiff contended that these releases and receipts contained the specific things which she and the defendant agreed to settle, and that no further settlement was had. The defendant testified that all demands that the plaintiff and defendant had against each other were then settled in full, and that he signed the several papers in full settlement of all matters between them.

The plaintiff offered evidence tending to prove that, after January 26, 1878, the plaintiff and the defendant renewed their

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mutual promise to marry each other. The defendant denied this.

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It appeared in evidence that, on February 14, 1878, the defendant married Lucinda Taber, the person whom he had agreed to marry previous to May 1875.

The plaintiff requested the judge to give certain instructions to the jury, of which the following need only now be stated: "1. Evidence of an express promise is not required. The conduct and deportment of the parties, and such circumstances as usually do or naturally would accompany the entering into such a contract, may furnish satisfactory evidence that such a contract has been entered into or renewed after such a contract has been interrupted or rescinded. 2. If a valuable consideration is shown, this is sufficient, however inadequate it may appear to be. This with the consideration of love and affection would furnish a good and valid consideration in law, to meet the term "value received" in the agreement declared on in the second count; and if the jury believe that the defendant signed this paper with the knowledge of its contents, and any valuable consideration whatever existed therefor, whatever the measure may be, then the liability to pay became absolute at the time specified therein, to wit, on the day the defendant married. 3. If the jury believe that the defendant signed this paper with a knowledge of its contents, the release of the defendant by the plaintiff from a promise to marry, or from prosecuting or molesting him for marrying another, does not release him from his agreement to pay the plaintiff one thousand dollars the day he is married. 4. The release given by the plaintiff to the defendant from the promise of marriage did not release the defendant from the other obligations which the defendant assumed according to the terms of the paper declared on in the third count, and if the jury believe that the defendant signed this paper with a knowledge of its contents, he is liable, notwithstanding such release, to take care of the plaintiff in sickness and health as long as she shall live; and his refusal to comply with such terms is sufficient grounds for this action. 5. If the jury shall believe that the defendant, subsequent to the date of the written release from the promise to marry, renewed his engagement to marry the plaintiff, either in express terms, or by actions which would reasonably imply such

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a renewal, this would cancel and annul such written release. 6. The receipt given in evidence is a release of any claims which are included in its terms, but it is only *prima facie* evidence of such a release, and if it appears, either from its terms or from the evidence offered, that any claim of the plaintiff upon the defendant was not by the joint agreement of the parties included in the terms of such receipt, then the receipt does not apply to any such claims not so included.

The judge declined so to instruct the jury; and instructed them on these points as follows:

"Evidence of an express promise of marriage is not necessary to prove a contract to marry. If the association and conduct of a man and woman, and the circumstances attending all their relations, are such as naturally and ordinarily accompany a mutual understanding relied upon by each that they are to be married each to the other, these facts are appropriate and competent evidence to prove a contract to marry by such persons.

"A contract to marry each other by a man and woman once made may be discharged and released by their mutual consent and agreement, and thereupon both are relieved of all obligation to fulfil such contract to marry.

"The resuming by a man and woman of a contract to marry which has been once entirely discharged or released must be proved by the same evidence, in kind and amount, required to prove an original and the same promise to marry, by and between the same parties.

"The receipts and releases of January 25, 1878, are not decisive evidence that all the preëxisting relations and obligations between the plaintiff and defendant, having reference to their marriage or mutual services, were on that day settled and determined. These receipts and releases, considered alone, in and of themselves, state a final settlement between the plaintiff and defendant of all the matters specified, or in terms comprehended, in the words of these receipts and releases. Either the plaintiff or defendant may prove, that, by their understanding, the receipts and releases were intended to include or exclude, and did include or exclude, matters between them not referred to in these receipts and releases, or comprehended in their terms. In determining the scope of these receipts and releases, the jury

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may consider the circumstances, considerations, motives, purposes, conduct and understanding of the parties, when the releases were made or directed to be made; and among these circumstances an important one is the fact, that such releases were written upon the dictation of the plaintiff, in the defendant's absence, and that the defendant, being unable to read or write, knew nothing of such releases and receipts except what was read or told to him by the plaintiff.

"If the jury find that the defendant has broken his contract, and not acted in good faith toward the plaintiff, she is entitled to recover damages, to be computed on the principal of indemnity and reasonable compensation, and not in any event as a penalty, or as vindictive damages.

"If the jury are satisfied that the plaintiff and defendant intended, by their mutual receipts and releases, each to discharge the other from all claims or obligations which they had made or acknowledged, prior thereto, or which had arisen out of their association with each other from April 1875 to January 25, 1878, they would be authorized to find that such receipts and releases comprehended, by the intention of the parties, in whatever general terms expressed, the discharge and release of the contracts of September 4, 1875.

"The contract declared on in the third count is not to be considered by the jury as constituting a cause of action for damages by the plaintiff, by the marriage of the defendant to a person with whom he had that old engagement to marry stated in such contract, or to any other person; but that contract may be considered by the jury as tending to prove that the defendant, on September 4, 1875, had promised, either absolutely or conditionally, to marry the plaintiff.

"If the defendant's promissory note of September 4, 1875, was made and delivered to the plaintiff, in consideration of an existing promise by him to marry her, and an agreement that he would pay her the sum of $1000, as a penalty for not fulfilling that promise at the time of his marriage to another, there was a legal consideration for that promissory note; and the plaintiff may recover upon it, in this action, provided it was not released and discharged by their transaction of January 25, 1878."

The jury returned a verdict for the defendant; and the plaintiff alleged exceptions

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C. A. Reed, for the plaintiff

G. Marston, for the defendant.

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LORD, J. 1. The first exception which we are called upon to consider is whether the court erred in refusing to admit testimony of the kindly relations between these parties in the year 1839, and during subsequent years up to the year 1875. The case finds that in 1839 neither of the parties was married, but that each was subsequently married to another person, and the evidence offered was that the plaintiff and the defendant, before their several marriages, had kindly feelings toward each other, and, during their married lives, the two families interchanged friendly visits. If there were nothing else to show that the presiding judge might properly in his discretion regard the evidence as too remote, the fact that the defendant by his answer admitted that he entered into a contract of marriage would of itself justify the rejection of evidence which could have no other bearing than to show a probability that the defendant would enter into a contract, which, upon the record, he admits that he did enter into. The evidence offered would have no tendency to prove any particular contract, either as to time or circumstances. It could only tend to prove a contract of some kind, at some time subsequent to the relations. When such a contract is admitted, all the consequences follow. But, upon the rescission of such contract, the same evidence cannot be competent to prove a renewal.

The fact that the rejection of the evidence is sustained for these reasons is not to be regarded as an intimation that under any circumstances the relations in early life between a man and a woman, who have each been married to another, would have any tendency to prove a promise of marriage between them when they have both been widowed after a married life extending through more than thirty years.

Nor do we mean to have it understood that we do not regard as sound the proposition of the defendant's counsel respecting the evidence offered and rejected, of the relations of the parties during their married life: "If the relations and calls were merely friendly and proper, they mean nothing in this respect; and if they were anything else, they were contrary to law and public policy, and cannot be put in evidence."

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2. The next exception taken by the plaintiff's counsel is to this instruction: "The resuming by a man and woman of a contract to marry which has been once entirely discharged or released must be proved by the same evidence, in kind and amount, required to prove an original and the same promise to marry, by and between the same parties."

The criticism upon this ruling made by the plaintiff's counsel is unreasonable. The suggestion that, by this ruling, if an original written contract of marriage had been rescinded by the parties, no other contract of marriage can be proved to exist between them, except by another writing, is wholly unfounded. The court had immediately before said to the jury: "Evidence of an express promise of marriage is not necessary to prove a contract to marry. If the association and conduct of a man and woman, and the circumstances attending all their relations, are such as naturally and ordinarily accompany a mutual understanding relied upon by each that they are to be married each to the other, these facts are appropriate and competent evidence to prove a contract to marry by such persons."

The case finds that the plaintiff, on January 25, 1878, released the defendant from his promise of marriage to her, and that the defendant married Lucinda Taber on February 14, 1878; and the plaintiff's claim was that, after the release which she gave on January 25, and before the defendant's marriage on Febuary 14, he entered into a new contract of marriage with her; and it was to meet this phase of the case that the court was called upon to instruct the jury as to the evidence required to prove a new contract of marriage, and, instead of repeating the carefully prepared statement which he had just given to the jury of what was sufficient to prove a mutual engagement to marry, he in substance referred the jury to that previous instruction as being applicable as well to a new promise to marry after a previous promise had been released, as to an original contract. By that instruction, he had told the jury the kind and amount of evidence necessary to establish the existence of a contract; and there was no error in thus referring to his original instruction for the purpose of instructing the jury as to the evidence necessary to establish a new contract. Whether, under the peculiar circumstances of this case, in which it appeared in writing that the original con-

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tract of marriage between these parties was qualified by a prior engagement of marriage with Lucinda Taber, and that the plaintiff, on January 25, released the defendant from his promise to her, and stipulated not to bring a suit against him for marrying any other woman, and the defendant within three weeks married the woman to whom he was engaged to be married before his contract with the plaintiff, the presiding judge might not have expressed the rules applicable to such a case in more stringent terms, we have no occasion to inquire. Certainly, the excepting party has no cause for complaint.

3. The next exception is to the instructions which the court gave and refused to give in relation to the paper declared on in the second count.

There was another paper bearing date the same day, and presumed to be executed at the same time, and to be a part of the same transaction, which was signed by both the defendant and the plaintiff; and, inasmuch as it is clear that both papers relate to the same subject, and were executed at the same time, they are to be construed together. The court below was not called upon by either party to give construction to those instruments, nor, upon this bill of exceptions, are we. It is enough to say that the instructions were sufficiently favorable to the plaintiff.

The request of the plaintiff's counsel for instruction on this paper was that, if a valuable consideration is shown, such consideration, with love and affection, would be a good and valid consideration in law. It will be observed that the counsel did not ask the court to instruct the jury as to what would constitute a valuable consideration sufficient to support a promise, and although now, in the argument of the cause, certain matters are suggested which it is contended would be a valuable consideration for the note, yet the attention of the court was not called to them at the trial, and the instruction which the court in fact gave was sufficiently favorable to the plaintiff. We do not understand the presiding judge to have used the phrase "penalty," in the instruction given in its strictly technical sense, but to have used it in its more popular signification of liquidated damages. Examining the two papers of September 4 as one instrument to be construed together, it is quite obvious that the treating it, as between the parties, as in any sense an independent promissory

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note containing in itself all the elements of a contract, and nothing else, was sufficiently favorable to the plaintiff, and especially as the presiding judge stated a consideration which he instructed the jury was a sufficient consideration, and no other consideration was suggested to him, nor was he asked to rule whether any specific consideration would be valid, or whether there was any evidence to support any other consideration.

4. The next exception of the plaintiff is to the instructions which the court gave in relation to the series of papers dated January 25, 1878, which are called receipts or releases. These papers were written by a magistrate. The plaintiff and the defendant had "a long and full conference concerning their affairs," in the presence of this magistrate. After that conference was ended, and the defendant had left the presence of the magistrate, these papers were written by him, as the bill of exceptions finds, "by the dictation of the plaintiff." By this phrase we do not understand that the plaintiff enunciated the precise words which the magistrate wrote, but rather that she communicated to the magistrate the particular receipts, releases and agreements, which he reduced to writing in such form as he thought would express the intention of the parties. It is immaterial, however, in what sense the word "dictation" is understood, for the instruments are to be construed by the language used under the rules of law applicable to such instruments. Receipts not under seal, whether called receipts or releases, or by whatever other name called, are not subject to the same rigid rules of construction as the written agreements of parties, but are open to explanation, and may be shown by parol to apply to subjects which are not expressed in them. In reference to these particular papers, the court instructed the jury what would be the natural and obvious meaning of the several phraseologies, and to this part of the instruction we do not understand any exception to be taken; and he instructed the jury further that they were not decisive evidence that all the preëxisting relations and obligations between the plaintiff and defendant having reference to their marriage or mutual services were on that day settled and determined. This instruction was sufficiently favorable to the plaintiff.

A brief examination of the transactions of the two days, September 4, 1873, and January 25, 1878, will reveal a very striking

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relation to each other and perhaps the idiosyncrasies of a single mind. On September 4, one of the papers executed was a mutual agreement between these two parties to take care of each other, and the services of each was the consideration for the services of the other, and no other consideration is referred to, and no other would be implied in law. There is, then, an engagement to marry each other, but it is qualified by the existing obstacle of a prior engagement upon the part of the defendant to marry another; and it is quite apparent that it was not deemed certain by the parties that this obstacle could be removed. In this view, the other paper becomes significant, which is a promise by the defendant to pay the plaintiff one thousand dollars on the day of his marriage. By the papers of January 25, 1878, it is evident that the same subjects were the matters of negotiation between the parties. The mutual contract by which each was to perform services to the other was settled and necessarily abandoned by the consent of the plaintiff that the defendant might marry another. The qualified or conditional arrangement to marry, made on September 4, was not only in terms released by the plaintiff, but there was a stipulation by her that she would not "interfere with his marrying to other parties by bringing suit or otherwise against him." Construing the two papers of September 4 together, and construing together the papers of January 25, it will be seen that they relate to the same subject-matter, and that the plaintiff has no right to complain that the court referred to the jury the question whether, by the intent of the parties, the settlement of January 25 was a final settlement, release and discharge of all the agreements of September 4. There was evidence of "a long and full conference of both the plaintiff and the defendant concerning their affairs," in the presence of a magistrate, and these papers were the result of that conference; and if, by the mutual understanding of the parties, that result was a full and perfect adjustment of all matters existing between them on that day, and an abrogation of all executory contracts between them, these papers were sufficient in form to express that conclusion; and if the presiding judge, instead of ruling as matter of law that this showed a final settlement, left the matter to the jury, who decided it rightly, the plaintiff has no cause of complaint.

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5. The plaintiff now objects that it was error to refuse her fifth request for instructions. It is difficult to understand how the plaintiff could be prejudiced by an instruction, as to the effect of a renewal of the defendant's engagement to marry her, when the jury have found that there was in fact no such renewal. The request, however, was one which could not properly be given. If the parties to an executory contract mutually release each other from its performance, and subsequently enter into the same contract in form, it is the new contract which subsists between the parties, and the old one is as effectually discharged, released and abrogated as if the new one had not been entered into. As to the effect of the renewal of the contract, the court had already given sufficient instructions.

6. The plaintiff also insists that her fourth request for instructions should have been granted. Upon examining the bill of exceptions, we do not find that any evidence was offered upon the subject of the contract declared on in the third count, or that it was regarded by any one as a subsisting contract, or that any tender of performance was made under it, and, upon referring to the third count of the plaintiff's declaration, we find that the paper is set out in it, and it is alleged that the latter clause of it was, on January 25, 1878, abrogated; and then it is alleged that such agreement to marry was renewed, and the marriage of the defendant to another person was alleged as the breach of that contract, and no other breach was alleged, although there is in general terms an allegation of willingness to perform every part of said agreement. It is obvious that this case was tried wholly and solely upon the breach of a contract to marry. We do not understand that any evidence was offered, under the declaration, upon the paper, except the fact of its execution as described; and its effect, under all the circumstances of the case, was left to be determined by the jury under the instructions of the court. But, without regard to the question, whether properly raised or not, it is enough to say that the agreement declared on and the agreement of January 25 are so utterly inconsistent with each other and their coexistence would be so subversive of morality and decency that the agreement of January 25 is necessarily in law an abrogation of the contract declared on.

Exceptions overruled.

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JAMES O. GODFREY *vs.* CHARLES H. MACOMBER & trustee.

Bristol. Oct. 31, 1879. — Jan. 19, 1880. COLT & AMES, JJ., absent.

An insurance company, which, by the terms of a policy issued by it, has the right to rebuild instead of paying the amount of a loss insured against, is not chargeable in a trustee process as the trustee of the assured; and the fact, that, after service of process upon it, it makes an arrangement with the assured and a creditor of his, by which the insurance company pays the money to the creditor who erects a building on his own land, is immaterial.

TRUSTEE PROCESS. Writ dated August 22, 1878, and served the same day. The Hingham Insurance Company, summoned as trustee, answered that, previously to the time of service upon it, it had, by a policy of insurance dated July 26, 1872, insured certain buildings of the defendant situated in Taunton against damage by fire; that, at the time of service, a loss by fire had occurred upon said buildings under the policy; that the trustee had received an order from the defendant directing it to pay to W. F. Macomber any sums of money that might be due the defendant on account of said loss; that, under the terms of the policy, the trustee had thirty days after ascertaining the loss in which to make payment, and, at the time of service, the thirty days had not expired; that, under the terms of the policy, the trustee also had the right to make good the damage by fire by replacing or repairing the property destroyed or damaged; that, subsequent to service upon it, the trustee replaced and repaired the buildings and property destroyed to the satisfaction of itself and of the defendant, in full settlement and indemnity for said loss; and that, therefore, at the time of service upon it, the trustee owed the defendant nothing, and had no goods, effects or credits of the defendant in its hands or possession.

In answer to interrogatories filed to the trustee, it answered that, in October 1878, it erected a building to take the place of the one destroyed, in accordance with an agreement with William F. Macomber, by the terms of which he, for the sum of $700 paid by the trustee agreed to put up a building and assume all the liability of the trustee under its policy to the principal defendant by reason of the said loss, and also to hold the trustee harmless from this process, and the trustee agreed to pay him

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the $700 when the building should be completed to the satisfaction of the defendant; that, in October 1878, the defendant notified the trustee that the building erected was satisfactory; that the building so erected was not on the spot where the old one stood, but was on land belonging to William F. Macomber; and that, at the time it was so built, the defendant owed William F. Macomber more than $700.

At the hearing in the Superior Court, before *Allen*, J., after judgment for the plaintiff against the principal defendant, the plaintiff asked the judge to rule that the erection of the building as above stated was not a replacing of it within the meaning of the policy; and that the trustee should be charged upon its answer.

The judge declined so to rule; and ordered the trustee to be discharged. The plaintiff alleged exceptions.

G. E. Williams, for the plaintiff.

W. H. Fox, for the trustee.

LORD, J. The only question for our consideration is, whether, upon the facts existing at the time of the service of the trustee process, the Hingham Insurance Company was chargeable as the trustee of the defendant. If it was, no subsequent acts upon its part, for the purpose of benefiting the principal defendant or his creditor, could discharge the trustee, nor could any subsequent act of the trustee render it chargeable. The precise and only question to be determined is, whether, at the time of the service of the process upon it, the trustee had in its hands money or other property due or belonging to the principal defendant absolutely and without any contingency. *Hancock* v. *Colyer*, 99 Mass. 187. *Meacham* v. *McCorbitt*, 2 Met. 352.

It is entirely certain that, at the time of the service of the process, there was no such absolute liability. The trustee had the right to rebuild instead of paying the money, and was properly discharged. *Exceptions overruled.*

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CHARLES E. FREELOVE *vs.* MARY E. FREELOVE.

Bristol. Oct. 29, 1879. — Jan. 20, 1880. COLT & AMES, JJ., absent.

In an action of replevin of household furniture, the plaintiff claimed the property under a bill of sale from A.; the defendant also claimed under a bill of sale, dated a month later, from A., whom she subsequently married; the property remained in the possession of A. until his death two years afterwards; the defendant took her bill of sale without notice of the sale to the plaintiff. The jury returned a verdict for the plaintiff. *Held*, that the verdict showed that the jury must have found that the plaintiff was entitled to the property under a valid bill of sale, and had not waived or lost any of his rights under it; that the plaintiff could maintain the action without a previous demand; and that the defendant's exceptions to a ruling that her bill of sale became inoperative and void by her marriage with A., and to a refusal to rule that, the action having been brought within forty days after the death of A., it was prematurely brought, became immaterial.

REPLEVIN of household furniture. Writ dated August 30, 1878. The answer denied the plaintiff's title to the property in question, and set up title in the defendant under a bill of sale of the property, dated September 29, 1876, the consideration being that the defendant should be and remain the housekeeper of Charles H. Freelove, the grantor, during her natural life, or until his decease.

At the trial in the Superior Court, before *Rockwell*, J., the plaintiff claimed title to the property in question by virtue of a bill of sale from his father, Charles H. Freelove, dated August 29, 1876, the existence of which was unknown to the defendant until the trial.

It also appeared that Charles H. Freelove and the defendant were married on January 16, 1877, and subsequently lived together as husband and wife in possession of said property, and with the full knowledge of the plaintiff, until the death of Charles H. Freelove on August 25, 1878, after which the property remained in the possession of the defendant, in the house of Freelove, until replevied in the present action.

The plaintiff asked the judge to rule that the bill of sale, under which the defendant claimed title, was rendered inoperative and void by the marriage of the parties to the same; and the judge so ruled, against the defendant's exception.

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The defendant asked the judge to rule that, as this action was commenced five days after the death of Charles H. Freelove, and as the forty days which his widow, the defendant, had the right to occupy the house and furniture in the house, had not expired, the plaintiff could not prevail, as against the defendant, before the expiration of that time, even though he might have title to the goods; that the plaintiff could not replevy the goods without first making a demand on the defendant for them. But the judge declined so to rule.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

L. Lapham, for the defendant.

H. K. Braley, (*M. G. B. Swift* with him,) for the plaintiff.

ENDICOTT, J. The plaintiff claimed the articles, which are the subject-matter of this controversy, under a bill of sale from his father, Charles H. Freelove, dated in August 1876. The defendant, on the other hand, claimed them under a bill of sale dated in September 1876 from Charles H. Freelove, whom she married in January 1877. The articles in question remained in the possession of Charles H. Freelove until his death, in August 1878. It does not appear that the bill of sale to the plaintiff was invalid, or that it was not sufficient to pass the title in the articles to the plaintiff. The only question for the jury was, whether the plaintiff, by allowing the goods to remain in the possession of Charles H. Freelove, or by any other conduct or acts of his, had waived or lost his title to the goods under his contract, or had recognized that of the defendant, who had taken a bill of sale of them without notice of the sale previously made. *Fox* v. *Harding*, 7 Cush. 516. *Priest* v. *Wheeler*, 101 Mass. 479. *West* v. *Platt*, 120 Mass. 421.

This question we must assume was submitted to the jury under proper instructions. The verdict shows that they must have found that the plaintiff was entitled to the goods under a valid bill of sale, and that he had not waived or lost any of his rights under it. It therefore becomes immaterial what was the true construction of the bill of sale to the defendant, or whether it became inoperative and void by her subsequent marriage with Charles H. Freelove.

For the same reason, the exceptions to the refusal of the

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judge to give the other instructions requested become immaterial.

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If the goods belonged to the plaintiff, he had the right to bring this action against the defendant holding the property under a claim of title without first making a demand for the same. *Exceptions overruled.*

ABRAHAM DION & another *vs.* JEFFREY POWERS.

Bristol. Oct. 29, 1879. — Jan. 20, 1880. COLT & AMES, JJ., absent.

The Gen. Sts. *c.* 120, § 13, do not authorize a District Court to grant a motion for the removal to the Superior Court of a petition to enforce a mechanic's lien, on the ground that the title to real estate is involved; and if such a petition is removed to the Superior Court, the petition should not be dismissed, but remanded to the District Court.

PETITION to the Second District Court of Bristol to enforce a mechanic's lien. The Fall River Savings Bank, mortgagee of the premises on which the lien was claimed, appeared and filed a motion alleging that the title to real estate was brought in question and praying for a removal of the cause to the Superior Court under the Gen. Sts. *c.* 120, § 13; which motion was granted.

At the trial in the Superior Court, without a jury, *Brigham*, C. J., found that the sole cause of removal from the District Court was the fact that the above-named corporation held a mortgage upon the premises which were subject to the petitioners' lien; and ruled that the Gen. Sts, *c.* 120, § 13, applied only to common-law actions, and not to proceedings to enforce statutory liens, and that, if the above statute applied to cases of liens, the fact that a mortgage existed on the premises subject to the lien did not raise such a question of title to real estate as to give cause for a removal under the above statute.

The petitioners contended that the question was whether the mortgage should take precedence of the lien, and, on that account, there was a question of title to real estate involved; and that the Superior Court had jurisdiction of the cause. But

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the judge ruled that said court had not jurisdiction of the cause, because the granting of the motion for removal by the District Court was erroneous. The petitioners thereupon moved that the cause be remanded to the District Court. But the judge ruled that he had no power so to remand it; and ordered that the petition be dismissed. The petitioners alleged exceptions.

H. A. Dubuque, for the petitioners.

H. K. Braley, for the respondent.

SOULE, J. The petitioners rely on the provisions of the Gen. Sts. *c.* 120, § 13, as containing authority for the removal of their petition from the District Court to the Superior Court. But it is to be observed that the mechanic's lien is not a common-law right, and that the proceedings for its enforcement are peculiar. All of the provisions of the General Statutes relating thereto are contained in *c.* 150. Section 8 provides that the lien may be enforced by petition to the Superior Court. Section 9 provides that, "when the amount of the claim does not exceed one hundred dollars, the lien may be enforced by petition to a justice of the peace, or police court." These are the only provisions by which jurisdiction of such petitions is given in express terms to any tribunal. The Second District Court of Bristol has the same jurisdiction with police courts. St. 1874, *c.* 293.

Chapter 120 of the General Statutes treats of the jurisdiction of justices of the peace in civil and criminal matters, and in § 1 names the actions of which they are to have exclusive original jurisdiction, and in § 2 names the actions of which they are to have original and concurrent jurisdiction with the Superior Court. No mention of the mechanic's lien is made in the chapter. The word "action" in § 13 refers to the actions named in the chapter. It would be contrary to the principle adopted in construing statutes to hold that general provisions, admitting of a different interpretation, should be construed as designed to change the jurisdiction in a special matter in which the right and the remedy are both created by a statute containing full and definite provisions as to the whole subject. *Humphrey* v. *Berkshire Woollen Co.* 10 Allen, 420. *Busfield* v. *Wheeler*, 14 Allen, 139. *Cooper* v. *Skinner*, 124 Mass. 183. The District Court had no authority to permit the removal of the petition to the Superior Court. It was, therefore, never removed, but is

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still pending in the District Court, to be proceeded with there according to law. All papers which have been sent up to the Superior Court should be sent back. The ruling of the chief justice of the Superior Court, ordering the petition to be dismissed for the reason given, was erroneous. The question whether the District Court had jurisdiction of the petition is not before us. *Exceptions sustained.*

DAVID L. DEARBORN *vs.* SUSAN L. MATHES, administratrix.

Essex. Nov. 8, 1878. — Jan. 12, 1880. ENDICOTT & LORD, JJ., absent.

An administrator, acting under letters of administration issued in another state, brought an action in this Commonwealth to recover a debt due his intestate, and obtained a verdict. After verdict, the defendant moved for a new trial on the ground that he had discovered since the verdict that letters of administration had not been taken out in this Commonwealth. This motion was overruled; and, after the plaintiff had taken out letters of administration here, judgment was entered on the verdict. *Held*, that a petition for a writ of review was rightly refused.

PETITION, filed June 12, 1877, to the Superior Court for a writ of review of a judgment recovered in that court by the defendant in review against the plaintiff in review. Trial in the Superior Court, before *Colburn*, J., who allowed a bill of exceptions in substance as follows:

The original action, which was an action of contract to recover a sum alleged to be due from the defendant to the plaintiff's intestate, was commenced on May 18, 1876, and was duly entered at June term 1876. The defendant by his counsel duly appeared and answered. It was tried by the court without a jury, and a verdict was rendered for the plaintiff for $1728.83. At the time the action was commenced the plaintiff had not taken out administration on her intestate's estate in this Commonwealth, but was acting under letters of administration granted in New Hampshire. But this was not apparent on the face of the pleadings, and the defendant did not discover it until after trial and verdict. After verdict, the defendant filed a motion for a new trial, setting forth, among other grounds, that

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no administration had been granted to the plaintiff in this Commonwealth, and notified the plaintiff's counsel of the filing of this motion, but by mistake failed to file with him a copy of the motion within four days after verdict, as required by law. The motion was for this reason overruled by the court, on May 26, 1877, without a hearing on its merits, and judgment was rendered for the plaintiff on June 11, 1877. After verdict and before final judgment, the plaintiff applied to the Probate Court of this county to be appointed administratrix of her intestate's estate in this Commonwealth, and she was duly appointed as such on September 25, 1876.

The plaintiff in review contended, and asked the judge to rule, as follows: "1. The plaintiff in the original action not having taken out administration in this Commonwealth at the time of the commencement of the action, the proceedings and judgment in said action were and are absolutely void, and incapable of being remedied by waiver or otherwise. The petitioner is therefore entitled to a review as a matter of law. 2. The subsequent appointment of the plaintiff as administratrix, after verdict and before judgment, is immaterial, and does not render the proceedings and judgment in said action valid. 3. There was no waiver by the defendant of the defect in the proceedings." But the judge refused so to rule; and ruled, as contended by the defendant in review, that the defect in the proceedings in the original action, arising from the failure of the plaintiff to take out administration in this Commonwealth before the action was brought, was remedied by the subsequent appointment of the plaintiff as administratrix before final judgment in the action; and ordered the petition to be dismissed. The plaintiff in review alleged exceptions.

H. H. Currier, for the plaintiff in review.

E. F. Stone, for the defendant in review.

GRAY, C. J. The objection that the original action could not be maintained, for want of the issue of letters of administration to the plaintiff in this Commonwealth before it was brought, could not be availed of without being pleaded, and affected only the capacity of the plaintiff to sue, and not the jurisdiction of the court. *Langdon* v. *Potter*, 11 Mass. 313. *Wooldridge* v. *Bishop*, 7 B. & C. 406.

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As the objection might have been, and was not, taken before verdict, it could be made a ground for a new trial only at the discretion of the presiding judge, and not as a matter of right; and a ruling thereon, at that stage of the cause, though a ruling in matter of law, could not be brought to this court for revision, either by bill of exceptions or by report of the judge. *Kidney* v. *Richards*, 10 Allen, 419. *Aldrich* v. *Springfield, Athol & Northeastern Railroad*, 125 Mass. 404. Upon a petition for review, which is in substance and effect an application for a new trial after judgment, the right of exception must be equally limited. The cases in which this court has entertained exceptions to rulings on motions for a new trial or petition for a review have been of questions of law affecting the jurisdiction and powers of the court below over the petition or motion, or the admissibility of evidence at the hearing thereon, or which could not have been raised before the verdict. *Davenport* v. *Holland*, 2 Cush. 1, 11. *Boston* v. *Robbins*, 116 Mass. 313, 315. *Tripp* v. *Brownell*, 2 Gray, 402. *Woodward* v. *Leavitt*, 107 Mass. 453, 460. *Commonwealth* v. *Tobin*, 125 Mass. 203, 208.

It may be added that, letters of administration having been actually taken out in this Commonwealth before judgment, the original defendant is in no danger of suffering any injustice, for those letters relate back to the death of the intestate, at least in such sense as to oblige the plaintiff to account in the regular course of administration for anything received under the judgment. *Alvord* v. *Marsh*, 12 Allen, 603. *Hatch* v. *Proctor*, 102 Mass. 351.

Exceptions overruled.

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CHARLES HODGKINS *vs.* GEORGE A. CHAPPELL & another.

Essex. Nov. 5, 1879. — Jan. 20, 1880. COLT & AMES, JJ., absent.

On the issue whether an oral contract, made by A. with B. acting for a firm of which he was a member, was one of sale or of consignment for sale, a letter written by B. to his partner, in which, after the contract was made, he stated its terms, is inadmissible in behalf of the firm.

In an action for the price of a lot of frozen fish, the defendant contended that they were worthless, and had been thawed and frozen several times while in the plaintiff's possession, and put in evidence of the state of the thermometer during this time. *Held*, that the plaintiff might in rebuttal put in evidence that other fish of a similar description stored in the same place for the same time did not thaw, and were taken out afterwards in good condition.

No exception lies to the order in which evidence at the trial of a case is allowed to be put in.

CONTRACT upon an account annexed for goods sold and delivered. Answer, a general denial. Trial in the Superior Court, before *Gardner*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered evidence tending to show that, on February 17, 1872, he met, in Boston, one Storer, one of the defendants, who are partners doing business in the city of New York, and told him that he had in Rockport thirty boxes of codfish which were frozen up when new, which he wished to sell; that, in reply to Storer's question how they looked, he said, "Pretty good," and that he would sell them for $2.50 per cwt.; that Storer then told him to put on the cars ten boxes, and mark five of them "Chappell & Storer," and five of them "W. Pearsall & Co.," saying that the defendants had two stalls in the market in New York, and those were the names under which the business was done; that accordingly he forwarded the ten boxes that day, directed as ordered, and on Monday following met Storer in Boston again and informed him that they were shipped; that Storer then said, "To-morrow we 'll see about the rest;" that on Tuesday he met him again, and Storer then told him he had received a telegram from his partner, and instructed the plaintiff to send on the rest, which he did when he returned to Rockport that night; that the rest consisted of six boxes, which were sent marked as before, half to the defendants by name, and half to

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Pearsall & Co.; that on Wednesday he met Storer again, who said to him, "They've rather gone back on those fish; but we 're all right and you are all right, the wagon-boys will have them Thursday;" that the fish were caught and purchased by the plaintiff in November, and were frozen when fresh caught, and had not been thawed; and that he sent a bill of parcels by mail when he sent the fish.

The defendants offered evidence tending to prove that the interviews between the parties were substantially different; that the plaintiff told Storer that he had some hard-frozen fish which he could not dispose of in Boston, and asked if Storer could not dispose of them in New York; that Storer told him to send on a few boxes and he would write to his partner, so that he would get the letter when he got the fish; that not a word was said about price, or about sending any to Pearsall, or about a purchase of the fish by the defendants, but only about a consignment of them for sales and returns; that the next day he received a telegram from his partner, which he communicated to the plaintiff, to this effect: "Have sold all the fish, tell Charlie to send on the rest;" that at this time nothing was said about price, or about a sale, or about any other bargain than the first; that on the next day he received another telegram from his partner, which he also showed to the plaintiff, to this effect: "Tell Hodgkins not to send the fish, the others were rotten and worthless;" that the plaintiff said he had already sent them, and that the defendants must do the best they could for him, to which Storer replied that he would write his partner to that effect, and did so; that no bill of parcels was forwarded with the fish, or until two or three years afterwards; that all the fish which came, came directed to them, and they never knew of any coming directed to Pearsall, with whom at that time they had no connection; that, on the arrival of the first lot, they were at once sold, some of them before they were taken from the cart; that some were sold to retail dealers in New York, and some to retail dealers in Newark, New Jersey; that on the same day, but after the first telegram had been sent to Boston, they were all returned as rotten and worthless; that those which were sold in New York were seized by the sanitary police and brought back to them, and nearly all of them were destroyed as utterly worthless and inju-

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rious to the public health; that some few small lots which were sold were not returned; and that an account of sales, in which the plaintiff was credited with the amount received, and charged with freight and expenses, and showing a small balance due the defendants, was forwarded to the plaintiff at once, to which no reply and no objection were made for several years. The receipt of such account was denied by the plaintiff.

The defendants also introduced evidence tending to show that these fish had been exposed to great changes of weather, and, specifically, evidence of the state of the thermometer every day from November to February; that their condition, when received in New York and thawed, showed that they had become tainted and spoiled before they were frozen at all, and that they had been thawed more than once after they were first frozen; and that they were not, when sent to New York, in any respect merchantable or suitable for human food, but were tainted, rotten, and utterly worthless. It was agreed that Storer never saw the fish before they were sent to New York.

The defendants showed that, after the first conversation between the plaintiff and Storer, the latter wrote a letter to his partner in New York in relation thereto, after the receipt of which and the fish, Chappell sent the first telegram; that in the letter Storer informed him of the terms on which the plaintiff was to send the fish; and, after proving that this letter had been destroyed by fire, offered to prove its contents. But the judge, upon the plaintiff's objection, refused to admit evidence of the contents of the letter, although finding as a fact that the original was destroyed; and the defendants excepted.

In reply to the defendants' evidence, the judge permitted the plaintiff to testify, against the defendants' exception, that the fish were kept in a certain shed in Rockport, from November to the time they were sent to New York; that, during this time, other fish, bought at the same time as these and of a similar description, were also kept there, which were put in at the same time; and that these other fish so kept there did not thaw during the time specified, but were taken out in the spring in good order and condition.

The plaintiff contended that the defendants had accounted for only half of the fish sent; and that, of the other half, no evi-

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dence was given by the defendants of their condition. The plaintiff put in evidence, against the defendants' exception, the testimony of the Eastern Railroad Company's freight agent at Rockport, who, after referring to his books to refresh his memory, testified that, on February 17, 1872, there were shipped from Rockport five boxes of fish marked "Chapparel & Storer, New York," and five marked "W. Pearsall, New York," and on February 20, 1872, three boxes marked to each of the same consignees. The books were examined by the defendants, were in the handwriting of the witness, and did not contain the name of any consignor or shipper; and the witness, on cross-examination, said that he could not testify that the plaintiff had anything to do with these shipments, but merely that goods so marked were forwarded on those dates. It appeared by said books, (which were not offered in evidence,) that no other fish were shipped from Rockport to the defendants or to Pearsall during that month.

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The jury returned a verdict for the plaintiff for the full amount claimed; and the defendants alleged exceptions.

S. B. Ives, Jr., for the defendants.

C. P. Thompson, for the plaintiff.

LORD, J. It is entirely obvious that the real question in controversy in this case was the comparative credibility of the plaintiff and of the defendant Storer, and this fact made it the more important that the independent testimony sustaining the view of one side or the other should be carefully scrutinized and kept within strictly legal limits. We are unable to see that in this respect there was any error.

1. The first point made by the defendants is that the letter from Storer to Chappell should have been admitted in evidence, and their claim is, that it should have been regarded either as part of the *res gestæ*, or as a part of a correspondence of which the telegram was the other part, which telegram was communicated to the plaintiff. What *res gestæ* it was part of, the defendants do not explain to us. It was not a part of the contract between the plaintiff and the defendants, for both parties agree that the contract for the first lot of fish, whatever it was, had been fully made and completed between the parties before the letter was written. It was simply the declaration of one of the defend

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ants to his co-defendant, in the absence of the plaintiff, and without the plaintiff's knowledge. Nor does it appear to be any part of any correspondence which was put into the case. The plaintiff did not introduce the telegram in evidence. He simply testified that Storer told him he had received a telegram in consequence of which he concluded to purchase the remainder of the lot of fish. When the defendant Storer testified, he produced the telegram; but there is no reference in the telegram to his letter to his partner, nor does it appear that the plaintiff ever did have or ever could have had any knowledge of the contents of such letter, or that any letter had been written from one partner to the other; and the admission in evidence against him of the private conversation or correspondence between the defendants would be in violation of his rights.

2. The next point made by the defendant is that the evidence of the condition of other fish, though bought at the same time and kept in the same place, for the same period, was incompetent, as irrelevant and collateral.

In examining the validity of this objection, it is important to understand at what stage of the case and under what circumstances this evidence was admitted. The plaintiff in chief had offered nothing as to the particular condition of the fish, nor the temperature in which they had been kept. The defendants in their defence introduced evidence "tending to show that these fish had been exposed to great changes of weather, and, specifically, evidence of the state of the thermometer every day from November to February; that their condition, when received in New York and thawed, showed that they had become tainted and spoiled before they were frozen at all, and that they had been thawed more than once after they were first frozen." And the bill of exceptions states in terms that it was "in reply to the defendants' evidence" that the court permitted the plaintiff to testify that the fish "were kept in a certain shed in Rockport, from November to the time they were sent to New York; that, during this time, other fish, bought at the same time as these and of a similar description, were also kept there, which were put in at the same time; and that these other fish so kept there did not thaw during the time specified, but were taken out in the spring in good order and condition."

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The evidence was not offered for the purpose of proving the other fish to be good; that matter was wholly immaterial and collateral; but it was offered for the purpose of meeting the defendants' testimony, and of showing that it was not true, by showing such a state of the temperature of the place where they had been stored as to render the thawing, which had been testified to by the defendant, improbable, if not impossible. We presume that the record of the thermometer of which the defendants testified was made at Rockport, and perhaps in the immediate vicinity of the fish; but temperature by the thermometer is not determinable except by its influence upon mercury or spirit, and those are not the only substances upon which temperature has an effect, and we see no reason why the condition of temperature may not be determined by its influence upon other materials. The evidence, therefore, was competent and pertinent to meet the exact state of facts which the defendant had put in evidence.

3. The third exception taken by the defendant is to the admission of the testimony of the Eastern Railroad Company's freight agent, who was permitted to testify that, on February 17, 1872, five boxes of fish were shipped from Rockport marked "Chapparel & Storer, New York," and five marked "W. Pearsall, New York," and on February 20, 1872, three boxes marked to each of the same consignees. The principal objection made to this testimony by the defendant seems to be that it was admitted at an improper stage of the trial. It does not seem to be seriously contested that the evidence would not have been competent as a part of the plaintiff's original case, as being one step in the proof of a sale and delivery. But whether it should be admitted at a later stage was entirely within the discretion of the presiding judge. In this case, it is contended that the evidence, especially as introduced at the time it was, would necessarily tend to the corroboration of the plaintiff's case, upon which the plaintiff had no right to offer corroboration, and which the facts proved had no legitimate tendency to corroborate. It is not improbable that this may be so. It was, however, within the power of the party to have asked specific and careful instructions as to the purposes for which it was admissible, and how far it could be used in support of the plaintiff's case, and what uses of it were improper or

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incompetent. But it does not appear by the bill of exceptions that any such instructions were asked, nor does it appear that full and ample instructions were not given, nor that the uses and purposes of the evidence were not exactly limited and qualified.

Exceptions overruled.

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SOLOMON LINCOLN, JR. & another, administrators, *vs.* ENOCH F. WOOD & others.

Essex. Nov. 7, 1879. — Jan. 20, 1880. COLT & AMES, JJ., absent.

Pending an appeal from the probate of a will, by which the entire estate of the testator was devised to a charity, the person named as executor and the heirs at law and next of kin of the testator made an agreement of compromise, which was afterwards ratified by this court, in November 1874, on a petition in equity, under the St. of 1864, *c.* 173, by the terms of which the executor was to pay immediately to the counsel employed in the case a certain sum as counsel fees; to trustees, to be appointed by the Probate Court to carry out the charity created by the will, a certain sum; after payment of debts and charges of administration, to pay the residue, not exceeding a certain sum, to the next of kin; and, if anything remained after such payment, to divide the same between the trustees of the charity and the next of kin, in a certain proportion. The executor subsequently declined the trust, and administrators with the will annexed were appointed in March 1875, who in July of that year paid the trustees of the charity, who were appointed in the preceding April, the amount named in the agreement. After the payment of debts and charges of administration, the residue in the hands of the administrators was less than the sum which by the agreement was to be paid to the next of kin. *Held*, that the trustees of the charity were not entitled out of this fund to any interest on the sum paid to them.

BILL IN EQUITY in the nature of a bill of interpleader, by the administrators with the will annexed of Jonathan T. Barker, against the trustees under said will, and the heirs at law and next of kin of the testator. The case was heard by *Ames*, J., on the bill and answers, and reserved for the determination of the full court, and was as follows:

Jonathan T. Barker died May 26, 1872. By his will, he devised and bequeathed all his estate to establish and support a free school in the town of Boxford, and provided that, after defraying the expenses of building and furnishing a suitable

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house for the school, the remainder of his estate should be kept in trust, and the income appropriated for the benefit of the school. He also requested in his will that three trustees should be appointed by the judge of probate, to receive and take charge of said funds. The will was admitted to probate by the Probate Court, and an appeal taken by the heirs at law and next of kin to this court.

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The plaintiffs were, on March 18, 1873, duly appointed special administrators of the estate, and entered upon their trust. During the progress of the appeal, the person named in the will as executor, and the heirs at law and next of kin, for the purpose of settling the controversy and of consenting to the distribution of the property of the testator, entered into and signed the following agreement, dated November 16, 1874:

"First. All the heirs at law and next of kin, in consideration of this agreement, withdraw all opposition to the probate of said will, and all appeal from the decision of the Probate Court and reasons of appeal, and consent that the same shall be admitted to probate as and for the last will and testament of said deceased.

"Second. The executor shall, immediately after the probate as aforesaid, pay to the counsel employed in the case four thousand five hundred dollars in full for all their charges, costs and expenses concerning the litigation and probate.

"Third. He shall pay to whatever trustees may be appointed by the court, to carry out the charity created by the will, the sum of thirty thousand dollars, to be held by them in trust and applied to said charity according to the terms of said will.

"Fourth. He shall administer all the residue of the estate of said deceased, as follows: 1st. He shall pay out of the same all the charges of administration and all debts of the deceased and demands against the estate. 2d. He shall distribute the residue not exceeding the sum of twenty-five thousand dollars among the next of kin of said deceased according to the statute of distributions. 3d. If anything remains after the distribution to the next of kin as aforesaid, he shall divide the same between the trustees of said charity and said next of kin, in the proportion of thirty to twenty-five."

At November term 1874, this agreement was, upon a petition

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in equity to this court, under the St. of 1864, c. 178, after notice to the attorney general, ratified and confirmed.

The person named in the will as executor declined to accept the trust, and the plaintiffs were, on March 1, 1875, appointed by the Probate Court administrators with the will annexed of the goods and estate not already administered. On April 19, 1875, trustees under the will were for the first time appointed by the Probate Court. On July 31, 1875, the plaintiffs paid to these trustees the sum of $30,000. They have also paid the sum of $4500 mentioned in the second article of the agreement of compromise, and all debts and demands against the estate, and the residue of the estate now in their hands is less than the sum of $25,000.

The trustees contend that they are entitled to receive interest upon the principal sum of $30,000 from the date of the order of confirmation of the agreement of compromise to the time that the principal sum was paid over to them. The heirs at law and next of kin contend that the whole of the residue should be paid to them.

D. Saunders, for the trustees.

J. P. Jones, for the heirs at law and next of kin.

SOULE, J. We see no ground on which the trustees are entitled to interest on the sum of thirty thousand dollars from the date of the decree ratifying the compromise to the time when that sum was paid to them.

The decree, by force of the statute, is binding and valid on all parties claiming either under the will or as heirs or next of kin. St. 1864, c. 178. But it is binding and is intended mainly for the purpose of determining the rights of the parties to particular or proportionate parts of the estate, as against each other, and does not, in the absence of any stipulation to that effect in the agreement, fix the right to immediate payment. It has the character of a judgment so far as regards proportionate parts of the estate, and precedence among the parties, but not as to the absolute right to receive anything. Because, as is provided by § 4 of the statute, the claims of creditors against the estate of the deceased are not impaired by the proceedings. The effect of the decree in the case at bar was in substance to substitute for the will of the testator an agreement for the distribution of

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the estate, after payment of the debts and of the counsel fees named, in certain proportions between the trustees thereafter to be appointed under the will and the next of kin of the testator. It left the estate to be settled by the administrators with the will annexed, in the ordinary way. They were entitled to a reasonable time in which to ascertain the condition of the estate, and to pay the debts, before being obliged to pay anything under the agreement to the trustees or the next of kin.

Whether the amount to be paid to the trustees is regarded as a legacy or a sum payable under a contract, no interest was due on it when it was paid. The amount to be paid was not fixed till November 1874, the administrators with the will annexed were appointed in March 1875, the trustees were appointed in April 1875, and the payment was made to them in the following July. It is not contended that interest was payable as on a legacy, after the expiration of a year from the death of the testator, probably because it seemed unreasonable to insist that an amount agreed on by way of compromise at a much later date should stand in the same position with a legacy actually given by the will, especially when the allowance of interest as on a legacy would have the effect to change materially the proportionate division of the estate from what is evidently intended by the language of the agreement of compromise. If the sum to be paid to the trustees could be regarded as a legacy, it must be treated as if the death of the testator occurred when the decree ratifying the compromise was made, in which event the trustees would not be entitled to interest because the legacy was paid within a year. If the sum is to be regarded as due under a contract, it was not payable by the terms of the contract at a specified time, and was therefore payable in a reasonable time, and was manifestly so paid.

If it be contended that the administrators after the decree held the sum of thirty thousand dollars as trustees for the charity, and are under the obligation to pay interest, because the fund was drawing interest, the answer is, that neither the special administrators nor the administrators with the will annexed were trustees under the will, neither set the sum of thirty thousand dollars apart for the charity, the whole fund in their hands was of the estate of the testator, and they could not without special authority from the proper tribunal, nor by any mere mental

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determination, so separate a part from the rest that it should cease to be a portion of the estate; and, not being trustees under the will, they could not open an account with themselves as trustees, and so separate and set up a fund for the charity, to be paid with its accumulation to the trustees when they should be appointed. *Miller* v. *Congdon*, 14 Gray, 114. Nothing in the facts indicates any purpose or attempt to separate and hold a specific fund for the charity.

We are of opinion, therefore, that the heirs at law and next of kin of the testator are entitled to the whole fund in the hands of the plaintiffs, it being less than the sum of twenty-five thousand dollars, after payment of such sum as costs out of the fund as shall be ordered by a single judge. *Decree accordingly.*

HANNAH M. HOOD *vs.* DAVIS F. ADAMS.

Essex. Nov. 5, 1879. — Jan. 21, 1880. COLT & AMES, JJ., absent.

In an action on a promissory note secured by a mortgage of real estate, it appeared that, at a sale by auction, under a power contained in the mortgage, the auctioneer purchased the estate for the plaintiff; and the only question for the jury was whether the auctioneer had authority to buy for the plaintiff. Two letters, written by the plaintiff to the auctioneer, were put in evidence, the first saying, "Please foreclose the mortgage as soon as convenient;" and the other, "I have been waiting for that money to pay the remainder of my taxes, and the interest is accumulating there too. So, if you will advertise the property as soon as possible, you will greatly oblige me." *Held*, that the two letters, construed together, contained no authority to the auctioneer to purchase the estate for the plaintiff.

On the issue whether a person authorized by a mortgagee to sell a mortgaged estate had authority to purchase the estate for the mortgagee, there were several letters between the parties, before and after the sale, put in evidence, and there was conflicting testimony of witnesses. *Held*, that the question was properly submitted to the jury.

CONTRACT upon a promissory note for $800, dated December 20, 1870, signed by the defendant, payable to the plaintiff, or order, and secured by a mortgage of real estate. Answer, a payment of the note by virtue of the purchase, by the plaintiff, through her agent, of the mortgaged estate at a sale under the

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power contained in the mortgage, for the full amount of the note and all expenses. After the former decision, reported 124 Mass. 481, the case was tried in the Superior Court, before *Gardner*, J., who allowed a bill of exceptions, in substance as follows:

The only question for the jury was whether one Baker, the agent of the plaintiff to foreclose the mortgage, was authorized to purchase for her in the manner he did. Several letters, being the correspondence, before and after the sale, between the plaintiff and Baker relating to the matter, were put in evidence, one of which, dated December 3, 1875, written by the plaintiff, contained the following: "Please foreclose the mortgage as soon as convenient;" another, also written by her, dated December 29, contained the following: "A year's interest was due December 20, and it seems to me that sufficient forbearance has been exercised. I have been waiting for that money to pay the remainder of my taxes, and the interest is accumulating there too. So, if you will advertise the property as soon as possible, you will greatly oblige me."

The brother of the plaintiff testified that, prior to the sale, he went for her to Baker, and asked him if he had foreclosed the mortgage, as she wanted the money; that Baker said the sale was advertised and was to take place on a day named; and that the note amounted to about $900, and he, Baker, did not suppose the plaintiff wanted the estate to go for less than that amount; that the witness said he did not know anything about it, that his sister said she wanted the money; that Baker asked him, if he saw his sister before the sale, to ask her if she wanted the property sold for less than the amount of the note; that he replied that he had no authority, but thought that Baker had better not let it go for less than the full amount due; and that he did not see his sister afterwards, and had no more talk with Baker. The plaintiff also testified that she never had any talk with her brother about what should be bid for her, or what she would let the estate go for. Baker and his clerk, to whom the property was struck off as agent for the plaintiff, so as to make a title in her, by conveyance to him under the power and a reconveyance by him to her, testified to the above conversation with the plaintiff's brother; and that the brother called a few days afterwards, and said that his sister did not wish the property to go for less than

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the amount of her claim. There was no other evidence of any communication between the plaintiff and Baker, and no evidence limiting or restricting any authority contained in the correspondence between them. The defendant did not contend that Baker was the plaintiff's general agent.

Baker further testified that several persons were present at the sale, and several bids were made by strangers to the title, one for $600 by a man of ample means; that, acting in good faith and with reasonable discretion, he bought the property for the plaintiff at the full amount of her claim; and that, when there were no bidders, it was not his custom to bid in the property without instructions. No question was made of Baker's good faith, or that he did not act according to his best judgment and discretion. Liberty was given the mortgagee to purchase in the power, which was in the usual form.

There was no other evidence upon the question of agency, excepting that the plaintiff testified that, in October 1875, she went to see Baker, and asked him to write to the defendant for the interest then due upon the note; that Baker asked her to see the defendant, which she did, and he refused to pay; that she told Baker she could not afford to lose her money, and Baker said, "Don't be afraid, you shall not lose it;" and that she had no one at the sale to bid on the property.

The defendant asked the judge to rule, among other things, that, "as matter of law, upon all the evidence, especially the correspondence, the agent was authorized to purchase the property for the plaintiff as he did." The judge declined so to rule; and ruled that the two letters, in themselves alone, did not give the agent such authority.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

R. E. Harmon, for the defendant.

A. Jones, for the plaintiff.

ENDICOTT, J. When this case was previously before us, it appeared that the presiding judge ruled that the answer and the facts offered in evidence would not, if proved, show a payment of the note, and we therefore assumed that the allegations of the answer and the facts offered in evidence were true, including the fact that Baker, the auctioneer, was duly authorized to purchase

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the estate for the plaintiff, pursuant to the power contained in the mortgage. 124 Mass. 481. But it appears from the bill of exceptions that, at this trial, the only question of fact for the jury was whether the auctioneer had authority to buy for the plaintiff; and the only question of law raised was this: Did the two letters of the plaintiff to Baker, the auctioneer dated December 3 and 29, 1875, respectively, authorize him to buy the property for the plaintiff in the manner in which he did buy it, or attempted to buy it? It was not contended by the defendant that Baker was the general agent of the plaintiff. We are of opinion that the presiding judge correctly ruled that the two letters, in themselves alone, did not give him such authority.

As both the letters were written prior to the sale, and both refer to a sale which the plaintiff wished him to make, they are to be construed together. They contain an authority to advertise the estate for sale, and it is clearly to be inferred from them that the estate was to be sold by Baker, as auctioneer, under the power contained in the mortgage; and the first letter contains the direction, "Please foreclose the mortgage as soon as convenient." A year's interest was then due, and the plaintiff was evidently in need of money, and desired the property to be advertised and the mortgage foreclosed by sale in order that she might obtain it. Her language in the second letter is, "I have been wanting that money to pay my taxes, and the interest is accumulating there too. So, if you will advertise the property as soon as possible, you will greatly oblige me." Construing this sentence in connection with the sentence in the previous letter, it is evident that she intended him to make such a foreclosure as would supply her with the money that she desired, and the idea is excluded that she intended, by the words "foreclose the mortgage," to authorize him to buy for her. In that event she could not obtain the money, which was the object she had in view by the foreclosure.

The question does not arise, what might be the effect of a general direction to an agent to foreclose a mortgage, containing a power in the mortgagee to purchase at the sale, without any limitation upon his authority, and without any intimation from the mortgagee of the manner or the purpose for which he

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desired the foreclosure to be made. Undoubtedly the plaintiff intended to foreclose the mortgage, and thereby to extinguish the title of the mortgagor in the premises, but she intended to accomplish this by such a sale as would place money in her hands.

The case was submitted to the jury, on the only question of fact in dispute, upon the testimony of witnesses, as well as upon the correspondence between the parties, before and after the sale; and the presiding judge could not properly rule, "as matter of law, upon all the evidence, especially the correspondence, that the agent was authorized to purchase the property for the plaintiff, as he did." No question of law touching a ratification of the sale is properly before us. *Exceptions overruled.*

ELIZABETH B. BARNES *vs.* CHARLES E. CHASE & others.

Essex. Nov. 5, 1879. — Jan. 21, 1880. COLT & AMES, JJ., absent.

In an action against the sureties on a bond, given by a person adjudged to be the father of a bastard child, as security for the payment, according to the order of the court, of a certain sum for the maintenance of the child, judgment should be entered for the penal sum named in the bond, without deducting payments made by the principal under that order; but execution should issue for the amount due under the order which the principal has failed to pay.

CONTRACT on a bond in the penal sum of $500, executed by Allen M. Norton, as principal, and the defendants as sureties, and conditioned that Norton, who had been accused by the plaintiff of being the father of a bastard child of which she was pregnant, should appear at the time and place named therein and answer to the complaint against him, and abide the order of the court thereon.

At the trial in the Superior Court, before *Gardner*, J., without a jury, the defendants admitted a breach of the bond, and produced the record of the court on the original complaint, by which Norton was adjudged to be the father of said child, and was ordered to pay for the maintenance thereof "one hundred

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dollars in gross forthwith, and two dollars a week afterwards, payable quarterly, till further order."

The defendants put in evidence receipts from the plaintiff of payments of money made to her by Norton, amounting to $317.50, which they contended should be applied on the penalty of the bond. It was admitted that $52 had been paid by the defendants, and should be allowed as payment upon the bond. The plaintiff testified that Norton had never paid anything in addition to the above payments under the order for the support of the child. The defendants asked the judge to rule that Norton was under no legal obligation or indebtedness except under the bond; and that the above payments made by him ought to be applied upon the penalty of the bond.

The judge refused so to rule; found that there was a breach of the bond and that judgment should be entered for the penal sum of the bond; that the sureties had paid $52; that Norton had paid the plaintiff $317.50; and that there was due under the order of the court $105.50; ruled that the payment by Norton did not absolve the sureties from liability; and ordered that execution issue for $105.50.

The defendants alleged exceptions.

T. B. Newhall & R. E. Harmon, for the defendants.

W. H. Niles, for the plaintiff.

ENDICOTT, J. The sureties on the bond could not be held liable for more than the penal sum named in the bond, but that sum was not the limit of the liability of the principal. He was bound to pay, according to the order of the court, "one hundred dollars in gross forthwith, and two dollars a week afterwards, payable quarterly, till further order." No other order appears to have been passed, and the bond stood as security for such payment. So long as Norton complied with the terms of the order, the sureties were not liable. When he failed to comply, there was a breach of the bond, and the plaintiff was entitled to judgment for the penalty of the bond. In what sum execution should issue would depend upon the amount due under the order which had not been paid. What portion had been paid by Norton in obedience to the order could not be deducted from the penalty of the bond. The presiding judge found that there was a breach of the bond, upon which judgment should be entered

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for the penal sum named. He therefore properly decided that the amount for which execution should issue was the sum due under the order which the principal had failed to pay.

Exceptions overruled.

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GEORGE W. CHANDLER & another *vs.* CITY OF LAWRENCE.

Essex. Nov. 6, 1879. — Jan. 21, 1880. COLT & AMES, JJ., absent.

If an ordinance of a city creating a certain office provides that the incumbent may be removed at the pleasure of the city council, the subsequent repeal of the ordinance by the city council, and notice to the incumbent of such repeal, operate as a removal from the office.

An ordinance of a city, by whose charter all powers vested in the mayor and aldermen and common council jointly are "to be exercised by concurrent vote, each board to have a negative upon the other," the passage of which is shown, as to the board of mayor and aldermen, by the certificate of the mayor, being the chairman of that board, and, as to the common council, by the certificate of its president, is not invalidated by a departure from a provision of the joint rules and orders of the city council, directing that every ordinance shall be passed first in the common council.

CONTRACT by the assignees in bankruptcy of the estate of Baldwin Coolidge to recover the salary due him as city engineer of the defendant, from July 21, 1875, to January 1, 1877. Answer, a general denial. Trial in the Superior Court, without a jury, before *Pitman*, J., who reported the case for the consideration of this court, in substance as follows:

In December 1873, an ordinance was passed by the city council of the defendant, creating the office of city engineer, section one of which was as follows: "There shall be chosen in the month of January in the year eighteen hundred and seventy-four, and in every third year thereafter, a city engineer, who shall hold his office for three years from the first Monday in January, in the year in which he shall be chosen, and until his successor is elected and qualified, or he is removed. He may be removed at the pleasure of the city council. He shall receive such compensation as the city council shall from time to time determine." In January 1874, Coolidge was elected to that office, and the

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city council established the salary at $2000 a year. He accepted the office, was qualified, and discharged the duties of the office until July 1875, when, in consequence of an ordinance purporting to repeal all ordinances relating to or establishing the office of city engineer, he was notified to leave the office, which he did under protest. This ordinance bore the following indications of its passage: "In board of aldermen, July 14, 1875. Passed to be ordained. Robert H. Tewksbury, Mayor." "In common council, July 20, 1875. Passed to be ordained. John L. Brewster, President."

Article 13 of the joint rules and orders of the city council of the defendant is as follows: "Every ordinance shall have as many readings in each board as the rules of each board require, after which the question shall be on passing the same to be enrolled, and it shall be sent to the other board for concurrence: and when such ordinance shall have passed to be enrolled in each board, the same shall be enrolled by the city clerk, or the clerk of the common council, and examined by a committee of the common council, and on being found by the committee to be correctly enrolled, the same shall be reported to the council, when the question shall be on passing the same to be ordained; and when said ordinance shall have so passed to be ordained, it shall be signed by the president of the common council, and sent to the other board, where a like examination shall be made by a committee of that board, and, if found to be correctly enrolled, the same shall be reported to the board, and the question shall be on passing the same to be ordained, and when the same shall have passed to be ordained, it shall be signed by the mayor."

Coolidge held himself ready to perform the duties of the office for the full term of three years, but the city treasurer, under direction of the mayor, refused to pay the salary after the passage of the repealing ordinance in July 1875, but he was paid until that date.

Upon these facts, the judge ruled that the plaintiffs were not entitled to recover, and found for the defendant. If the ruling was correct, judgment was to be entered for the defendant; otherwise, a new trial was to be ordered.

A. C. Stone & C. U. Bell, for the plaintiffs.

E. T. Burley, for the defendant.

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GRAY, C. J. The ordinance by which the engineer's office was created expressly reserved to the city council the power to remove him at pleasure. The repeal of that ordinance by the city council, and notice to him of such repeal, operated as a removal. *Brackett* v. *Blake*, 7 Met. 335, 339. *Knowles* v. *Boston*, 12 Gray, 339.

By the city charter of Lawrence all powers vested in the mayor and aldermen and common council jointly are "to be exercised by concurrent vote, each board to have a negative upon the other;" the mayor presides in the board of aldermen, but his separate approval of an ordinance is not required, nor has he any veto power, as under the amended city charter of Boston. Sts. 1853, *c.* 70, §§ 6–8; 1854, *c.* 448, §§ 35, 47.

The passage of the repealing ordinance to be ordained by each branch of the city council is shown, as to the board of mayor and aldermen, by the certificate of the mayor, being the chairman of that board, and, as to the common council, by the certificate of its president. The departure from the provision of the joint rules and orders, which directs that every ordinance shall be passed first in the common council, does not affect its validity. *Bennett* v. *New Bedford*, 110 Mass. 433. *Holt* v. *City Council of Somerville*, 127 Mass. 408. *Judgment affirmed.*

GEORGE W. LIBBEY *vs.* CITY OF LAWRENCE.

Essex. Nov. 6, 1879. — Jan. 21, 1880. COLT & AMES, JJ., absent.

In an action by a police officer against a city for services rendered in 1877, at the rate of $2.25 a day and 25 cents for each hour of extra service, the case was submitted on agreed facts, which stated that by the charter of the city the mayor and aldermen had full power to appoint police officers and to remove them at pleasure; that all other municipal powers were vested in the mayor and aldermen and in the common council, to be exercised by concurrent vote; that in 1865 both boards passed a resolution fixing the pay of police officers at $2.25 a day; that in 1875 the rate for the year 1876 was fixed at $2.25 a day, and extra work at 25 cents an hour, and the police were paid at this rate until February 1877, when the mayor and aldermen adopted an order making the pay $2.00 a day, and extra work 20 cents an hour, at which rates the plaintiff had been paid for the rest of the year 1877. If the plaintiff was entitled to recover

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$2.25 a day, and 25 cents an hour for extra work, from February 12, 1877, judgment was to be entered for him for a certain sum; otherwise, for the defendant. *Held*, that, whether the order of 1877 was valid or not, the defendant was entitled to judgment.

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CONTRACT upon an account annexed for a balance alleged to be due for services as a police officer of the defendant. Answer, a general denial. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiff was duly appointed a police officer of the defendant on January 7, 1877, at the commencement of the municipal year, and was detailed for and performed regular patrol duty as night watchman until the appointment of a new police force upon the organization of the city government for 1878. He was paid at the rate of $2.25 per day of ten hours' service, and twenty-five cents for each hour of extra service until February 12, 1877, and thereafter at the rate of two dollars per day, and twenty cents per hour for extra time, he claiming that he was entitled to receive pay at the former rate. On November 14, 1865, the city council passed a joint resolution that "the pay of the night watch shall be at the rate of two dollars and twenty-five cents per night, commencing with the 1st day of September, 1865." In a joint resolution of the city council passed December 1, 1875, fixing the compensation of city officers for the year 1876, it was provided that "the compensation of the day police and night patrolmen shall be at the rate of two dollars and twenty-five cents per day of ten hours, when employed, payable monthly, extra hours and temporary service to be paid for at the rate of twenty-five cents for each hour." No other action appears to have been had by the city council in regard to the pay of the day or night police. From September 1, 1865, to February 12, 1877, the patrol police were paid at the rate of $2.25 per day and twenty-five cents for each additional hour of service.

On February 12, 1877, the board of mayor and aldermen adopted the following order: "That the pay of the regular day and night patrol shall be two dollars per day and twenty cents per hour for all extra time that they may be employed." Of this order the plaintiff had due notice.

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Since the organization of the city government under its charter in 1853, the police force has been appointed and reconstituted at the commencement of each municipal year, and has consisted of a regular day patrol and a regular night patrol.

Section 8 of the city charter provides as follows: "The executive power of the said city generally, and the administration of the police, with all the power heretofore vested in the selectmen of Lawrence, shall be vested in and may be exercised by the mayor and aldermen as fully as if the same were herein specially enumerated. The mayor and aldermen shall have full and exclusive power to appoint a constable and assistants, or a city marshal and assistants with the powers and duties of constables, and all other police officers, and the same to remove at pleasure. . . . All other powers now vested in the inhabitants of said town, and all powers granted by this act, shall be vested in the mayor and aldermen and common council of the said city, to be exercised by concurrent vote, each board to have a negative upon the other."

If, upon the above facts, the plaintiff was entitled to recover $2.25 per day, and twenty-five cents per hour for extra service, from and after February 12, 1877, during the rest of his employment, judgment was to be entered for him in the sum of $100 and interest; otherwise, judgment for the defendant.

J. K. Turbox, for the plaintiff.

E. T. Burley, for the defendant.

GRAY, C. J. We do not find it necessary to consider the question, argued at the bar, of the validity of the order of the mayor and aldermen of February 12, 1877; for the plaintiff has been paid at the rate mentioned in that order; there is no evidence before us of the value of his services; and the joint resolution passed by the city council in December 1875 fixed the compensation of officers for the year 1876 only, and he does not therefore show himself to be entitled to recover the compensation therein named for services performed in 1877, and, by the terms of the case stated, cannot maintain his action.

Judgment affirmed.

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HUGH COLLINGILL *vs.* CITY OF HAVERHILL.

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Essex. Nov. 5, 1879. — Jan. 22, 1880. AMES & SOULE, JJ., absent.

The facts that a dog, owned by and licensed in the name of the superintendent of a poor-farm of a city, is kept at the farm, with the knowledge of one of the overseers of the poor of the city, and, without objection by him, is fed with food furnished by the city for common use at the farm, and, during a portion of the time, is allowed the run of the farm, do not, as matter of law, show that the city is a keeper of the dog, within the Gen. Sts. c. 88, § 59.

TORT, under the Gen. Sts. *c.* 88, § 59, to recover double the amount of the damage sustained from the bite of a dog. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court, on appeal, on an agreed statement of facts in substance as follows:

The plaintiff, in pursuit of legitimate business, went to the poor-farm owned and used by the defendant, and was there bitten by a dog, which was owned by and licensed in the name of John W. Virgin, the superintendent of that farm. The dog was kept at the farm and in the apartments of the superintendent, with the knowledge of one of the overseers of the poor of the city, and, without objection by him, was fed with food furnished by the defendant for common use at the farm, and during a portion of the time was allowed the run of the farm. The superintendent was employed by the defendant, through the overseers of the poor, to superintend the management and working of the farm, subject to their order and approval, receiving therefor a stated salary, with house-rent and provisions for his family, and had a suite of rooms assigned to his family at the farm in a portion of the main house separate and apart from the paupers. The plaintiff was bitten in the entry of the superintendent's apartments, while walking towards that portion of the house.

If, upon the above facts, the plaintiff was entitled to recover, damages were to be assessed by a jury; otherwise, the plaintiff was to become nonsuit.

B. F. Brickett, for the plaintiff.

H. N. Merrill, for the defendant.

LORD, J. It has been so often held in this Commonwealth that the officers of a town in the exercise of their official duty

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are not the agents of the town, that we must seek for the liability of this defendant on some other ground than by the conduct of its officers in the discharge of their official duty. The plaintiff, aware of this, seeks to charge the city upon the ground that the dog by which he was bitten was kept upon its premises, by its servant, in the course of his employment, and so to bring the case within the decision of *Barrett* v. *Malden & Melrose Railroad*, 3 Allen, 101.

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The question in that case was whether there was evidence to submit to the jury upon the question whether the defendant, by its servants, was the keeper of the dog. In this case, the facts are all found, and such facts are not found as necessarily to create a liability on the part of the city. If the question of its liability depends upon an inference to be drawn from the facts, the court below has drawn that inference against the plaintiff; and we think rightly. There is nothing in the facts tending to show that the superintendent of the city farm was not both the owner and keeper of the dog; and although the facts find that "during a portion of the time" the dog "was allowed the run of the farm," there is no fact which shows or has any tendency to show that that "run of the farm" was for the benefit or in the interest of the defendant. *Judgment affirmed.*

HUMPHREY MOOAR *vs.* FREDERIC HARVEY.

Essex. Nov. 5, 1879. — Jan. 24, 1880. COLT & AMES, JJ., absent.

A person may change his domicil while in the military service.

Upon the issue of a change of domicil, the question of the party's intent, when his testimony is contradicted by other evidence, is one of fact for the jury.

CONTRACT upon four promissory notes, signed by the defendant, payable to the plaintiff, or order, on demand, and dated, respectively, October 19, 1861, December 14, 1861, February 19, 1862, and August 15, 1862. Writ dated July 23, 1877. Answer, the statute of limitations. After the former decision, reported 125 Mass. 574, the case was tried in the Superior

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Court, before *Pitman*, J., who, after a verdict for the plaintiff, allowed a bill of exceptions, the substance of which appears in the opinion.

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E. J. Sherman & C. U. Bell, for the defendant.

W. S. Knox, for the plaintiff.

MORTON, J. The only issue presented in this case was whether the defendant had changed his domicil from Lawrence to Washington before six years had elapsed after the date of the notes in suit. Gen. Sts. *c.* 155, § 9.

It appeared at the trial that in 1862 he had his domicil in Lawrence; that he then enlisted in the army, served for a year, was discharged, and reënlisted for a term of five years; that, in February 1864, he was detailed as a book-keeper in the Surgeon General's office in Washington; that in 1869 he was appointed a clerk in the Treasury Department in Washington, which office he now holds; and that, since February 1864, he has lived in Washington. The six years which would bar the latest of the notes in suit expired August 15, 1868. Up to that time, the defendant was in the military service subject to the orders of his superior officers, but it is not true, as contended by his counsel, that therefore he could not gain a new domicil in any place to which he was ordered. In all matters not involved in his military duties, he was *sui juris*, and had the capacity to change his domicil to any place if he saw fit. The jury would be justified in finding that, since 1864, he has actually lived in Washington, with short occasional absences. This is one essential element of domicil in Washington.

The remaining element is the intent with which he lived there. The burden was upon the plaintiff to prove that he lived there with the intent to make it his home or domicil; and the only exception now insisted upon is to the ruling of the court that there was sufficient evidence to be submitted to the jury upon this question. But, as we have before said, he lived in Washington, and all the outward *indicia* which usually determine the domicil of a person pointed to that place as the place where he resided and had his home. The evidence tended to show that he had not paid taxes nor voted in Lawrence since 1862. This failure to perform the duties and avail himself of the privileges of a citizen is a significant fact pointing to a change of

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domicil. There was evidence that he had admitted that he had "resided in Washington" since 1864. It is true, he testified that he did not intend to change his domicil to Washington, but he was contradicted upon material points by other witnesses, and it was exclusively within the province of the jury to determine the weight his testimony was entitled to. What was his intent was a question of fact to be decided upon all the evidence in the case, and we are of opinion that, upon the evidence in this case, this question could not properly have been taken from the jury.

Exceptions overruled.

HENRY H. GREEN *vs.* BOSTON & LOWELL RAILROAD COMPANY.

Essex. Nov. 6, 1879. — Jan. 24, 1880. COLT & AMES, JJ., absent.

In an action against a railroad corporation for the loss of property entrusted to it for carriage, statements made, orally or in letters, to the plaintiff by the defendant's freight agent, to whom the property was delivered, relating to the investigation of the loss, and showing that the property had been in the defendant's possession, are admissible in evidence against the defendant.

In an action against a railroad corporation for the loss of a case of goods entrusted to it for carriage, the defendant's freight agent, to whom the case was delivered, was called as a witness by the plaintiff, and on cross-examination was asked "if he had any authority to take such goods as this case contained." *Held*, that the question was rightly excluded.

This clause in a carrier's contract, "Specie, drafts, bank-bills and other articles of great intrinsic or representative value, will only be taken upon a representation of their value and by a special agreement assented to by the superintendent," does not apply to a family portrait, contained in a wooden case.

In an action against a railroad corporation for the loss of a case containing a portrait of the plaintiff's father, entrusted to the corporation for carriage, the measure of damages is the actual value of the portrait to the plaintiff, and not the market value; and evidence that he had no other portrait of his father is admissible.

In an action against a railroad corporation for the loss of a case of goods entrusted to it for carriage, there was evidence that the case, together with other goods filling two cars, was delivered to the defendant at L. to be transported to P., whence it was to be carried by a line of steamers to A.; that the two cars were received by the agents of the steamer from the defendant "unopened and just as they were received," and were kept on their wharf carefully watched and guarded until the goods were transferred to the steamer; and that, on

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unloading the cars, it was found that the case was not in either car. The defendant asked the judge to rule that there was no evidence of the loss of the case between L. and the depot at P. *Held*, that this ruling was rightly refused.

No exception lies to the refusal of a judge to instruct the jury as to what might be the effect of one fact taken separately, when it is accompanied and connected with other facts tending to establish the main issue.

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CONTRACT against a common carrier to recover the value of an oil painting, the portrait of the plaintiff's father. Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

The portrait was delivered by the plaintiff to the defendant at Lawrence, boxed in a rough board case, to be carried with a large amount of household furniture over the defendant's road, and other roads connecting with it, to Providence, Rhode Island.

The plaintiff put in evidence the written contract of transportation with the defendant, dated September 17, 1875, which enumerated the goods received from the plaintiff, marked "H. H. Green, Philadelphia, Penn., via Clyde Line from Providence," agreed to deliver them to the plaintiff, or order, at the defendant's depot in Providence, and contained the following provision: "No responsibility will be admitted, under any circumstances, to a greater amount upon any single article of freight than $200, unless upon notice of such amount, and a special agreement therefor. Specie, drafts, bank-bills and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent." No notice of the contents of the case was ever given to the defendant, and the defendant had no knowledge of its contents until a claim was made for its loss, and no special agreement other than the above contract was made.

The plaintiff testified that he had never received the portrait; that, about two months after the goods were delivered to the defendant, he had a conversation with Abiel Rolfe, the defendant's freight-agent at Lawrence, who said that the defendant had been trying to find the missing case, but so far was unable to do so; that "we or the Clyde Line will have to pay for it," and "we have delivered it to the Clyde Line." This conversation was admitted, against the defendant's objection. The

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plaintiff also testified, against the defendant's objection, that he had no other portrait of his father.

One Tabor testified, for the plaintiff, that he had charge of the railroad freight of the Clyde Line in Providence in 1875; that he unloaded the cars containing the plaintiff's goods on September 23, 1875, on the wharf of the Clyde Line at Providence; that he could not now remember how long the cars had been on the wharf before he unloaded them; that he did not know whether, when he went to unload them, the doors of the cars were fastened or not; that the case described by the plaintiff was not in the cars with the other goods of the plaintiff, and he never saw the case; that the wharf of the Clyde Line was about two hundred feet long by sixty feet wide; that it was enclosed by a high board fence, and the gate was securely locked at night; and that a watchman was at all times upon the wharf.

Abiel Rolfe testified, for the plaintiff, that he was the freight agent of the defendant at Lawrence; that he had no doubt he signed the contract of shipment; that he attended personally to the loading of the plaintiff's goods, which were put into two cars; that he remembered the case described by the plaintiff; that the car doors were closed and secured by nailing strips of board behind them, so that they could not be opened without removing the strips; that the cars went over the defendant's road to Ayer Junction, thence over the Nashua & Worcester Railroad to Worcester, and thence over the Providence & Worcester road to their depot in Providence; and that the defendant had no depot in Providence. He was then asked, by the defendant, if he had any authority to take such goods as this case contained. This question was objected to by the plaintiff, and excluded.

The plaintiff also put in evidence two letters to him, one from Rolfe, and the other from J. S. Lincoln, the general freight agent of the defendant. The letter from Rolfe, dated January 10, 1875, stated that the cars were not opened until they arrived in Providence; and that the writer was convinced that the case was somewhere between Providence and Philadelphia, or in Philadelphia. It also contained this sentence: "We, of course, have to account for the case, but would ask you to delay a short time longer, in order to give further opportunity to look for it." The letter from Lincoln, dated January 28, 1876, was as follows:

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"Your favor of 6th and 18th, relative to loss of a box from the shipment of your household goods, from Lawrence, Sept. 17th, is received. I have traced the line of roads from Lawrence to Providence, for this missing box, and am well satisfied it was delivered with the other goods to the Clyde Line at Providence; this freight left Lawrence 3.20 P. M. on the 17th of Sept., and was delivered to Clyde Line at 3 P. M. on the 18th, in season for the boat of that date, which was Saturday, and the goods were not forwarded until the next Wednesday, or the 22d, they remaining in the cars on the track, from the afternoon of the 18th, notwithstanding the tracer is indorsed by them 'no delay at Providence,' and I must respectfully refer you, for the adjustment of your claim, to the agent of the Clyde Line."

The defendant put in evidence tending to show that the cars were not opened between Lawrence and Worcester, or between Providence and the wharf of the Clyde Line at that place; but there was no evidence from any one who accompanied the cars from Worcester to Providence. The plaintiff made no claim to recover an amount exceeding $200.

The defendant asked the judge to rule as follows: "1. No notice or representation of the contents of the box claimed to be lost, nor any representation of the value of the oil painting contained in said box having been given to the defendant, and no special agreement for its transportation having been made, the defendant is not liable under the contract produced by the plaintiff. 2. Under the contract put in by the plaintiff, he cannot recover for the oil painting, unless he made representation of its value, and without a special agreement assented to by the superintendent. 3. By the contract shown by the plaintiff, the defendant was not bound to deliver any of the goods mentioned in said contract except at their freight depot in Providence, or at the depot in Providence of the connecting road by which said goods were forwarded. 4. The mere fact that the goods were not received by the Clyde Line of steamers from Providence is not evidence that the goods were lost before they arrived at the depot in Providence. 5. The plaintiff can recover only a fair market value of the article lost. 6. There was no evidence of the loss of the case between Lawrence and the depot at Providence."

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The judge declined to give any of the above rulings except the third; as to the fourth, he declined to give it, on the ground that the defendant was not entitled to a ruling as to the effect of a certain fact alone, when the same fact was accompanied or surrounded by other facts and circumstances in proof; and full instructions were given which were not excepted to.

The jury returned a verdict for the plaintiff for $200; and the defendant alleged exceptions.

D. Saunders & C. G. Saunders, for the defendant.

A. C. Stone, (*C. U. Bell* with him,) for the plaintiff.

MORTON, J. 1. The bill of exceptions does not show any error in the admission in evidence of the plaintiff's conversation with Rolfe. He was the freight agent of the defendant, who made the contract with the plaintiff, and was the person to whom the plaintiff might properly apply to account for the missing case. Statements made by him in the course of investigating the matter of the loss would be declarations within the scope of his agency, and admissible against the defendant. *Lane* v. *Boston & Albany Railroad*, 112 Mass. 455. The defendant contends that the statement made in the conversation, that "we or the Clyde Line will have to pay for it," was not within this rule, because it was a mere admission of the liability of the defendant. But it was accompanied by a statement that "we have delivered it to the Clyde Line," and was thus a denial of the defendant's liability. It contained an implied admission that the case had been delivered to the defendant, and in this view was competent, even if it had been an admission of the defendant's liability. For the same reasons, the letters of Rolfe and of Lincoln were properly admitted.

2. Rolfe was produced as a witness by the plaintiff, and, upon cross-examination, the defendant asked him "if he had any authority to take such goods as this case contained." This question was rightly excluded by the court. Rolfe was the freight agent of the defendant at Lawrence, held out to the world as authorized to receive goods and to make contracts for their transportation. There is nothing to show that the plaintiff had notice of any limitation of his authority. He had the right to assume that Rolfe had the general authority implied by his

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position, and is not affected by any private instructions limiting that authority.

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3. The contract between the parties contains the following provision: "No responsibility will be admitted, under any circumstances, to a greater amount, upon any single article of freight, than $200, unless upon notice of such amount and a special agreement therefor. Specie, drafts, bank-bills and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent." The defendant asked the judge to rule that, as the plaintiff had not given notice of the value of the lost case, and had made no special agreement as to its transportation, assented to by the superintendent, he could not recover.

The plaintiff admitted that the first clause of this provision applied to this case, and claimed and recovered only a verdict for $200. The other clause does not specify portraits as articles which will be taken only upon a representation of their value and a special agreement. It specifies "specie, drafts, and bank-bills." In determining the meaning of the words "other articles of great intrinsic or representative value," the rule *noscitur a sociis* applies; the general words following the particular enumeration must be held to include only articles of the like kind.

A portrait is not an article of great intrinsic or representative value, like specie or drafts or bank-bills, and therefore the Superior Court rightly refused to rule as requested in the first and second prayers of the defendant.

4. The defendant asked the court to rule that "the plaintiff can recover only a fair market value of the article lost." The general rule of damages in trover, and in contract for not delivering goods, undoubtedly is the fair market value of the goods. But this rule does not apply when the article sued for is not marketable property. To instruct a jury that the measure of damages for the conversion or loss of a family portrait is its market value would be merely delusive. It cannot with any propriety be said to have any market value. The just rule of damages is the actual value to him who owns it, taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its

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value to the owner. *Stickney* v. *Allen*, 10 Gray, 352. The court properly refused to give the instruction requested, and we are to presume gave proper instructions instead thereof. This being the rule of damages, the testimony of the plaintiff that he had no other portrait of his father would bear upon the question of its actual value to him and was competent.

5. The defendant requested the judge to rule that there was no evidence of the loss of the case between Lawrence and the depot at Providence. But there was evidence that the case, together with other household furniture filling two cars, was delivered to the defendant at Lawrence, to be transported to Providence, whence it was to be carried by the "Clyde Line" to Philadelphia; that the two cars were received by the agents of the Clyde Line from the defendant, "unopened and just as they were received from the north," and were kept on their wharf carefully watched and guarded, until the goods were transferred to the steamer; and that, on unloading the cars, it was found that the case containing the portrait was not in either car. It was the exclusive province of the jury to judge of the credit and weight of this testimony. If it satisfied them that the case was not lost after the cars reached Providence, the necessary inference was, either that it was not put into the car at Lawrence, or that it was lost between Lawrence and Providence. The instruction requested, therefore, was rightly refused.

6. The judge also rightly refused to instruct the jury, as requested in the fourth prayer, that "the mere fact that the goods were not received by the Clyde Line of steamers from Providence is not evidence that the goods were lost before they arrived at the depot in Providence." The judge was not required to instruct the jury as to what might be the effect of one fact taken separately, when it was accompanied and connected with other facts tending to establish the main issue. *Packer* v. *Hinckley Locomotive Works*, 122 Mass. 484.

We have thus considered all the points upon which the defendant now insists, and find no reason for setting aside the verdict.

Exceptions overruled.

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WILLIAM S. DENNY *vs.* LUCIUS MERRIFIELD.

Suffolk. March 11, 1879. — Jan. 12, 1880. MORTON & ENDICOTT, JJ., absent.

Proceedings of composition under the U. S. St. of June 22, 1874, § 17, followed by payment or tender of the sums due, bar the rendering of any judgment against the debtor personally in an action by a creditor, whose debt is described in the statement of the debtor, and would be barred by a certificate of discharge in bankruptcy.

The St. of 1875, *c.* 68, authorizing the entry of a special judgment for the purpose of charging the sureties on a bond given to dissolve an attachment, if the defendant is "adjudged a bankrupt," and the attachment is "not made within four months next preceding the commencement of proceedings in bankruptcy," does not warrant the entry of such a judgment when the attachment is made within the four months, and there is no assignment in bankruptcy, and the debtor is discharged by proceedings of composition under the U. S. St. of June 22, 1874, § 17, whether he is or is not adjudged a bankrupt.

CONTRACT for money had and received. Answer, a composition in bankruptcy under the U. S. St. of June 22, 1874, § 17. Trial in the Superior Court, without a jury, before *Aldrich*, J., who reported the case for the determination of this court in substance as follows:

The debt sued on was a valid debt due from the defendant to the plaintiff. The action was commenced on January 31, 1878, by an attachment of the defendant's property, which was sufficient, and the attaching officer had in his hands, when this action was entered, money enough to pay the plaintiff's claim in full. On February 21, 1878, the defendant filed his petition in bankruptcy in the District Court of the United States for the District of Massachusetts, but no hearing was ever had on the petition, nor was the defendant ever adjudged a bankrupt, nor an assignee of his estate chosen. At the time of filing his petition in bankruptcy, the defendant also filed, under the U. S. St. of June 22, 1874, § 17, an offer of composition with his creditors at the rate of twenty per cent, which, after due notice, was accepted by a resolution passed and signed by the requisite majority of his creditors, and, on March 23, 1878, was approved and recorded by the court. The plaintiff's name and the amount of his claim were placed upon the list of the creditors, and proper notices were sent to him. The defendant has fully complied with and carried out the terms of the composition

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with his other creditors, and duly tendered to the plaintiff a sum which was twenty per cent of his claim, which the plaintiff refused to accept. The plaintiff attended none of the composition meetings, and took no part in any of those proceedings.

On April 16, 1878, the defendant filed with the clerk of the court a bond with sureties, approved by the plaintiff's attorney, to discharge the attachment, the condition of which was that the defendant should, within thirty days after the final judgment in such action, pay to the plaintiff the amount, if any, which he should recover, and that the sureties should also, within thirty days after the entry of any special judgment in such action, pay to the plaintiff the sum, if any, for which such judgment should be entered; and the officer surrendered the property attached to the defendant.

The plaintiff objected to the admissibility of the bond in evidence, but the judge admitted it. The plaintiff contended that he was entitled to a judgment against the defendant, or a judgment against the property attached, or a special judgment, or such a judgment as would enable him to proceed against the sureties on the bond. But the judge ordered judgment for the defendant.

If the bond was inadmissible, and without it the plaintiff was entitled to judgment, such judgment was to be entered. If the plaintiff was entitled to any kind of judgment, such judgment was to be entered; otherwise, judgment for the defendant.

F. S. Hesseltine & F. A. Dearborn, (*W. W. Carruth* with them,) for the plaintiff.

D. Manning, Jr., for the defendant.

GRAY, C. J. The U. S. St. of June 22, 1874, § 17, allows a creditor, holding collateral security for his debt, to share in the proceedings of composition, only to the excess of the debt above the security, or upon surrendering the security for the benefit of the estate; and makes the composition binding upon all debts, whether secured or unsecured, which are duly described in the statement of the debtor, and are of such a nature that they would be barred by a certificate of discharge in bankruptcy. *Mudge* v. *Wilmot*, 124 Mass. 493. *Leggett* v. *Barton*, 11 Vroom, 83. The composition, followed by payment or tender of the sums due according to it, therefore discharged the

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defendant from personal liability to the plaintiff, and the plaintiff is not entitled to a general judgment.

As no assignment in bankruptcy was ever made, the proceedings did not discharge the plaintiff's attachment, and would not have prevented the plaintiff, if the property attached had remained subject to the lien created by the attachment, from taking special judgment against that property for the purpose of giving effect to that lien. *Ray* v. *Wight*, 119 Mass. 426. *Sage* v. *Heller*, 124 Mass. 213. *Alsop* v. *White*, 45 Conn. 499.

But the attachment having been dissolved and the property surrendered to the defendant upon his giving bond for the payment of any judgment recovered in the action, the property attached is no longer bound by the attachment, and consequently no special judgment against the property can be entered.

The remaining question is, whether a special judgment can be given for the plaintiff for the purpose of charging the sureties on that bond. If the bond had been in the ordinary form of a bond to dissolve an attachment, such as was in use in this Commonwealth before the passage of the St. of 1875, *c.* 68, no such special judgment could have been rendered. The plaintiff's rights, therefore, depend upon the construction of this statute. *Barnstable Savings Bank* v. *Higgins*, 124 Mass. 115, and cases cited.

Proceedings for a composition under the act of Congress of 1874 may be had at any time after the filing of a petition in bankruptcy, "whether an adjudication in bankruptcy shall have been had or not;" and, as already stated, do not, unless there has been an assignment in bankruptcy, dissolve attachments, though made within four months before the filing of the petition. The St. of 1875, *c.* 68, passed nine months later, authorizes the entry of a special judgment, for the purpose of charging the sureties on a bond given to dissolve an attachment, only in cases in which both the defendant "has already been or afterwards is adjudged a bankrupt," and the attachment is "not made within four months next preceding the commencement of proceedings in bankruptcy." This statute cannot, consistently with its explicit provisions, be construed to include cases like that before us, in which there has been no adjudication of bankruptcy, nor assignment in bankruptcy, nor attachment made more than four months before the filing of the petition.

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If we were sitting as legislators, we might yield to the suggestion that the reasons are no less strong for allowing such a special judgment to be entered in every case in which proceedings in bankruptcy are had for the distribution of a debtor's property among his creditors and for his discharge from his debts by way of composition, than in the case in which he is adjudged a bankrupt and the subsequent proceedings are in the ordinary form; and in a case in which the attachment, though made within four months before the commencement of proceedings in bankruptcy, fails to be dissolved because no assignment in bankruptcy is made, than in one in which, notwithstanding such an assignment, the attachment remains in force because made more than four months before the commencement of such proceedings. But, sitting as judges, we cannot extend the statute by construction to cases which, though they may appear to be within its reason, do not satisfy the conditions clearly prescribed and defined by its language. *Jacob* v. *United States*, 1 Brock. 520. *Denn* v. *Reid*, 10 Pet. 524, 527. *Putnam* v. *Longley*, 11 Pick. 487, 490. *Judgment for the defendant.**

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* A similar decision was made on the same day in Bristol in the case of

J. F. COMSTOCK & others *vs.* JATHNIEL C. PECK.

CONTRACT for goods sold and delivered. Writ dated March 19, 1878, returnable to the Superior Court. An attachment was made the same day, which was dissolved two days afterwards by the defendant giving a bond with sureties, containing the condition prescribed by the St. of 1875, *c.* 68. On March 23, 1878, the defendant filed a petition in bankruptcy, and was adjudged a bankrupt; but no assignee was appointed, and subsequently a resolution of composition with the creditors was adopted by the creditors, and duly recorded; but the plaintiffs took no part in these proceedings. The creditors other than the plaintiffs were paid according to the terms of the composition, and the amount due the plaintiffs thereby was tendered to them. At March term 1879, *Allen*, J., on motion of the plaintiffs, ordered a special judgment to be entered for them; and the defendant alleged exceptions.

W. H. Fox, for the defendant.

E. H. Bennett & W. E. Fuller, for the plaintiffs.

GRAY, C. J. In this case, argued while that of *Denny* v. *Merrifield*, *supra*, has been under advisement, although the defendant has been adjudged a bankrupt, yet the attachment having been made less than four months before the commencement of proceedings in bankruptcy, the case is not within the St. of 1875, *c.* 68. *Exceptions sustained.*

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EDWARD FITZGERALD *vs.* CHARLES E. ALLEN & another.

Suffolk. Nov. 11, 1879. — Jan. 12, 1880. MORTON & SOULE, JJ., absent.

A person, who performs work for another under a special contract, which reserves to the latter the right to cancel the contract, is entitled, after such cancellation, to recover, upon a *quantum meruit*, the full value of his work up to that time, although the contract provides that the amount of the first month's work is to be retained as security for the faithful performance of the work.

CONTRACT in three counts. The first count was on a written contract, by the terms of which the plaintiff agreed to lay all the concrete required on "Section A" of the Sudbury River conduit for the sum of seventy-five cents per cubic yard, and to furnish all tools and labor necessary to do the work; the defendants agreed to furnish the materials for the work, which was to be done according to the plans and specifications for "Section A," and to the full satisfaction of the engineers and inspectors and entire acceptance of the Boston Water Board; any work not done to their satisfaction to be taken up and relaid at the expense of the plaintiff; the first full month's estimate to be held by the defendants as security for the faithful performance of the work; and the defendants reserved the right to cancel the contract, if so ordered by the engineer. The second count was on an account annexed for extra work done under the contract. The third count was on a *quantum meruit* for work done under the contract up to the time when it was cancelled by the defendants.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff did not claim to recover on the first count.

It appeared in evidence that the defendants had contracted with the city of Boston to build "Section A" of the Sudbury River conduit, and the work covered by the plaintiff's contract was a portion thereof; that by the contract with the city the defendants were bound to build the section to the entire acceptance of the Boston Water Board, and to take up and rebuild any part of it, at their own expense, that might be directed by the board at any time before the final acceptance by them, and the city retained fifteen per cent of the contract price to secure performance; that the first month's estimate of work

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done under the plaintiff's contract amounted to $192, and this sum had been retained by the defendants under the provisions of the contract until the work should be accepted by the Water Board, which had never yet been done; that the engineer had ordered the discharge of the plaintiff, because he was not satisfied with his work; and that the section had not been completed, and, by the terms of the defendants' contract with the city, it was not to be accepted until the whole of it was completed.

The defendants contended that the action could not be maintained upon the *quantum meruit*, or not until the whole work was completed and accepted by the Boston Water Board; and that in any case they were entitled to retain the amount of the first month's estimate until the whole work was completed and passed upon by the Water Board.

The judge instructed the jury to find the whole amount due the plaintiff, and deduct therefrom $192, the amount due for the first month's work. The jury found, that, after deducting the $192, there was due to the plaintiff $111.78; they also found, specially, that the value of the work and materials furnished by the plaintiff before his discharge was worth the amount claimed. The plaintiff alleged exceptions to the above ruling.

It was agreed that, if the plaintiff was entitled to recover on the third count, and the ruling of the judge directing the jury to deduct the amount of the first month's estimate was incorrect, the verdict of the jury should be amended and stand for the sum of $303.78.

J. R. Murphy, for the plaintiff.

F. P. Goulding & F. H. Dewey, Jr., for the defendants.

LORD, J. It was error in the presiding judge to direct the $192 to be deducted from the value of the labor and materials. The plaintiff commenced to work under a written contract; and, while that contract was in force, his rights, remedies and liabilities were all to be determined by the terms of that contract; but, when that contract was wholly terminated, his rights would depend upon the mode in which it was terminated. It may have been terminated by his own voluntary refusal to continue to perform it, or by the absolute prohibition of the defendants to permit him to perform it, or by his absolute inability

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by act of God or otherwise, to continue its performance, or by the mutual consent of the parties, or by a termination, as in this case, under a power reserved by the terms of the contract itself.

The rule laid down in *Hayward* v. *Leonard*, 7 Pick. 181, has been constantly recognized by this court, and has been approved as often as recognized, as founded in right and equity. *Hayward* v. *Leonard* was followed by *Smith* v. *Lowell Meeting-House*, 8 Pick. 178, *Moulton* v. *Trask*, 9 Met. 577, *Snow* v. *Ware*, 13 Met. 42, and *Atkins* v. *Barnstable*, 97 Mass. 428. The result of the cases is, that, if the special contract is terminated by any means other than the voluntary refusal of the plaintiff to perform the same upon his part, and the defendant has actually received benefit from the labor performed and materials furnished by the plaintiff, the value of such labor and materials may be recovered upon a count upon a *quantum meruit*, in which case the actual benefit which the defendant receives from the plaintiff is to be paid for, independently of the terms of the contract. The contract itself is at an end. Its stipulations are as if they had not existed. But this does not imply that the contract may not be put in evidence, and its terms referred to, upon the question of the real value to the defendant of the plaintiff's labor and materials. If the time of performance is extended very far beyond the time fixed by the contract, if the materials furnished are of a very different quality from that provided for by the contract, these facts have necessarily a bearing upon the real value of the services and labor. The original contract price, too, is an important element in determining the value of the labor and materials; and the proportion in value which the work done bears to the whole value of the contract labor and materials is also important in determining the *quantum meruit*.

It follows that, upon the authorities in this Commonwealth, the plaintiff was entitled to recover what, under all the circumstances of the case, his labor and materials were actually worth. And, as we understand that no objection was made by either party to the rules which the presiding judge laid down to guide the jury in determining the value of the labor and materials, there was no other error in the trial than the deduction of the $192; and, by the agreement of the parties, as it

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appears by the bill of exceptions, the verdict is to be amended by the addition of that sum, and judgment is to be entered for the amount of the amended verdict. *Judgment accordingly.*

JAMES SULLIVAN *vs.* JAMES H. LANGLEY & others, & trustee.

Suffolk. Nov. 11, 1879. — Jan. 12, 1880. MORTON & SOULE, JJ., absent.

A writ, in which A. alone was the defendant, was served upon a bank as trustee, which answered that, at the time of service, it had standing on its books a certain sum to the credit of A. & Company. The writ was afterwards amended by joining B. as a defendant, and subsequently a special precept, under the St. of 1876, c. 167, was served on the trustee. The trustee still continued to hold the fund, and it was conceded that A. and B. composed the firm of A. & Company, and that the fund belonged to them. More than four months after the amendment, but within four months of the issuing of the special precept, A. and B. filed a petition in bankruptcy and were adjudged bankrupts, and an assignment of their joint and separate estate was made to C., who came in as a claimant of the fnnd in the hands of the trustee. *Held*, that the previous attachment became valid by the amendment, and the trustee was at once chargeable upon its original answer, independently of the subsequent attachment on the special precept; and that the assignment in bankruptcy did not discharge the attachment.

TORT for fraudulent representations by which the plaintiff was induced to give his promissory note for $1000 payable to James H. Langley. Writ dated April 7, 1874, returnable to the Superior Court, against Langley and Jesse F. Alderman as principal defendants, and the Boston Five Cents Savings Bank as trustee.

At the first term, the trustee filed an answer stating that, at the time of the service of the writ, there was standing upon its books the sum of $1000, and no more, to the credit of J. F. Alderman & Company, but whether they were the defendants it did not know, and that otherwise it had no goods, effects or credits in its hands belonging to any person by the name of James H. Langley or Jesse F. Alderman.

At July term 1875, the plaintiff was allowed to amend his writ by joining Edgar S. Bristol as a defendant, and a summons was issued to him; and, at October term 1875, he appeared, and

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upon a trial a verdict was rendered for the plaintiff against all the defendants, and they alleged exceptions, which were overruled by this court. See 120 Mass. 437.

In June 1876, the trustee was charged upon its answer, and appealed to this court, which, on December 2, 1876, set aside the judgment charging the trustee, and ordered the case to stand for further hearing in the Superior Court.

On December 4, 1876, the plaintiff, in order to perfect his attachment, and to cure any defect that might exist therein by reason of the fact that Bristol had been joined as a defendant after the case was pending in court and after service on the trustee, moved for and obtained from the Superior Court a special precept, under the St. of 1876, *c.* 167, to attach the goods, effects and credits in the hands of the trustee, belonging to the defendants or any of them, which precept was served on the trustee on December 5, 1876. On January 12, 1877, the trustee filed an answer stating that, at the time of the service of this precept, it had standing upon its books to the credit of J. F. Alderman & Company the sum of $1284.54, and no more, consisting of the sum of $1000 disclosed in its former answer, and of interest since accrued thereon, and that it did not know who composed that firm.

On April 5, 1877, Alderman and Bristol filed a petition in bankruptcy, and on the same day were adjudged bankrupts by the District Court of the United States. On May 23, 1877, William F. Slocum was duly chosen their assignee, and an assignment of their joint and separate estate was made to him.

At April term 1878, the assignee in bankruptcy was admitted as a claimant of the fund in the hands of the trustee. At the trial of the validity of his claim, before *Putnam*, J., the above facts appeared, and it was conceded that the defendants Alderman and Bristol composed the firm of J. F. Alderman & Company, and that the fund in the hands of the trustee belonged to them. The plaintiff asked the judge to rule that the original attachment was valid, and that it was perfected and made good by the amendment of the writ and by the special attachment. But the judge declined so to rule; and ruled that the attachment was dissolved, and the fund passed to the claimant by virtue of the assignment in bankruptcy; and found for the

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claimant and discharged the trustee. The plaintiff alleged exceptions.

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C. H. Hudson & E. W. Sanborn, for the plaintiff.

W. F. Slocum, pro se.

GRAY, C. J. The first service upon the trustee of a writ in which Alderman, but no partner of his, was then a principal defendant, did not indeed create a valid attachment of the debt due from the trustee to the partnership of J. F. Alderman & Company. *Hawes* v. *Waltham*, 18 Pick. 451. *Hoyt* v. *Robinson*, 10 Gray, 371. *Bulfinch* v. *Winchenbach*, 3 Allen, 161. But, as soon as the writ was amended by joining Bristol as a defendant, the trustee still continuing to hold the fund, then, all the necessary parties being before the court, no rights of other persons having intervened, and it being conceded that the two defendants, Alderman and Bristol, composed the firm of J. F. Alderman & Company, and that the fund belongs to them, the previous attachment became valid, and the trustee was at once chargeable upon its original answer, independently of the subsequent attachment on a special precept issued under the St. of 1876, *c.* 167. Gen. Sts. *c.* 129, § 41. *West* v. *Platt*, 116 Mass. 308. *Terry* v. *Sisson*, 125 Mass. 560. *Wright* v. *Herrick*, 125 Mass. 154.

When this case was last before us this point was left undecided, because the attachment on the special precept was of itself sufficient to hold the fund, in the absence of any evidence of an assignment in bankruptcy. *Sullivan* v. *Langley*, 124 Mass. 264. The proceedings in bankruptcy having been commenced more than four months after the amendment by virtue of which the first attachment became valid, the assignment now proved clearly does not discharge the first attachment.

In the decision made by this court in 1876, mentioned in the bill of exceptions, (but not published in the reports, because it determined no question of law argued by counsel or which seemed to be of any importance as a precedent,) a judgment charging the trustee was set aside, and the case ordered to stand for further proceedings in the Superior Court, because the record then brought up contained nothing but the trustee's answer, which did not disclose the facts, now conceded, that Alderman and Bristol composed the firm of J. F. Alderman & Company,

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and that the fund in the trustee's hands belonged to them, and it did not appear whether the decision of the court below was upon that answer alone, or upon additional allegations of the plaintiff.

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The result is, that the Superior Court, upon the case as now presented, erred in refusing to rule that the original attachment of the fund in the trustee's hands was valid, and in ruling that the fund passed to the claimant by the assignment in bankruptcy, and therefore discharging the trustee. *Exceptions sustained.*

FRANK A. GOELL *vs.* J. M. SMITH.

Suffolk. Nov. 12, 1879. — Jan. 19, 1880. MORTON & SOULE, JJ., absent.

Where the violation of the terms of a lease or bailment of a chattel tends to show the assumption of dominion over, and ownership of, the chattel, by the lessee or bailee, this is evidence of a conversion of the chattel.

TORT for the conversion of a horse. Trial in the Superior Court, without a jury, before *Putnam*, J., who found the following facts:

In October 1875, the plaintiff, who lived in Nahant, agreed with the defendant, who kept a livery-stable and riding-school in Boston, that the latter might take the plaintiff's horse to Boston and have the use of him until April 1, 1876, unless the plaintiff in the mean time sold the horse or took him away. The defendant was to have the use of the horse for his board and keeping, but he was to use him only in the ring in his riding-school, and was not to use him on the road. It was further agreed between them that the defendant might have the right to sell the horse for the plaintiff if he could do so, paying to the plaintiff the sum of $250 out of the purchase money, and retaining the balance, if any, himself. The defendant took the horse to Boston and put him into his livery-stable upon these terms. In March 1876, the defendant let the horse for hire, to be used upon the road for pleasure driving, to a person who rode him

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under the saddle, and, while being thus used, the horse ran away and was killed.

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Upon these facts, the defendant contended, and asked the judge to rule, that the action would not lie. The judge declined so to rule, found that there was a conversion, and ordered judgment for the plaintiff. The defendant alleged exceptions.

E. M. Bigelow, for the defendant.

G. L. Huntress, (*S. B. Ives, Jr.* with him,) for the plaintiff.

LORD, J. In this case, the only question of law raised at the trial appears thus: "Upon these facts the defendant contended, and asked the judge to rule, that the action would not lie."

The judge, sitting without a jury, declined to make this ruling, but found as a fact that there was a conversion of the horse. The evidence is not reported with the view of determining whether there was any evidence of a conversion. It is entirely clear that all the facts which are reported are consistent with and have some tendency to prove a conversion; and whether in law they required the judge to find a conversion depended, not only upon the acts, but the motives, intentions and purposes of the party performing the acts. Even if it be assumed that the facts proved did not of themselves necessarily in law demand a finding of a conversion, they are certainly competent evidence tending to show a conversion, and it cannot be said, as matter of law, that the judge had no right to find a conversion. If the presiding judge had ruled, as matter of law, that the facts stated in the report, without regard to the motives, purposes, or intentions of the defendant, would have been a conversion, the very elaborate argument of the defendant's counsel would have been pertinent and appropriate. But none of the propositions of law for which the defendant contends were adversely ruled upon; and upon a state of the evidence which might have justified a finding of a conversion or which might have been consistent with no conversion, the judge simply declined to rule, as matter of law, that the action would not lie, but found, as matter of fact, an actual conversion by the defendant. To this finding there is no legal exception. We may assume that the owner of a chattel may part with his possession of it upon an agreement of lease or bailment, some of the terms of which may be violated and yet there be no conversion of the property. But where the

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violation of the terms of the agreement tends to show the assumption of dominion over, and ownership of, the chattel, it is evidence tending to show a conversion of it to his own use by the lessee or bailee; and it is a question of fact, under well-recognized rules of law, and not simply a question of law, whether he had converted it to his own use; and the decision of a competent tribunal to settle that fact cannot be revised by the court when there is evidence to sustain it.

Exceptions overruled.

LUTHER A. WRIGHT & others *vs.* HORATIO G. HERRICK.

Suffolk. Nov. 13, 1879. — Jan. 19, 1880. MORTON & SOULE, JJ., absent.

A. bought goods of B., informing him that the business was his, and that it would be carried on by C. in A.'s name. Subsequently C. formed a partnership with another person, and A. revoked C.'s agency, and directed him not to use his name, and had no more connection with or knowledge of the business or the name in which it was carried on by C. and his partner. A. gave no notice of any change to B., who, without notice or knowledge of the change, continued in good faith to sell goods to the firm on the credit of A. The firm also bought goods of D., who gave credit to A. B. brought an action against A. and attached goods as his property. D. afterwards brought an action against C. and his partner, doing business under the name of A., and attached the same goods. B. was then allowed, without notice to D., to amend his writ by adding the names of C. and his partner as defendants, and declaring against all three as doing business under the name of A. Both B. and D. recovered judgments. As between C. and his partner, and A., the latter had no interest in the attached goods. D. requested the attaching officer to apply the proceeds of the property in satisfaction of the execution obtained on his judgment. This the officer declined to do except in part, but first applied the same in satisfaction of the execution obtained by B. on his judgment. D. then brought an action against the officer; and, at the trial, asked the judge to rule that the relation of A. to C. and his partner, as to B., was that of principal and agent, and not that of partnership; that, if A. was liable at all, he was liable individually as principal, and C. and his partner, if liable at all, were liable as agents, but that B. must elect to hold either the principal or the agents, and could not hold both; and that the attached property, being the property of the agents, could not be levied upon to satisfy B.'s execution. The judge declined so to rule, and found for the defendant. *Held*, that D. had no ground of exception.

TORT against the sheriff of Essex for the alleged wrongful act of his deputy. After the former decision, reported 125 Mass.

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154, the case was tried in the Superior Court, without a jury, before *Pitman*, J., who found the following facts:

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The plaintiffs attached certain personal property on a writ against W. W. Phillips and Edward Martin, as copartners, doing business under the name of Henry Phillips, on March 24, 1875. It was afterwards sold on mesne process, on a prior attachment, on a writ in favor of Edward Martin against Henry Phillips, which last-named writ was never entered in court. The plaintiffs recovered judgment against William W. Phillips and Martin, in the Superior Court for the county of Suffolk, at January term 1876, and placed the execution duly issued thereon in the hands of the defendant's deputy, and requested him to apply the proceeds of the personal property in satisfaction of the execution. This he declined to do, except in part, but first applied the same in satisfaction of an execution issued from the Police Court of Haverhill on December 1, 1875, upon a judgment in favor of Matthew Plumstead, Jr., recovered on November 15, 1875, against Henry Phillips, William W. Phillips and Martin, as copartners, doing business under the name of Henry Phillips. Plumstead's writ was dated March 24, 1875, and commanded the officer to attach the property of Henry Phillips; and thereon, upon March 24, prior to the attachment in the suit of the plaintiffs against William W. Phillips and Martin, the deputy did attach the personal property as the property of Henry Phillips. Subsequently, and before judgment in the action, by leave of the Police Court, and without notice to the plaintiffs, Plumstead amended his writ and declaration by declaring against Henry Phillips, William W. Phillips and Martin, as copartners, doing business under the firm name of Henry Phillips.

In the fall of 1872, Henry Phillips, in person, made the first purchase of Plumstead, informing him that the business was his, and he alone was responsible; that the business would be carried on by William W. Phillips in the name of Henry Phillips; and that William W. Phillips did the work of the store for him. In the spring of 1873 the partnership between William W. Phillips and Martin was formed, and at that time Henry Phillips revoked William W. Phillips's agency, and directed him not to further use his name, and had no more connection with, nor knowledge of, the business or the name in which it was carried on by William

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W. Phillips and Martin; but gave no notice of any change to Plumstead, who, without notice or knowledge of the change, continued to sell goods and charge them, as he had before, to Henry Phillips; and the debts of the plaintiffs and of Plumstead, on which their judgments were obtained, were contracted in the name of Henry Phillips, who had no interest in the attached goods, which was not known to Plumstead. The goods sued for and those goods attached were sold by Plumstead in good faith on the credit of Henry Phillips; but Henry had other property.

Upon these findings, the plaintiffs asked the judge to rule that the relation of Henry Phillips to William W. Phillips and Martin, as to Plumstead, was that of principal and agent, and not that of partnership; that if Henry Phillips was liable at all, he was liable individually as principal, and William W. Phillips and Martin, if liable at all, were liable as agents, but that Plumstead must elect to hold either the principal or the agents, and could not hold both; and that this property, being the property of the agents, could not be levied upon to satisfy Plumstead's execution.

The judge declined so to rule, ruled that the plaintiffs were not entitled to recover, and ordered judgment for the defendant. The plaintiffs alleged exceptions.

W. E. Jewell, for the plaintiffs.

J. P. Jones, for the defendant.

ENDICOTT, J. The facts in this case, though substantially the same, differ in some respects from those disclosed when the case was last before us. 125 Mass. 154.

It appears that, in the autumn of 1872, Henry Phillips purchased goods of Plumstead, and informed him that the business was his, and would be carried on by William W. Phillips in his name. It was not distinctly stated in the bill of exceptions, but it is to be inferred, that William W. Phillips had authority to use, and did use, his name in the purchase of goods. In the spring of 1873 the business was transferred to William W. Phillips and Edward Martin, who had formed a partnership to carry it on, and the authority of William W. Phillips, as agent, was revoked, and he was directed by Henry Phillips not to use his name. After this, Henry Phillips had no connection with, or

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knowledge of, the business, and did not know in what name it was carried on by William W. Phillips and Martin. The new firm carried on the same business as Henry Phillips. Of this change Plumstead had no notice, and, without any knowledge of the change, continued to sell goods to the new firm, and charged them to Henry Phillips. Whether Henry Phillips gave notice of this change to the plaintiffs, or to other persons who had sold goods to him does not appear, but it is evident that William W. Phillips and Martin continued to use his name in carrying on their partnership business in the same manner as it had been carried on before; for it is stated in the bill of exceptions that the debts of the plaintiffs and of Plumstead, on which their judgments were obtained, were contracted in the name of Henry Phillips, who had no interest in the attached goods, which was not known to Plumstead. It is fairly to be inferred from this statement, that they were sold to both on the credit of Henry Phillips, and it was so stated in the former opinion; and the plaintiffs cannot well deny that William W. Phillips and Martin carried on business under the partnership name of Henry Phillips, for they are so described in the writ upon which their attachment was made. The goods were sold by Plumstead in good faith to the firm on the credit of Henry Phillips, and were the same that were attached and sold by the defendant's deputy.

Upon these facts and findings, we cannot say that the court below was bound, as matter of law, to give the ruling requested. Having refused to give that ruling, the court might well find for the defendant. *Exceptions overruled.*

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WILLIAM J. FAY *vs.* NICHOLAS HARLAN.

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Suffolk. Nov. 17, 1879. — Jan. 19, 1880. MORTON & SOULE, JJ., absent.

The statements of a patient to his physician as to his symptoms and complaints, for the purpose of medical treatment and advice, and the indications of suffering on the part of the patient observed by the physician in his attendance upon him, are admissible in his favor in an action for a personal injury.

The record of a criminal court, showing that a person was indicted for an offence to which he pleaded guilty, and that he was discharged on probation, is not admissible in evidence to impeach the credibility of such person as a witness, under the St. of 1870, *c.* 393, § 3.

TORT for assault and battery. At the trial in the Superior Court, before *Allen*, J., the plaintiff offered evidence tending to prove that he was struck upon the head by the defendant with the butt of a whip; and called Luther B. Morse, a physician, who testified that he attended the plaintiff immediately after the injury. The witness was then asked by the plaintiff, against the defendant's objection, whether there were any complaints of suffering made by the plaintiff at the time. The judge allowed the witness to testify to such complaints made as statements of symptoms to him as attending physician. The witness also testified that he attended upon the plaintiff for several weeks after the injury, making several visits during that time. He was then asked by the plaintiff, against the defendant's objection, whether there were indications or symptoms of suffering during those visits. The judge allowed the question to be put, and the witness testified to such indications.

The plaintiff testified in his own behalf; and, to affect his credibility as a witness, the defendant offered in evidence a record, which showed that the plaintiff had been indicted for an assault, to which he pleaded guilty, and that, on acknowledgment of satisfaction and payment of costs, he was discharged on probation. The plaintiff objected to its admission; and the judge excluded it. The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

G. W. Searle & J. L. Eldridge, for the defendant.

T. Riley, for the plaintiff.

AMES, J. It is well settled that the declarations of a patient, as to his symptoms and complaints, to his physician, for the

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purpose of medical treatment and advice, are competent and admissible in evidence. They are not to be considered as mere hearsay, if made with a view to be acted on in a matter of grave personal concernment, in relation to which the party has a strong and direct interest to adhere to the truth. *Barber* v. *Merriam*, 11 Allen, 322. All other visible symptoms and indications manifesting pain and suffering stand upon the same ground. The weight and value of such evidence are for the jury to determine in each case.

Under the statute provision that the conviction of a witness of any crime may be shown to affect his credibility, (Gen. Sts. *c.* 131, § 13; St. 1870, *c.* 393, § 3,) it has been decided that the term "conviction" is used in a sense including the judgment of the court, and that a plea of guilty, without such final judgment, is not sufficient. *Commonwealth* v. *Gorham*, 99 Mass. 420. The record offered to impeach the credit of the witness does not show any such judgment, but only that he was discharged on probation. See also *Commonwealth* v. *Lockwood*, 109 Mass. 323, 330; *Commonwealth* v. *Dowdican's Bail*, 115 Mass. 133; *Partridge* v. *Hood*, 120 Mass. 403. *Exceptions overruled.*

WILLIAM H. McNEIL *vs.* ARNOLD KENDALL & another.
JAMES B. AMES *vs.* SAME.

Suffolk. Nov. 14, 1877. — Jan. 21, 1880. COLT & AMES, JJ., absent.

Where a lessee of a lot of land makes a lease, for the remainder of his term, of a building standing on a portion of the leasehold premises, and by the terms of the lease grants easements, appurtenant to the building, of light and air, and of passing and repassing, over other portions of the leasehold premises, in common with him and those claiming under him, such lease is an underlease and not an assignment of his whole term in a portion of the leasehold premises.

The owner of two parcels of land in a city, one on S. Street, and the other on L. Street, bounded in part by the rear line of the first parcel, demised the two parcels, on the same day, by separate indentures of lease, each for the term of twenty years, to A. These indentures were duly recorded. The city then took, by the right of eminent domain, a portion of each parcel. A. then took down the buildings on each parcel, as he had a right to do under the leases, and erected a warehouse fronting on S. Street, covering all the land included in the first lease, except that taken by the city, and also covering a

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portion of the land included in the second lease. He also erected a building fronting on L. Street, which covered a portion of the land included in the second lease. An area was left open between the two buildings, and a passageway constructed, leading from L. Street, under the building fronting thereon, across the area to a door in the rear of the building on S. Street. Each building had windows opening into the area, and the building on S. Street, which was higher than the other, had windows overlooking it. Subsequently A., by an indenture duly recorded and in the form of a lease, demised to K. for the remainder of the term, "the warehouse on S. Street," giving no other description of the premises, and making no allusion to the area or the passageway, except that the instrument contained a provision that the building on L. Street should not be carried higher so as to obstruct the light, and that the occupant of the building on L. Street should have a right through the passageway. Before giving this instrument, and while the original leases had more than seven years to run, A. demised to B., for the remainder of the term, by an instrument not recorded, the building on L. Street, expressly excluding the passageway. Subsequently, the right, title and interest of A. under the leases to him were duly sold on an execution against him. The rights under the first lease were conveyed to M., and those under the second lease to a third person, who conveyed them to M. *Held*, in an action by M., after an entry upon the land, against K., for the rent subsequently accruing under the indenture from A. to K., that this instrument was an underlease and not an assignment; and that the action could be maintained.

ENDICOTT, J. In the first of these cases McNeil, the plaintiff, as assignee under a levy of sale of the leasehold estates of Samuel T. Ames, created under certain indentures from Lucy Ann Harris, seeks to recover rent from the defendants, to whom Samuel T. Ames had leased, prior to the sale, a portion of the premises included in the indentures.

In the second case James B. Ames, the plaintiff, contends that the lease from Samuel T. Ames to the defendants operated in law as an assignment of his entire term in the premises described therein, and not as an underlease; and that there was no estate or reversion in those premises remaining in Samuel T. Ames which could be levied upon and sold. Under an assignment, therefore, after the levy and sale, made to him by Samuel T. Ames of the rent reserved in the defendant's lease, James B. Ames seeks to recover the same from the defendants.

The cases were argued together as one case, and will be so considered by the court in determining which plaintiff is entitled to recover the rent from the defendants.

It appears from the record in these cases, that Lucy Ann Harris was, in 1866, the owner in fee of two estates in Boston, one on Summer Street, and the other on Lincoln Street. By an

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indenture, dated in September of that year, she demised to Samuel T. Ames, for the term of twenty years from January 1, 1867, the estate on Summer Street; and, at the same time, by another indenture, she demised to him for the same term the estate on Lincoln Street, which was bounded in part by the rear line of the estate on Summer Street. It is unnecessary to recite these indentures at length; with the exception of the amount of rent reserved, and certain provisions in regard to the removal and erection of buildings, they do not differ materially. Under the first named, the lessee was bound by his covenants to take down the building standing on the estate on Summer Street, and to erect thereon a good and substantial warehouse, of not less than a certain value, and to keep the same in repair, and insured for the benefit of the lessor. Under the second, he had the right to take down the buildings on the estate on Lincoln Street, and, if he did so, he was also required to build thereon a good and substantial warehouse. It was stipulated in this indenture that the lessee should keep the buildings standing thereon, or such as he might erect in their place, in good repair. Under these indentures, which were duly recorded, Samuel T. Ames went into possession of the whole estate. The city of Boston, in the exercise of the right of eminent domain, took a portion of each lot for the purpose of widening the street on which it fronted, and laid out the same as a highway before any of the instruments were executed which are the subject of this controversy.

Under the powers and in accordance with the covenants contained in these indentures, Samuel T. Ames took down all the old buildings on the demised premises, and, having full power and control over the same, treated them as one estate, and erected two warehouses thereon, obliterating the old lines of division. One warehouse was built on Summer Street, which covered all the land included in the first indenture, excepting that which was taken for the highway, and also covered a portion of the rear of the land demised by the second indenture. It was constructed of brick and stone and was four stories high. The other was built on Lincoln Street, as widened, of brick and stone, two stories high, and covered a portion of the land described in the second indenture. A space or area was left open

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between the two buildings, and a passageway was constructed five feet wide and planked, leading from Lincoln Street on the southerly side of the premises, in a direct line, under the last-named building, and across the area, to a door in the rear part of the building fronting on Summer Street. Each building had windows opening upon the area, and the building on Summer Street had windows overlooking the building on Lincoln Street. It is stated in the defendants' bill of exceptions, in the first case, that this passageway was left, constructed and designed for the use of the building on Summer Street, in connection with the door in the rear of the same, and was the only means of access from the highway to the area, and also to the door fronting thereon in the rear of the building on Lincoln Street.

In July 1873, Samuel T. Ames, by an indenture duly recorded, leased to the defendants for the remainder of his term "the store and warehouse Nos. 119 and 121 on Summer Street in Boston;" giving no other description of the premises, and making no allusion to the area or the passageway in the rear, except in a clause which recites that "it is understood that the rear building on Lincoln Street shall not be carried up any higher, so as to obstruct the light during the continuance of this lease. Also agreed that the party occupying the small building on Lincoln Street shall have a right through the passageway." This lease is in the common form, and contains the provisions, that the lessor shall rebuild in case of fire, and remit during the time a fair proportion of rent; that the lessees shall pay the rent reserved and taxes, and deliver up the premises at the end of the term, and not make or suffer any waste; and that the lessor may enter to view and make improvements, and may expel the lessees if they fail to pay rent and taxes, or make or suffer any strip or waste.

Whatever may be the legal effect of this indenture, it is evident that the parties contemplated only a sub-lease of a portion of the whole estate, as improved by Samuel T. Ames.

Before giving this lease, Samuel T. Ames, in May 1873, demised, by an indenture to H. P. Bambauer for the remainder of his term, "the two-story building, No. 2 Lincoln Street, in Boston," giving no other description, and not alluding to the area, but referring to the passageway in these words: "Passageway

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partly under the building is not included in this lease." This lease was surrendered in August, 1873, and at the same time Samuel T. Ames executed another lease of the same premises for the same term to Jacob Bambauer, which contains the same provision in regard to the passageway. Neither of these leases was ever recorded. The last was assigned by Samuel T. Ames to the plaintiff, McNeil, after he had purchased the leasehold interest of Ames in the Lincoln Street estate, which was sold at the sheriff's sale.

By neither of these indentures did Samuel T. Ames convey the land included within the area or the passageway. It is clearly to be implied from the language of the lease to the defendants, taken in connection with the fact that the passageway was then laid out from Lincoln Street to the door in the rear of the defendants' premises, that a right in that passageway passed by the indenture to the defendants in common with Samuel T. Ames and the occupants of the other building. It is also clear that the defendants acquired an easement for the light afforded to their building by the area, under the provision that the building on Lincoln Street should not be "carried up higher so as to obstruct the light during the continuance of this lease." These easements thus granted to the defendants, in the land not conveyed in either indenture and in the land occupied by the other building, constituted a portion of the premises demised to the defendants to be enjoyed in common with Samuel T. Ames, and such other persons as might occupy the building on Lincoln Street.

It was in this condition of the property, that all the right, title and interest of Samuel T. Ames in the two estates, held by him under the two indentures from Lucy Ann Harris, were seized and sold, at a sheriff's sale in November 1875, upon an execution issued against him in favor of the Lancaster National Bank. The plaintiff, McNeil, purchased the leasehold estate fronting on Summer Street, which was duly conveyed to him by the sheriff. One E. K. Harris purchased the other, and, having received a deed of the same from the sheriff, conveyed his interest therein to McNeil, who thus became assignee in law of the entire interest of Samuel T. Ames in the whole estate, to the same extent as if Ames had himself transferred all his

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leasehold interests therein. *Sanders* v. *Partridge*, 108 Mass. 556, 558. It was not contended at the argument that these sales were in any respect irregular or invalid.

There is no question that some portion of the leasehold estates of Samuel T. Ames in the premises passed to McNeil by the levy and sale. The lease to Jacob Bambauer was not recorded, and cannot be treated as valid against the levy; and the subsequent assignment of it to McNeil cannot in any way operate to his prejudice. That portion of the premises therefore passed to him, as well as the area and passageway, subject to the defendants' easements therein; together with such interests and rights of reversion as Samuel T. Ames had in the strips of land taken for highway. Whether the remaining premises passed to him depends upon the question, whether the defendants hold, as assignees of a part of the premises for the whole term, or as sublessees.

Before dealing with that question, it is proper to allude to some difficulties which might have arisen on this state of facts. In improving the property, Samuel T. Ames disregarded the lines of division, as set out in the two indentures from Lucy Ann Harris, and erected the building on Summer Street partly on land included in the first, and partly on land included in the second indenture; and, in leasing this building to the defendants, he attached to the whole estate thus conveyed certain easements in the other land included in the second indenture. In selling his leasehold estates under both indentures, of course they must be sold separately, and if they had been bought and were now held by different persons, each purchaser would have acquired only a part of the building occupied by the defendants; and a very serious question would have arisen, in regard to their respective rights, as against the defendants, who hold the whole building, and the easements connected therewith, as one estate. But this question is not before us, for McNeil holds whatever passed by the sale of both. Nor is it denied that Samuel T. Ames had the right thus to disregard the old lines of division in improving the property, as one estate; and all parties claim interests under him in the entire premises occupied by the defendants. As between them, therefore, we must assume that it is one estate, irrespective of all lines of division and of the

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fact that Samuel T. Ames obtained his interest by separate and distinct indentures; and the cases have been argued before us on this assumption.

It is unnecessary to cite authorities to the proposition, that to constitute an assignment by a lessee of the whole, or of a specific part, of his leasehold estate, the entire interest of the lessee in all the premises included in the assignment must pass to the assignee. Even if the instrument may be in form a sub-lease, yet if it conveys the whole estate it will operate as an assignment. In deciding, therefore, whether this lease to the defendants is in law an assignment, we must ascertain from all its provisions, as applied to the subject-matter, whether Samuel T. Ames conveyed his entire term and interest in the premises, which the defendants have the right to occupy and enjoy under their lease from him.

What then passed to the defendants from Samuel T. Ames? The land under the building, the building itself, the right to use the passageway in the rear extending to Lincoln Street, the right to enjoy the light in the area, secured by the provision that the space above the two-story building on Lincoln Street shall remain open and unobstructed. These were not mere personal rights, but easements appurtenant to and a part of the premises conveyed, and necessary for the complete enjoyment of that portion which opened on the area. *Dennis* v. *Wilson*, 107 Mass. 591. *Peck* v. *Conway*, 119 Mass. 546. And if Samuel T. Ames or those claiming under him had raised the building on Lincoln Street higher than two stories, the defendants would have been entitled to relief in equity to enforce the restriction. *Parker* v. *Nightingale*, 6 Allen, 341. The defendants thus acquired the whole interest in the warehouse on Summer Street and the land on which it stood, and subordinate and limited interests in all the other land between the warehouse and Lincoln Street. These cannot be separated or divided, but form one estate, carved out of the whole leasehold estate of Samuel T. Ames, acquired from Lucy Ann Harris.

It is plain, therefore, that Samuel T. Ames, while he conveyed to the defendants his whole term for years, did not convey his whole interest in the premises, which the defendants had the right to occupy and enjoy under their lease; but retained in

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himself all the land, not covered by the warehouse on Summer Street, subject to the easements granted to the defendants. The interest which he conveyed to the defendants was a portion of the entire estate, and not his whole estate in a portion of the same. "For there is a diversity between the whole estate in part, and part of the estate in the whole, or of any part." Co. Lit. 385 *a*. Shep. Touchst. 199.

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While this case differs in many of its features from that of *Patten* v. *Deshon*, 1 Gray, 325, yet the point there determined is decisive of this, independently of the considerations stated above. In that case, one Walker, a lessee for years, had given a lease in a portion of the premises by metes and bounds, for his entire term, to the defendant, and afterwards assigned all his right, title and interest in his lease to the plaintiff; and it was held that the plaintiff could recover from the defendant the rent accruing upon his lease. Chief Justice Shaw in delivering the judgment said: "It would be too narrow a construction to hold that this was only an assignment of the instrument or document; it means all the right, title and interest, which he holds, or has title to hold, under the instrument. It clearly embraced the transfer of all right to the use and enjoyment, for the residue of the term, of all that part of the leased premises which had not been underlet to Deshon. Had the sub-lease to Deshon been surrendered, or forfeited by non-payment of rent, the assignment would have passed to the assignee the right to use and enjoy that part of the premises let to Deshon, for the residue of the term. It was therefore a substantial interest intended to be assigned." "And it is to be considered, that Patten, the plaintiff, by force of that assignment of Walker to him, for the whole term, had become assignee of the lessee, and as such liable to the action of the original lessor, for the entire rent. In order to enable him to meet that obligation, equity required that he should have the entire benefit of the term, including not only the use and occupation of the part not underlet, but also the rent accruing from sub-lessees, of all such parts of the premises as were held by them; and therefore it must have been the intention of the parties, in the assignment, that the assignee should take upon himself the burden of paying the whole rent, and be entitled to the benefit of the whole of the leased premises; and that Walker, the original

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lessee and assignor, being relieved from the payment of any rent to the original lessor, could have no right to receive rent of a sub-lessee."

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In the case at bar, McNeil acquired under the levy and sale all the right, title and interest of Samuel T. Ames in a considerable portion of the leasehold estate not let to the defendants. By the terms of the lease to the defendants, Samuel T. Ames had the right to reënter if the defendants failed to pay rent, or committed strip or waste, and this right passed to McNeil under the conveyance from the sheriff of all the right, title and interest of Samuel T. Ames in the leasehold estates.

We are not aware that the decision in *Patten* v. *Deshon* has ever been judicially questioned; nor has any case been called to our attention, in which, upon the same state of facts, a different rule has been declared. It has been cited with approval in numerous cases in our own reports; it has been the law in Massachusetts for more than twenty years, and lays down a just and equitable rule, not inconsistent with the established principles of law. *Buffum* v. *Deane*, 4 Gray, 385, 393. *Hunt* v. *Thompson*, 2 Allen, 341. *Way* v. *Reed*, 6 Allen, 364. *Sanders* v. *Partridge*, 108 Mass. 558, 560. *McNeil* v. *Ames*, 120 Mass. 481. *Porter* v. *Merrill*, 124 Mass. 534. *Farrington* v. *Kimball*, 126 Mass. 313. See also *Shumway* v. *Collins*, 6 Gray, 227.

The plaintiff, McNeil, entered upon the premises after the sale, notified Lucy Ann Harris of his assignment, and that he would pay rent to her; and also gave notice to the defendants that they must pay rent to him; and we are of opinion, for the reasons stated, that he is entitled to recover. It therefore becomes unnecessary to consider the other questions so ably argued at the bar, or to review the numerous cases cited by the counsel. By the terms of the report, in the first case the exceptions must be overruled; and in the second case the entry must be

Plaintiff nonsuit.

A. A. Ranney, for the plaintiff in the first case, and for the defendants in the second case.

J. B. Ames, pro se, and for the defendants in the first case.

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THEODORE L. SAVAGE *vs.* SEYMOUR W. STEVENS.
SAME *vs.* DANIEL NORCROSS.

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Suffolk. Nov. 17, 1879. — Jan. 24, 1880. MORTON & SOULE, JJ., absent.

After judgment and execution for damages and costs have been obtained and satisfied in an action against one wrongdoer, while an action is pending against a joint wrongdoer, the plaintiff is not entitled to a judgment for nominal damages in the latter action, so as to enable him to recover the costs thereof also; and the judgment and satisfaction in the first action, having been pleaded by the defendant in the second action and admitted by the plaintiff, is a bar to the latter action, and the defendant is entitled to judgment for his costs.

TWO ACTIONS OF TORT for false and fraudulent representations. The cases were submitted to the Superior Court, and, after judgment for the defendants, to this court on appeal, on an agreed statement of facts in substance as follows:

The plaintiff brought three separate actions of tort for the same cause of action, the two above named and one against C. S. Bridge. All of the actions were brought on the same day, were returnable at the same term of court, and were put in order for trial at the same term. At the trial of the action against Stevens, the presiding judge directed a verdict for the defendant, and the plaintiff alleged exceptions, which were sustained by the Supreme Judicial Court, and a new trial ordered. See 126 Mass. 207. After the trial of this action, but before a new trial had been ordered, the action against Bridge was tried, and a verdict rendered therein for the plaintiff for $500, upon which judgment was entered, and for costs, which was satisfied, and the execution thereon was discharged. After that judgment was satisfied, each of these defendants filed a supplemental answer, pleading the judgment and satisfaction in bar.

The plaintiff contends that he is entitled to nominal damages and costs in both cases. The defendants contend that they are entitled to a general judgment, and for costs.

B. E. Perry & S. W. Creech, Jr., for the plaintiff, in addition to some of the cases referred to in the opinion, cited *Livingston* v. *Bishop*, 1 Johns. 290; *Stevens* v. *Briggs*, 14 Vt. 44; *Wheeler* v. *Fuller*, 39 Vt. 310; *Tarin* v. *Morris*, 2 Dall. 115; *Knott* v. *Cunningham*, 2 Sneed, 204; *Sherman* v. *Brett*, 7 Wis. 139.

A. V. Lynde & W. P. Harding, for the defendants.

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GRAY, C. J. When an injury is done to one man by the wrongful act of several, the law allows him to proceed against them either jointly or severally, and, if he sues them severally, he may prosecute all the actions to judgment, although he can have but one satisfaction for the same injury. By our law, judgment against one without satisfaction does not bar an action against the others. *Lovejoy* v. *Murray*, 3 Wall. 1. *Elliott* v. *Hayden*, 104 Mass. 180. It is clear, on the one hand, that, after judgment recovered and satisfied against one, no action can be commenced against the others; and, on the other hand, that if the plaintiff prosecutes several actions to judgment before receiving any satisfaction, he may recover judgment in each action for damages and costs, and may levy execution in any one of the actions for the damages, and in each action for the costs adjudged to be due him.

The question now before us is whether, after judgment and execution for damages and costs have been obtained and satisfied in the action against one wrongdoer, while actions are pending against the others, judgments for nominal damages can be entered in these actions, so as to enable the plaintiff to recover the costs thereof also. This is a question of practice rather than of principle, and, notwithstanding the variety of opinion in other courts, as shown by the cases cited at the argument, can hardly be considered an open one in this Commonwealth.

In *Gilmore* v. *Carr*, 2 Mass. 171, pending an action by the indorsee against the maker of a promissory note, judgment was recovered in an action by the plaintiff against the indorser for the amount of the note and costs, and execution was issued thereon and satisfied; and these facts being submitted to the court in a case stated, it was held, by separate and concurring opinions of Chief Justice Parsons and Justices Sedgwick, Sewall and Parker, that in the action against the maker the judgment should not be for the plaintiff for nominal damages and costs, but for the defendant for his costs.

Subsequent decisions show that, if there had been no satisfaction, the plaintiff might have recovered judgment for damages and costs in each action; *Simonds* v. *Center*, 6 Mass. 18; that the mere taking in execution of the body of the defendant in one action would not have barred the other action; *Porter* v.

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Ingraham, 10 Mass. 88; and that the court would not, against the plaintiff's objection, exercise its equitable power to stay proceedings in one action on the payment by the defendant therein of a sum of money into court which did not include the costs of both actions. *Whipple* v. *Newton*, 17 Pick. 168.

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But the decision in *Gilmore* v. *Carr*, as to the effect upon one action of actual satisfaction received by the plaintiff of the amount of the judgment for damages and costs in the other, has never been overruled in this Commonwealth. In *Porter* v. *Ingraham*, which was decided by Justices Sewall, Thatcher and Jackson, in the absence of Chief Justice Parsons and of Mr. Justice Parker, the court, after observing that the practice recognized in *Gilmore* v. *Carr* varied from the practice in England and in Pennsylvania, said that, if there had been no distinction in any essential circumstance between the two cases, "we should be disposed to consider it as an authority by which this case also must be decided. At least, we should not overrule it without taking further time for consideration." And in *Whipple* v. *Newton*, decided by Chief Justice Shaw and Justices Putnam, Wilde and Morton, the very reason assigned for refusing to allow the payment into court was, that "it would not only deprive the plaintiff of his costs in a suit rightly brought on a good cause of action, but leave him exposed to pay costs to the defendant," — thus clearly affirming that the effect of a satisfaction in one action would be to entitle the defendant to judgment for his costs in the other.

The decision in *Gilmore* v. *Carr* has been followed in New Hampshire and in Maine. *Farwell* v. *Hilliard*, 3 N. H. 318. *Maine Bank* v. *Osborn*, 13 Maine, 49. *Foster* v. *Buffum*, 20 Maine, 124. And the same rule has been applied to the case of several actions against joint trespassers in *Mitchell* v. *Libbey*, 33 Maine, 74, and in *Ayer* v. *Ashmead*, 31 Conn. 447.

There is less reason for sustaining the plaintiff's position in the cases now before us than in *Gilmore* v. *Carr*. In that case, as the law then stood, the maker and the indorser of a promissory note could not have been sued in one action, (as they now can, under Gen. Sts. *c.* 129, § 4,) and the defence relied on might have been given in evidence, without any special plea, under the general issue of *non assumpsit*. But this plaintiff might, at his

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election, have brought a single action against all the defendants; and, under the new practice act, all matters in avoidance must be specially pleaded, and no supplemental answer alleging facts which have occurred since the former answer can be filed without leave of the court, and on complying with such terms in the matter of costs as the court may see fit to impose. Gen. Sts. *c.* 129, §§ 15, 20, 25, 41. The plaintiff, in such a case as this, may ordinarily find adequate protection of his rights, either by bringing one action against all the wrongdoers jointly, or by prosecuting his several actions to judgment before he levies any execution, or, when the regular time for pleading has expired, (and if it has not, his costs cannot be large,) by appealing to the discretion of the court, if he can show good reasons for having brought several actions instead of one, to refuse to allow the proposed answer to be filed except upon the terms of paying his costs to that time.

The plaintiff, after having submitted the effect of the defence pleaded in the supplemental answers to the judgment of the court upon a case stated, cannot object that these answers were not duly filed; and the judgment and satisfaction against a joint wrongdoer, having been pleaded by the defendant and admitted by the plaintiff, is a bar to these actions for the same injury. In England, by rule of court, upon the filing of any plea in the nature of one *puis darrein continuance*, the plaintiff may confess it and have judgment for his costs. *Barnett* v. *London & Northwestern Railway*, 5 H. & N. 604. *Foster* v. *Gamgee*, 1 Q. B. D. 666. But, by our statutes, no special provision is made, except in the case of pleading a discharge in bankruptcy or insolvency; and the present cases fall under the general rule, and each defendant, as the prevailing party, is entitled to judgment for his costs. Gen. Sts. *c.* 156, §§ 1–3. *Judgments affirmed.*

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ROBERT C. WINTHROP & others, trustees, *vs.* ATTORNEY GENERAL & another.

Suffolk. Nov. 21, 1879. — Jan. 24, 1880. ENDICOTT, J., did not sit. SOULE, J., absent.

By a deed of trust, the donor gave to trustees a large sum of money, to be by them and their successors held in trust to found and maintain a museum of archæology and ethnology in connection with Harvard College. A portion of the sum was to be invested by the trustees, and the income applied to forming and preserving a collection of antiquities; the income of another portion was to be applied to the establishment and maintenance of a professorship of archæology and ethnology in the college; and the remaining portion was to be invested and accumulated until it reached a certain sum, when it might be employed in the erection, upon land of the college, of a museum building, which when completed should become the property of the college, for the uses of the trust. The trustees were directed to keep a record of their doings, and to annually make a report to the president and fellows of the college, setting forth the conditions of the trust, and the amount of income received and paid out. Provision was made for filling vacancies in the board of trustees, and permission was given to obtain an act of incorporation. The trustees were also authorized to appoint a treasurer, and to enter into any arrangements and agreements with the college, not inconsistent with the terms of the trust, which might in their opinion be expedient. An agreement was subsequently proposed to be made between the trustees and the college, by which the trust funds were to be invested and managed by the college as a part of its general fund, and a proportionate part of the entire income be annually credited to the two funds first mentioned and be paid to the trustees or their treasurer, and the proportionate income of the third fund annually added by the college to the third fund until such time as the trustees should demand payment of the whole or any part of the principal or income, upon giving six months' notice; the management of the trust funds to be held by the college in perpetuity, subject only to the right of the trustees to demand and receive the income of the two funds first mentioned, and the whole of the third fund; and the college to invest the funds as it should see fit, and not to be responsible for any loss. *Held*, on a bill in equity by the trustees for instructions, that the proposed agreement as to the two funds first mentioned was inconsistent with the terms of the trust; and that the facts that the treasurer of the trustees, who had served without compensation, was about to resign, that by the plan proposed the funds would be managed without expense, and that another treasurer could not otherwise be secured without great expense, did not present a case of such exigency as to warrant the sanction of the court to the agreement.

MORTON, J. By this bill in equity, brought against the Attorney General and the President and Fellows of Harvard College, the plaintiffs, as trustees under a deed of trust executed by the late George Peabody, seek the instructions of the court as to

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their right to carry into effect an agreement which they desire to make with the last-named defendant.

By the deed of trust the donor gives to the trustees "the sum of one hundred and fifty thousand dollars, to be by them and their successors held in trust, to found and maintain a Museum of American Archæology and Ethnology in connection with Harvard University." He directs, that of this sum the trustees shall invest forty-five thousand dollars as a fund, the income of which shall be applied to forming and preserving collections of antiquities and objects relating to the earlier races of the American continent; that the income of a further sum of forty-five thousand dollars shall be applied by the trustees to the establishment and maintenance of a professorship of American Archæology and Ethnology in Harvard University, the professor to be appointed by the authorities of the University upon the nomination of the said trustees; and that the remaining sum of sixty thousand dollars be invested and accumulated as a building fund until it shall amount to at least one hundred thousand dollars, when it may be employed in the erection of a suitable fire-proof museum building upon land of the college, which building when completed is to become the property of the college for the uses of this trust and none other. He further directs that the trustees shall keep a record of their doings, and shall annually prepare a report setting forth the condition of the trust and funds and the amount of the income received and paid out, to be presented to the president and fellows of the college. After making provisions for filling vacancies occurring in the board of trustees by death, resignation or otherwise, the donor further directs that the trustees shall have "the liberty to obtain from the Legislature an act of incorporation if they deem it desirable; to make all necessary by-laws, to appoint a treasurer, and to enter into any arrangements and agreements with the government of Harvard College, not inconsistent with the terms of this trust, which may in their opinion be expedient."

By the proposed agreement, a copy of which is set out in the bill, the three trust funds are to "be invested and managed by the President and Fellows of Harvard College, through their treasurers and other financial officers and agents, as a part of

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the general fund of Harvard College, in such manner that there may be credited in each year to each of said three trust funds, by said corporation, such proportion of the income divided by said corporation among all the funds forming said general fund, as shall be proportionate to the ratio which the capital of each of said three trust funds in such year bears to the whole amount of all the funds forming said general fund; and that the income annually credited to the two funds first above mentioned may be annually paid to said trustees or their treasurer; and that the annual income of the third of said trust funds may be annually added by said corporation to the principal of said third trust fund, in order that the same may accumulate until such time as said trustees may demand payment of the whole or any part of the principal or income of said third trust fund, upon giving six months' notice to said corporation;" the trustees stipulate that "the management of said trust funds may be held by the said corporation in perpetuity, subject only to the right of the trustees to demand and receive the annual income of the two trust funds first herein mentioned, and to demand and receive the whole or any part of the principal or the income of said third trust fund, upon giving six months' notice in writing as aforesaid; that said corporation shall have the right to vary the investments through its treasurers, officers and financial agents whenever it shall see fit; and that said corporation shall not be responsible for any loss, wasting or diminution of either of the trust funds in its charge, nor of the income of either of them, and that neither the trustees nor their successors shall interfere with the management or the custody of said trust funds by said corporation through its treasurers, officers or other agents, so long as the said corporation shall fulfil its covenants contained in this agreement."

It seems to us clear that this agreement is inconsistent with the terms of the trust. It was plainly the intention of the donor to entrust the large sum given by him to the care and management of the trustees chosen by him, and their successors. He selected as trustees men of ability and eminence, and carefully provided that they should be succeeded by men of like character. An important part of their duties is to take care of the trust fund. It is "to be by them and their successors held in trust."

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They are to invest it and to report to the president and fellows of the college, from year to year, the condition of the trust and funds and of the income. These provisions and the general scope of the deed show that it was the intention of the donor that the care and management of the principal of the fund, as well as of the income, should be permanently in the trustees.

But, by the proposed agreement, the trustees are entirely divested of any control over the principal of the two trust funds first named in the deed. They are placed under the control and management of the President and Fellows of Harvard College to be held in perpetuity, as a part of their general funds, provided that the corporation shall pay to the trustees, as income, a part of the income of the general funds, to be determined by the proportion which the said trust funds bear to the whole of the said general fund. This arrangement, in effect, divides the duties of the trustees, and, as to the control and management of the funds, substitutes for the trustees selected by the donor, new trustees who are to manage the funds in a manner not intended or contemplated by him. It is a departure from the directions of the donor, which could be justified, if at all, only upon proof of the most pressing exigency. But the only reasons assigned by the plaintiffs are that their treasurer, who has acted without compensation, is about to resign, and that the agreement, if made, would be beneficial to the trusts, as it secures the services of efficient treasurers and custodians of the funds without charge, whose services they could not otherwise secure without great expense. This does not show an exigency which would justify the court in altering the scheme of the donor. The court cannot do this, either as to the objects of the charity or the agents by whom it is to be administered, unless it appears to be impossible to carry out the scheme according to its terms. *Fellows* v. *Miner*, 119 Mass. 541. *Harvard College* v. *Society for Theological Education*, 3 Gray, 280. In this case there is no failure of the objects and purposes of the trust, calling for the application of the rules as to the *cy pres* appropriation of the funds; there is no failure of trustees, but the present trustees and their successors can without difficulty execute the trust according to its terms, and we are of opinion that it is their duty to do so, as

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well in regard to the investment, care and management of the principal of the trust funds, as in regard to the other duties created by the trust deed.

The learned counsel for the plaintiffs argues that the trustees are justified in making this agreement under the last clause of the trust deed. But as the agreement contains elements which are "inconsistent with the terms of the trust" and the scheme of the donor, it is not covered by this clause. He also argues that the question in the case is merely whether the arrangement proposed is a safe and prudent investment of the trust funds. We cannot so regard it. As we have before said, the agreement involves as one of its elements the absolute and irrevocable surrender by the trustees of the control and custody of the principal of the first two funds and the substitution of other custodians, and thus violates the letter and spirit of the deed of trust. Even if the arrangement is one which is safe and prudent to be made by one having the absolute control of property, it is a disposition which the trustees are not at liberty to make.

It is unnecessary to discuss the question how far these considerations would apply to the third trust fund, if it was the subject of an independent agreement, because the objections to the provisions of the agreement as to the first two funds are sufficient to show that the bill cannot be maintained.

Bill dismissed.

E. R. Hoar, (*C. A. Williams* with him,) for the plaintiffs.

No counsel appeared for the defendants.

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JOHN C. FRANK *vs.* MARY E. HOEY.

Suffolk. Nov. 17, 1879. — Jan. 28, 1880. MORTON & SOULE, JJ., absent.

If an order for intoxicating liquors is given by a person in A. to an agent of a dealer, who has a license to sell such liquors in B., and received by the agent subject to his principal's approval, and the liquors, which were sold on credit, are put up by the seller, marked with the buyer's name, directed to him at A. and delivered to the carrier in B., it is a sale of the liquors in B.

CONTRACT on an account annexed for intoxicating liquors sold and delivered. Answer, that the liquors were sold in violation of the St. of 1875, *c.* 99.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff introduced evidence tending to show that he sent his agent from Boston to Natick, where the defendant did business, to solicit orders for liquors, subject to the plaintiff's approval; that the agent received verbal orders for liquors from the defendant, which he delivered to the plaintiff on his return to Boston; that the plaintiff put up the goods mentioned in the orders, charging the price agreed upon between his agent and the defendant; that the sale was upon credit; that the goods were marked with the defendant's name, directed to her at Natick, and were delivered by the plaintiff to the express or railroad in Boston; and that no directions were given as to the mode of transporting the goods.

The defendant introduced evidence tending to show that she purchased the liquors in question of the plaintiff's agent; that the agent fixed the price and the terms of sale; that all the negotiations were had at her store in Natick; that she received the liquors through express companies or railroad, and paid the freight on receipt; and that she never saw the orders and never bought goods on orders.

It was admitted that the plaintiff had a license of the fourth class to sell spirituous liquors in Boston, and had no license to sell spirituous liquors in Natick.

The defendant asked the judge to instruct the jury as follows: "A wholesale dealer in Boston, licensed there to sell spirituous liquors, cannot through a salesman agree with a person in Natick to sell spirituous liquors there; and if such salesman makes an agreement to sell liquors in Natick, and the principal ratifies

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such contract of sale by shipping the liquors, then such contract was made in Natick, the ratification relating back to the time and place of sale." The judge gave the first part of the instruction asked, but refused to give the remainder of it; and instructed the jury as follows: "Under his license as a wholesale dealer in Boston, the plaintiff could lawfully send his agent to Natick to solicit orders from the defendant for such liquors; and if such orders were taken subject to the approval of the plaintiff in Boston, and such liquors after such approval were sent to the defendant by railroad or express, and received by the defendant at Natick, then such transaction would not be unlawful, and the plaintiff may recover the price of such liquors."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. N. Mason & E. F. Dewing, for the defendant.

C. S. Lincoln, for the plaintiff.

AMES, J. If, as the plaintiff contended, the negotiations between his agent and the defendant were subject to his approval, they did not amount to a sale or a binding contract of sale, until that approval had been given. It would be the case of an order for goods which the vendor might accept or reject as he pleased. The prices, quantities, and qualities might be designated in the order, and all that remained to be done on the vendor's part might be (if he concluded to make the sale) to select the goods from his general stock and in some mode to set them apart; but until this should be done, there would be no sale of those specific goods. *Sortwell* v. *Hughes*, 1 Curtis, 244. In such a case, unless some special agreement to the contrary appeared, delivery to the carrier in Boston would be delivery to the purchaser. *Orcutt* v. *Nelson*, 1 Gray, 536. *Finch* v. *Mansfield*, 97 Mass. 89. *Kline* v. *Baker*, 99 Mass. 253. *Clough* v. *Whitcomb*, 105 Mass. 482. *Suit* v. *Woodhall*, 113 Mass. 391.

The jury found the facts to be as the plaintiff contended, and that the sale was made in Boston. The evidence would justify such a verdict, and the instructions given by the court were correct. *Exceptions overruled.*

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MISSIONARY SOCIETY OF THE METHODIST EPISCOPAL CHURCH *vs.* GEORGE A. CHAPMAN & others.

Franklin. Sept. 17, 1879. — Feb. 25, 1880. AMES & ENDICOTT, JJ., absent.

A testator devised an interest in land "to the missionary case of the Methodist Episcopal Church." On a petition for partition by the Missionary Society of the Methodist Episcopal Church, a corporation, organized under the laws of New York, claiming to be the devisee, it appeared that the testator was a member of the Methodist Episcopal Church in a town in this Commonwealth; that, by the rules of that denomination, all money collected for missions was required to be sent to the petitioner, and there was no incorporated society nor organization of any kind in New England which took charge of the missionary work of the denomination, although the rules of the denomination provided, in certain contingencies, for the establishment of missionary societies in the several conferences; that the testator, who was accustomed to contribute to the various charities of the denomination, did not know the name of the petitioner, nor of its existence, although he knew that the money collected for missions in the church in his town was sent to and managed and expended by an organization in New York, acting in the interest of the denomination. *Held*, assuming that the word "case" meant "cause," and that the devise was valid, that it did not appear that the petitioner was the devisee; and that the petition must be dismissed.

APPEAL by the heirs at law of George Chapman from a decree of the Probate Court appointing commissioners, on the petition of the Missionary Society of the Methodist Episcopal Church, to make partition of two parcels of land in Shelburne. The petition set forth that the petitioner and the respondents held the land as tenants in common, set forth their respective shares, and alleged that they were not in dispute nor uncertain At the hearing before *Soule*, J., the following facts appeared:

The will of George Chapman, dated July 13, 1855, after certain specific bequests, contained the following clause: "I also give and bequeath to the children of my son G. L. Chapman, if he has any, after his decease, two fifths of what shall be left at his decease for their own use when they become of age; and the remainder, one half to the Missionary case of M. E. Church, the other half to the Trustees of Methodist Theological Seminary established at Concord in the State of New Hampshire for the purpose of educating poor young men preparing to preach the doctrine of the M. E. Church." The petitioner, a corporation, incorporated in 1839, under the laws of the State of New York,

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claimed to take an interest in the two parcels of land, under the devise "to the Missionary case of the M. E. Church."

The testator was an active member of the Methodist Episcopal Church at Shelburne Falls, and contributed to its support. During his life, there was no incorporated missionary society in that denomination in New England, nor any organization of any kind which took charge of and managed the missionary work of the denomination, although the rules of the denomination provided, in certain contingencies, for the establishment of missionary societies in the several conferences. It was the custom of the church at Shelburne Falls, during the life of the testator, to make collections of money from its members for the support of the local church, and for the missions of the denomination, for educational purposes, for the Tract Society, and for the Sunday School Union. The money thus collected for missions was sent to the petitioner, as required by the rules of the denomination. The testator was accustomed to contribute to the various charities which the denomination supported. It did not appear that the testator knew the name of the petitioner, nor of its existence; but the judge found, as a fact, that the testator knew that the money collected for missions was sent to and managed and expended by an organization acting in the interest of the Methodist Episcopal Church in the city of New York. The money collected for this purpose was frequently spoken of, in the church at Shelburne Falls, as collected for "missions," or for the "missionary cause."

The judge, at the request of both parties, reported the case for the consideration of the full court. If the petitioner took an interest in the real estate under the will, and was entitled to partition, the decree of the Probate Court was to be affirmed; otherwise, the decree was to be reversed, and the petition dismissed.

J. A. Aiken, for the appellants.

S. T. Field, for the appellee.

SOULE, J. The language of the devise under which the petitioner claims is peculiar, and not perfectly clear. It is susceptible of two interpretations. The word "case," in the phrase "to the Missionary case of the M. E. Church," may be regarded as meaning "box," in the sense of fund. In the absence, however, of evidence of any use of the term in that sense by the members

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of the church with which the testator was connected, or by him at any other time, we do not think it probable that he so used it in his will. But we think it more probable that the word "case" is merely a misspelling of the word "cause;" and this impression is strengthened by the fact, which appears in the report, that in the church at Shelburne Falls of which the testator was a member, money collected for missions was frequently spoken of as collected for the missionary cause. Assuming, then, that the devise is "to the missionary cause of the Methodist Episcopal Church," the object for which it is given is of suitable character and described with sufficient definiteness to make a valid devise for charitable purposes. The doctrine which controls this part of the case has been frequently considered by this court, and is fully discussed and carefully stated in *Jackson* v. *Phillips*, 14 Allen, 539; and the authorities are there collected and commented on.

It does not necessarily follow, however, from the fact that the devise is a valid one, that the petitioner is entitled to partition, as the devisee. It appears that the petitioner is a corporation by charter from the Legislature of the State of New York, and that, by the rules of the Methodist Episcopal Church, all money collected for missions was required to be sent to the petitioner, and that there was no incorporated society, nor organization of any kind, in New England, which took charge of the missionary work of the denomination, although the rules of the denomination provided for the establishment of such societies, in certain contingencies, in the several conferences.

On the other hand, it does not appear that the testator knew the name of the petitioner, nor of its existence, though he knew that the money collected for missions in the church at Shelburne Falls was sent to and managed and expended by an organization acting in the interest of the Methodist Episcopal Church in the city of New York.

On these facts, and with the interpretation which we put upon the language of the will, we cannot see that the petitioner took as devisee. There is nothing in the language of the will which points directly to the petitioner; its name is not mentioned, either in whole or in part. The facts above recited would be of importance in determining, in a suit in equity, what corporation

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or person should have the management of the trust estate, but they fail to be of any assistance in favor of the petitioner's assumption that it is the devisee. This is of little or no importance to the charity intended to be benefited, because the want of a trustee named in the devise will not work a failure of the devise. It is well settled that, when land is devised for a public charity, and no trustee is named, the heir takes in trust for the charity, or a court of equity will appoint a trustee to hold the estate for the purposes for which it was devised. *Bartlett* v. *Nye*, 4 Met. 378. *Washburn* v. *Sewall*, 9 Met. 280. *North Adams Universalist Society* v. *Fitch*, 8 Gray, 421. *Winslow* v. *Cummings*, 3 Cush. 358. *Brown* v. *Kelsey*, 2 Cush. 243.

The facts in the case at bar are less strong in favor of the position that the petitioner took as devisee, than they were in favor of the American Bible Society as legatee, in the case of *Bliss* v. *American Bible Society*, 2 Allen, 334. In that case, the legacy was to the Bible Society of the Methodist Episcopal Church, and it appeared that the organization of that name was dissolved many years before the will was made; and that for ten years before the will was made the Methodist churches had united with the American Bible Society in carrying forward its objects, and that contributions were thenceforward made in the Methodist Episcopal churches throughout New England, from year to year, in aid of the American Bible Society, and among others in the Methodist Episcopal Church of Wilbraham, of which the testator was a member, and, for more than ten years, members of the Methodist Episcopal Church had been members of the Board of Managers of the American Bible Society, and held office therein. It was contended that the American Bible Society might be properly regarded, under these circumstances, as the Bible Society of the Methodist Episcopal Church; but it was held that the designation of that organization, though it had ceased to exist, was too exact and express to create any ambiguity; especially as there was no evidence that the testator knew of its dissolution. The court, therefore, appointed a trustee to receive the legacy and expend it according to the charitable intent of the donor. In the case at bar, the devise is not to an organization which had ceased to exist, but is a devise for a charitable purpose, with no trustee named. This being so, the

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petitioner has no right to partition of the lands described in its petition.

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The questions who is to manage the trust, and whether the charitable purposes of the testator shall be effected through the instrumentality of the petitioner, can be settled only in proceedings on the equity side of the court.

The view which we have taken of the matters already considered renders it unnecessary to indicate any opinion on the other questions which were argued by counsel.

Decree of Probate Court reversed, and petition dismissed.

CATHERINE W. CHAPMAN *vs.* HERMAN L. MILLER.

Hampshire. Sept. 16, 1879. — Feb. 25, 1880. AMES & ENDICOTT, JJ., absent.

The power given to a married woman by the St. of 1857, c. 249, § 2, to convey, with the assent of her husband, any real or personal property which might thereafter come to her by "gift of any person except her husband," includes land conveyed to her by a third person for a pecuniary consideration.

The assent in writing, required by the St. of 1857, c. 249, § 2, of a husband to his wife's deed of her real estate, is sufficiently shown by the insertion of his name in the attestation clause, "in token of relinquishment of his right in the above-named premises," with his signature and seal.

WRIT OF ENTRY to foreclose a mortgage of land in Plainfield. Plea, *nul disseisin*.

At the trial in the Superior Court, before *Dewey*, J., without a jury, the demandant claimed title under a deed of mortgage to her from Sarah Wetherbee, whose name alone appeared as grantor. The attestation clause was as follows: "In witness whereof we, the said Sarah Wetherbee, and Nehemiah A. Weth erbee, husband of said Sarah Wetherbee, in token of relinquishment of his right in the above-named premises, have hereunto set our hands and seals this fourteenth day of June, in the year of our Lord one thousand eight hundred and fifty-eight." The deed was signed and sealed by the grantor and her husband.

The deed of the land to Sarah Wetherbee was dated March 2, 1858, when she was a married woman, and did not declare that the conveyance was to her sole and separate use.

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The judge ruled that the deed to the demandant passed no title to her, for the reason that the husband of the grantor did not join in the conveyance; and found for the tenant. The demandant alleged exceptions.

J. C. Hammond, for the demandant.

W. G. Bassett, for the tenant.

GRAY, C. J. If the wife had acquired her title to the land before the St. of 1857, *c.* 249, by deed in common form, and not expressed to be to her sole and separate use, it might be doubted whether her husband could have been deemed to have so joined in her mortgage to the plaintiff as to make it valid. Rev. Sts. *c.* 59, § 2. *Bruce* v. *Wood*, 1 Met. 542. *Jewett* v. *Davis*, 10 Allen, 68. *Wales* v. *Coffin*, 13 Allen, 213. *Agricultural Bank* v. *Rice*, 4 How. 225.

But by the St. of 1857, *c.* 249, §§ 1, 2, any real or personal property since "coming to a married woman, by descent, devise or bequest, or the gift of any person except her husband," remained her sole and separate property; and might be sold and conveyed by her as if she were unmarried; and the husband was not required to join in, but it was sufficient that he should "assent in writing" to, a conveyance of her real estate. These provisions were reënacted in the General Statutes, with the addition of the words "or grant" after the word "gift." Gen. Sts. *c.* 108, §§ 1, 3, 10. Following the definition of Blackstone, "Gifts or grants of personal property are thus to be distinguished from each other, that gifts are always gratuitous, grants are upon some consideration or equivalent," it has been intimated, though not decided, that, as applied to personal property, the terms of the General Statutes are more comprehensive than those of the statute of 1857. 2 Bl. Com. 440. *Spaulding* v. *Day*, 10 Allen, 96, 98. But as applied to real estate, the words "give," "gift," — *do*, *donum*, — have never been limited to gratuitous conveyances; and it has accordingly been adjudged that, as regards real estate, the word "give" in the statute of 1857 is equivalent to the words "give or grant" in the General Statutes, and includes a conveyance to the wife for a pecuniary consideration. Co. Lit. 384 *a*. 2 Inst. 276. 2 Bl. Com. 300. *Dow* v. *Lewis*, 4 Gray, 468. *Libby* v. *Chase*, 117 Mass. 105.

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In the case at bar, the wife, having acquired her title by deed since the statute of 1857, might convey it without her husband joining as a grantor; and the insertion of his name in the last clause of the mortgage, with his signature and seal, manifest the "assent in writing," which was all that was requisite to make it valid. *Hills* v. *Bearse*, 9 Allen, 403. *Child* v. *Sampson*, 117 Mass. 62. *Exceptions sustained.*

PASCAL GROW *vs.* FRANCES E. DOBBINS & others.

Middlesex. Jan. 13. — Feb. 16, 1880. COLT & LORD, JJ., absent.

A bill in equity, against the heirs of a deceased person, to recover a debt due from his estate, cannot be maintained, under the Gen. Sts. c. 101, §§ 31–34, in the absence of allegation or proof that the estate had been settled.

BILL IN EQUITY, filed April 2, 1877, against the heirs of William Dobbins, alleging that, on January 19, 1872, the plaintiff executed to William Dobbins a lease of a parcel of land in Lowell for the term of ten years from date, Dobbins to pay rent at the rate of one hundred and fifty dollars a year in monthly instalments; that Dobbins died on August 6, 1873, and on September 2, 1873, his widow was appointed administratrix of his estate, and paid the rent up to January 19, 1876; that since that date the rents falling due have not been paid; that real estate to the value of ten thousand dollars and upwards, owned by William Dobbins at his decease, descended to the defendants and is now held by them in fee; that on May 19, 1874, the said widow was appointed guardian of the defendants, and was still acting as such; and that the time prescribed by law for the limitation of suits against the administratrix expired before this cause of action accrued.

The prayer of the bill was, that it might be determined how much each of the defendants was liable to pay; and that judgment and execution might issue accordingly.

The defendants answered, denying that any real estate descended to them, or that they were liable; and alleging that the

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estate of William Dobbins was not fully administered, and had been represented insolvent in the Probate Court.

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At the hearing before *Colt*, J., the bill was dismissed, on the ground that it did not allege, nor did it appear at the hearing, that the estate had been settled when the bill was filed. The plaintiff alleged exceptions.

R. B. Caverly, for the plaintiff.

D. S. Richardson & G. F. Richardson, for the defendants.

GRAY, C. J. By the Gen. Sts. *c.* 101, §§ 31–34, it is only "after the settlement of an estate by an executor or administrator," as well as after the expiration of the time limited for the commencement of actions against him, that debts which could neither have been sued against him, nor secured by application to the judge of probate, under *c.* 97, § 8, to have assets retained or a bond given, can be the subject either of an action at law or of a suit in equity against the heirs or next of kin. In the present case, there being no allegation or proof that the estate had been settled, the bill was rightly dismissed. *Grow* v. *Dobbins*, 124 Mass. 560. *Brooks* v. *Rayner*, 127 Mass. 268.

Exceptions overruled.

JOHN C. HAMMOND, trustee, *vs.* SOPHRONIA GRANGER & another, administrators.

Hampshire. Sept. 16, 1879. — Feb. 27, 1880. AMES & ENDICOTT, JJ., absent.

A testator by his will bequeathed to A. and B. a certain fund in trust. They accepted the trust, and, in 1861, gave bonds with C. as surety. C. died testate in 1876, an administrator with the will annexed gave bond and published notice of his appointment in that year, and his estate had not been fully administered, when, in 1879, A. and B. were removed from the office of trustee, and D. was appointed in their stead and made a written demand upon them to deliver to him all the trust property in their hands, which they refused to do. *Held*, that their refusal constituted a breach of their bond, and a claim thereupon arose against the estate of C. as a surety on that bond; and that D. could maintain a petition to the Probate Court, under the Gen. Sts. *c.* 97, § 8, to order C.'s administrator to retain in his hands sufficient funds to satisfy D.'s claim against the estate.

A single trustee appointed by the Probate Court, in the place of two trustees who have been removed, takes the title in the trust property, and the right to prosecute all necessary suits to recover the same.

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PETITION to the Probate Court, under the Gen. Sts. c. 97, § 8, to order Sophronia Granger and John W. Smith, administrators with the will annexed of Lorenzo N. Granger, to retain in their hands sufficient funds to satisfy the petitioner's claim against his estate. The Probate Court dismissed the petition, the petitioner appealed to this court, and the case was heard and reserved by *Gray*, C. J., for the determination of the full court, upon a statement of facts in substance as follows:

Cotton Smith by his will, which was admitted to probate August 7, 1860, bequeathed to George C. Smith and John W. Smith the sum of $10,500 in trust to pay to his children the income thereof during their lives, and the principal at their death to their issue, and further provided as follows: "And I further direct that, in order to the execution of either of the powers herein granted to said trustees or their successors, the consent of both shall be necessary, and in case either of said trustees shall decline to accept the said trust, or shall die before a full and complete execution of the same, I direct that the surviving trustee, if there shall be any, and my surviving children, or, in case there shall be no trustee surviving, then my surviving children alone, shall nominate another trustee or trustees, who shall be satisfactory to, and may be appointed by the court of probate of the said county of Hampshire; and the said trustee or trustees shall, after such appointment, have the same powers and be subject to the same restrictions in all respects as the trustees hereinbefore named. And in case the said surviving trustee or children shall fail to nominate as aforesaid, the said court of probate may appoint some suitable person to such office; and all vacancies among said trustees shall continue to be filled in like manner so long as such trustees shall be necessary."

George C. Smith and John W. Smith accepted the trust, and on February 3, 1861, gave bonds for the performance thereof, with Thaddeus Smith and Lorenzo N. Granger as sureties, both of whom afterwards died. Lorenzo N. Granger died testate March 27, 1876; and on May 2, 1876, the respondents gave bond as administrators with the will annexed, and published notice of their appointment, and his estate has not been fully administered. In February 1879, George C. Smith and John W. Smith, still holding the trust fund, were removed by the Probate Court

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from the office of trustee. On March 22, the petitioner was appointed in their stead by that court, upon the nomination in writing of all the surviving children of Cotton Smith, and on March 27 made a written demand upon the trustees to deliver to him all the trust property in their hands, which they refused to do. All those children of Cotton Smith are still living, and some of them have children.

The petitioner contended that, in virtue of his appointment as trustee, and by reason of the breach of the bond of the former trustees by their refusal to deliver the trust fund to him, he had a claim in the same amount against the estate of Lorenzo N. Granger as surety on that bond, and that, more than two years having elapsed since the bond was given, the respondents should be ordered to retain in their hands sufficient funds to satisfy his claim. The respondents objected, 1st, that the petitioner was not a creditor of their testator, whose right of action did not accrue within two years after the giving of that bond, within the meaning of the Gen. Sts. *c.* 97, § 8; 2d, that the appointment of the petitioner was invalid, because the will required the appointment of two trustees.

It was agreed that, if, upon these facts, the petition could be maintained, judgment should be rendered accordingly; otherwise, the petition should be dismissed, or such other order entered as to the court should seem meet.

J. C. Hammond, pro se.

I. B. Bottum, for the respondents, cited to the first point, St. 1788, *c.* 66, §§ 4, 5; Rev. Sts. *c.* 66, § 5, and Commissioners' report; Gen. Sts. *c.* 97, §§ 5, 8, and Commissioners' report; *Royce* v. *Burrell*, 12 Mass. 395, 398; *Paine* v. *Moffit*, 11 Pick. 496, 499; *Hall* v. *Bumstead*, 20 Pick. 2, 7, 8; *Bemis* v. *Bemis*, 13 Gray, 559; *Low* v. *Bartlett*, 8 Allen, 259, 264; *Lovell* v. *Nelson*, 11 Allen, 101; *Spelman* v. *Talbot*, 123 Mass. 489; *Holden* v. *Fletcher*, 6 Cush. 235; *Hunt* v. *Holden*, 2 Mass. 168; and to the second point, *Massachusetts General Hospital* v. *Amory*, 12 Pick. 445, *Dixon* v. *Homer*, 12 Cush. 41; *Shaw* v. *Paine*, 12 Allen, 293.

GRAY, C. J. The statutes of the Commonwealth concerning the payment of the debts and liabilities of deceased persons are framed with the objects, 1st, of securing a prompt settlement and distribution of the estate, and, 2d, so far as can be, of affording

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to all creditors adequate remedies. The general rule is that no executor or administrator can be sued by any creditor of the deceased after two years from the giving of the administration bond. Gen. Sts. *c.* 97, §§ 5, 12. The exceptions in cases of new assets coming to the hands of the executor or administrator after the expiration of the two years, and of equitable claims which might have been and were not sued within the period of limitation, do not affect the case before us. Gen. Sts. *c.* 97, §§ 6, 7. St. 1861, *c.* 174, § 2.

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This case depends upon the provisions by which "a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that the same is justly due from the estate," the court shall order the executor or administrator to retain in his hands sufficient to satisfy the same, unless a sufficient bond "for the payment of the demand in case the same is proved to be due," is offered and given by a person interested in the estate. Such a claim is not conclusively established by the decision of the Probate Court, but must be "proved to be due in an action commenced by the claimant within one year after the same becomes payable," or, if an appeal is taken from the decision of the Probate Court, then within one year after a final determination of that appeal, against the executor or administrator, or against the person giving the bond. Gen. Sts. *c.* 97, §§ 8–11. St. 1871, *c.* 238.

These provisions in terms cover every claim, the right of action upon which does not accrue within the period of the special statute of limitations, and which now appears to be "justly due from the estate," and include every debt arising out of a contract of the deceased which becomes "justly due" before the estate is settled, even if it was neither *debitum* nor *solvendum* within the two years.

The claim of the petitioner is upon the bond given on May 2, 1876, by the respondents, as administrators with the will annexed of Lorenzo N. Granger, and arises thus: The former trustees under the will of Cotton Smith gave bond in 1861 for the performance of their trust, with Granger as a surety, and in February 1879 were removed from that trust. On March 22, 1879, the

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petitioner was appointed in their stead, and a week afterwards demanded of them the trust fund in their hands. Their refusal to deliver it to him constituted a breach of their bond, and a claim thereupon arose against the estate of Granger as a surety on that bond. Gen. Sts. *c.* 100, § 1. *Choate* v. *Arrington*, 116 Mass. 552. *Brooks* v. *Jackson*, 125 Mass. 307. The removal of the former trustees, the appointment of the petitioner in their stead, and their refusal to deliver the trust fund to him, not having taken place until more than two years after the respondents gave bond as executors of Granger, the petitioner did not have, and could not by making a demand have acquired, any right of action on the claim within the two years; and, the claim being now both due and payable, a clear case is presented for an order by the Probate Court under the Gen. Sts. *c.* 97, § 8. *Grow* v. *Dobbins*, 124 Mass. 560. *Same* v. *Same*, *ante*, 271. *Brooks* v. *Rayner*, 127 Mass. 268.

The cases cited by the respondents are in no wise inconsistent with this view. In none of them had any application been made to the Probate Court to set aside assets; and most of them related either to the effect of the special statute of limitations, or else to the liability of heirs and devisees, who can only be sued after the estate has been settled and upon debts which could not have been sued for against the executor or administrator. Gen. Sts. *c.* 101, §§ 31 *& seq.* *Hall* v. *Bumstead*, 20 Pick. 2.

In *Spelman* v. *Talbot*, 123 Mass. 489, the point adjudged was that the claim of one joint debtor against the administrators of another for contribution to a sum paid by the plaintiffs after the time of limitation of actions against the administrators had expired, and which therefore did not come into existence until after that time, was not within the equitable exception to that statute created by the St. of 1861, *c.* 174, § 2; there had been no application to the Probate Court to order assets to be retained or a bond to be given, and therefore, as previously decided in *Bacon* v. *Pomeroy*, 104 Mass. 577, no action could have been maintained under the Gen. Sts. *c.* 97, § 10; and the dictum that the possible liability of the plaintiffs would not give them a contingent claim against the estate, upon which they could have obtained such an order from the Probate Court, was evidently based upon the fact, that at the time spoken of it was

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wholly uncertain whether the plaintiff would ever have any claim at all.

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An action at law upon the bond of the trustees, or upon the bond of the administrators of the surety on the first bond, must indeed have been brought in the name of the judge of probate as the obligee therein, and not in the name of the new trustee; but as the new trustee is the person entitled to bring such an action in the name of the judge of probate, he is the proper person to present a petition under the Gen. Sts. *c.* 97, § 8; for it would be an anomaly to require the judge of probate, as the obligee in the bond, to apply to himself in his judicial capacity for an order under this statute.

The question whether two trustees should have been appointed instead of one is not brought directly before us, as it would be by appeal from the decree of the Probate Court appointing a single trustee. Even if that court ought to have appointed an additional trustee, it is clear that the property vested in the trustee appointed, and that he has the right to prosecute all necessary suits to recover the same. *Greene* v. *Borland*, 4 Met. 330. *Dixon* v. *Homer*, 12 Cush. 41.

The result is that the decree of the Probate Court dismissing the petition must be reversed, and the case remitted to that court for *Further proceedings.*

OAKES A. AMES & another, executors, *vs.* FREDERICK L. AMES & others, executors.

Bristol. Oct. 30, 1879. — Feb. 27, 1880. COLT & AMES, JJ., absent.

If the existence of a claim against the estate of a deceased person depends upon a future contingency, it is not a debt "justly due" from the estate, within the Gen. Sts. *c.* 97, § 8.

PETITION to the Probate Court, by the executors of the will of Oakes Ames, to order the executors of the will of Oliver Ames to retain in their hands sufficient funds to satisfy the petitioners' claim against his estate. The Probate Court dismissed the petition; and the petitioners appealed to this court. Hearing before

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Gray, C. J., who affirmed the decree; and the petitioners appealed to the full court. The material facts appear in the opinion.

H. J. Fuller, for the petitioners.

J. H. Benton, Jr., for the respondents, was not called upon.

MORTON, J. The statute provides, that "a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that the same is justly due from the estate, he shall order the executor or administrator to retain in his hands sufficient to satisfy the same. But if a person interested in the estate offers to give bond to the alleged creditor with sufficient surety or sureties for the payment of the demand in case the same is proved to be due, the court may order such bond to be taken, instead of requiring assets to be retained as aforesaid." Gen. Sts. *c.* 97, § 8.

To bring himself within this provision, a person must show that he is a creditor of the deceased, whose right of action did not accrue within two years of the giving of the administration bond, and that he has, at the time of his petition, a claim which is "justly due from the estate." It is not enough to show that the deceased has entered into a contract with him under which a liability may or may not arise in the future. Such a state of things does not prove the existence of a claim which the judge of probate can find to be "justly due" from the estate.

The policy of our laws is to secure the prompt and early settlement of the estates of deceased persons. The statutes make three provisions for the protection of creditors and the collection of their debts against the estate: 1st. If a creditor's cause of action accrues within two years of the date of the administration bond, he may, within said two years, sue the executor or administrator. 2d. If at any time before the estate is settled he has a debt due upon which the right of action does not accrue within the two years, he may, by application to the judge of probate, obtain an order that the executor or administrator shall retain in his hands sufficient to satisfy it, or that a bond shall be given for the payment of what may be proved to be due, in which case the creditor is required to bring

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a suit, to prove his claim to be due, within one year after his cause of action accrues, or, if an appeal is taken from the decision of the Probate Court, within one year after the final determination of the appeal, otherwise the executor of the persons signing the bond will be discharged. Gen. Sts. *c.* 97, §§ 9, 10. St. 1871, *c.* 238. 3d. A creditor whose right of action accrues after the expiration of said two years and after the settlement of the estate, and whose claim could not have been sued against the executor or administrator, and has not been presented and allowed under the provisions of *c.* 97, may, by a suit commenced within one year after the time when such right of action accrues, recover the claim against the heirs and next of kin of the deceased and the devisees and legatees under his will. Gen. Sts. *c.* 101, §§ 31–35. *Hammond* v. *Granger*, *ante*, 272. These provisions afford as ample protection to creditors as was deemed by the Legislature to be consistent with the reasonably speedy settlement of estates of deceased persons.

The provisions of *c.* 97, § 8, are confined to cases of creditors who have debts due from the estate, either payable presently or in the future. They do not extend to cases where the deceased has entered into a contract which may possibly result in a debt at some future time, but upon which there is no existing debt at the time of the application to the judge of probate.

In the case at bar, the testator signed a contract, by which, in consideration of the transfer to him of 3173 shares of the stock of the Credit Mobilier of America, he agreed with the petitioners that "if hereafter any holder of stock in said Credit Mobilier of America shall by sale to the Union Pacific Railroad Company, or by litigation, compromise or otherwise with said company, realize anything whatever per share for his stock, I will make up to said executors the amount per share received by such holder."

Nothing has become due under this contract. It is entirely uncertain whether or not anything will ever become due. The existence of any demand or debt depends upon a contingency. The judge of probate could not rightly decide that any debt was justly due from the estate, and there was no possible mode in which he could determine whether a debt would arise in the

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future, and, if so, what would be its amount. He therefore rightly dismissed the petition.

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The petitioners' remedy, if any debt shall hereafter arise by the happening of the contingency, will be against the heirs or devisees or legatees. *Hayward* v. *Hapgood*, 4 Gray, 437.

The petitioners rely upon the cases of *Bacon* v. *Pomeroy*, 104 Mass. 577, *Tarbell* v. *Parker*, 106 Mass. 347, and *Grow* v. *Dobbins*, 124 Mass. 560; but, in each of those cases, the dictum that the creditor therein had his remedy under the Gen. Sts. *c.* 97, § 8, was made with reference to a debt which had become certain and fixed, and upon which a cause of action had accrued before the estate was settled.

It is not necessary to consider what would be the effect of the St. of 1879, *c.* 71, in a case to which it applies, as the testator died and his estate was in process of settlement at the time of the passage thereof, and it therefore does not apply to this case. St. 1879, *c.* 243. *Decree affirmed.*

GEORGE DWIGHT, JR. *vs.* LUDLOW MANUFACTURING COMPANY.

Hampden. Jan. 7. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A. proposed by letter to B. to put the gutter of a mill "in proper shape." B.'s letter of acceptance stated A.'s proposal to be to "repair and renew so far as necessary the gutter." *Held*, that the contract contained in the letters required A. only to make such repairs and renewals that the gutter should do all that it was capable of doing, when in good condition, according to its original plan of construction, and not to build a new gutter of a different construction, even if the original plan was defective.

CONTRACT upon an agreement contained in the following letter from the plaintiff to the defendant, dated May 14, 1875: "We hereby propose to furnish the material and put up complete the roof and upper floor of Mill No. 1, the plan and material to be the same as upon Mill No. 2, with the following changes and additions. . . . Price for the above, twenty-five hundred dollars. We also propose to put gutter of No. 2 Mill in proper shape without charge;" — and in the following letter

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from the defendant to the plaintiff, dated May 15, 1875: "Your proposition of the 14th inst., to furnish material and complete the work of rebuilding roof and upper floor of Mill No. 1 Ludlow Manufacturing Co., and repair and renew so far as necessary the gutter of Mill No. 2, for the sum of twenty-five hundred dollars, duly received and accepted."

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The case was referred by rule of court to an arbitrator, who reported that the original plan of construction of the gutter on Mill No. 2 was defective in that the flashing did not extend a sufficient width under the roof, and in the gutter being insufficiently supported; that, at the time the contract was made, forty feet of the gutter, which was originally three hundred and forty-eight feet long, had broken down and required to be rebuilt; that the plaintiff offered to rebuild this part, and to repair the whole gutter upon the plan of its original construction; that, to put the gutter in absolutely proper shape so as to make it a perfect gutter, it was necessary that it should all be taken down, and new supports put under it, so as to substantially construct it anew, and to increase the width of the flashing; and that the defendant required these things to be done, and contended that the plaintiff was bound to do them under the contract; but on the plaintiff's refusing to do more than he offered as above stated, the defendant refused to let him perform the work.

The arbitrator awarded that, if the plaintiff's interpretation of the contract was correct, (as in his opinion it was,) the plaintiff was entitled to judgment for the sum of $873; otherwise, for the sum of $388; and submitted the question of the construction of the contract to the court.

The Superior Court ordered judgment for the plaintiff for the larger sum; and the defendant appealed to this court.

W. L. Smith, for the plaintiff.

E. H. Lathrop, for the defendant.

AMES, J. The interpretation of the contract adopted by the arbitrator was, in our judgment, the only one which it would bear. The plaintiff's letter contains a proposition "to put the gutter of mill No 2 in proper shape without charge." This was very far from a proposition to furnish a new gutter of a different construction. The defendant's letter accepting the proposition requires the plaintiff to "repair and renew, so far as necessary, the

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gutter of Mill No. 2." This form of expression can only mean that the plaintiff was to make such repairs and renewals that the existing gutter should do all that it was capable of doing, when in good condition, according to its original construction. The result is that the plaintiff is entitled to judgment for the larger of the two sums reported by the arbitrator.

Judgment affirmed.

CHARLES H. BROWN & others *vs.* MAYOR & ALDERMEN OF FITCHBURG.

Worcester. Oct. 1, 2, 1879. — Feb. 25, 1880. ENDICOTT & LORD, JJ., absent.

The mayor and aldermen of a city have no authority, under the Gen. Sts. *c.* 48, or the St. of 1869, *c.* 111, to include in the assessment of the cost of a sewer in one street a part of the cost of a sewer in another street, with which it connects, built several years before, and for the cost of which, at the time of its construction, no assessment was made upon the owners of estates benefited thereby; and an assessment so made may be quashed upon a writ of *certiorari*.

SOULE, J. The petitioners ask for a writ of *certiorari* in order that the record of the mayor and aldermen of the city of Fitchburg in the matter of the assessment of the cost of a sewer in Willow and Green Streets in that city may be quashed. Numerous errors are alleged as reasons why the writ should issue. It is unnecessary for us to pass upon them all. We are satisfied that, whether that part of the sewer which is in Green Street was legally established or not, the assessment was illegal. In making it, a substantial amount, being part of the cost of what is termed by the respondents the outlet of the sewer, was included as a part of the cost of the Willow and Green Street sewer. This outlet was constructed by the selectmen of the town of Fitchburg, and accepted by the town in the year 1872, at a cost, including the land damages, of more than $15,000. The respondents contend that it was constructed as a part of a system of sewers adopted by the town of Fitchburg in 1869, and as the common outlet for all sewers which should thereafter be constructed within certain limits known as the Willow Street District: and that, therefore, a proportional part of its cost was

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properly included in the assessment to pay for the Willow and Green Street sewer, which lies within those limits.

In determining the question, it is unnecessary to consider whether the town of Fitchburg had authority in 1869 to adopt a plan for a comprehensive system of sewers, which should be constructed one after another at greater or less intervals of time, and requiring several years for the completion of the system; because, in the absence of special legislation governing the case, any assessment for paying the cost of any sewer, constructed by either the town or the city, could be legally made only in accordance with the provisions of the Gen. Sts. *c.* 48, as extended and modified by the St. of 1869, *c.* 111. If, therefore, the town or city wished to assess the persons whose estates were in any way benefited, within the meaning of the statutes, by the construction of the sewer leading from Summer Street to the river, and which the respondents term "the outlet," they could have done it by having the selectmen, or the mayor and aldermen, within a proper time after the sewer was established, ascertain, assess and certify the proportional part of the charge of making that sewer, to be paid by each of the persons receiving benefit, and notify the persons to be charged. An assessment thus made, identifying the sewer by description or name, would have been in accordance with the terms of the statute, and any person aggrieved by it could, within three months after receiving notice of it, have applied for a jury, as the statute provides. In making the assessment, the municipal authorities would have been authorized to include in it, not only those persons whose estates were actually connected at the time, by public or private drains, with the sewer, but all those whose estates might be drained by means of it; so that, if it was a part of a comprehensive system, and intended to be the common outlet for all sewers thereafter to be built within certain limits including the region in which the Willow and Green Street sewer now is, and was adapted to benefit all the estates in that region, the assessment might properly have covered all those estates. *Downer* v. *Boston*, 7 Cush. 277. *French* v. *Lowell*, 117 Mass. 363.

Instead of pursuing the course marked out by the statutes, the mayor and aldermen made no attempt to assess for the cost of the Summer Street sewer or "outlet," and therefore never

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determined what estates were benefited by it, nor what proportion of the cost of construction should be paid by the owners of estates benefited, but arbitrarily, and without any legal warrant therefor, included a part of its cost in the amount of the assessment laid ostensibly for payment of the cost of the Willow and Green Street sewer. This renders the whole assessment illegal and void, and the petitioners are entitled to a writ of certiorari to bring the record up to this court, in order that it may be quashed. *Writ of certiorari to issue.*

W. S. B. Hopkins & E. P. Loring, for the petitioners.

P. Goulding & H. C. Hartwell, for the respondents.

Dwight B. Look *vs.* Clarence Kenney.

Worcester. October 3, 1879; January 12. — February 25, 1880.

A. and B. were in partnership. B. died and A. was appointed his administrator. Subsequently, to secure his debt to the firm, a debtor of the firm executed a mortgage of land, in which the consideration was stated to be paid by "A. and the estate of B.;" the same form was used in designating the grantees; and a power of sale was given to "said grantees." *Held*, that A., as administrator, was sufficiently designated as one of the grantees; that the whole legal title was vested in him, one half to his own use, and the other as administrator; and that his omission to describe himself as administrator in a deed given in execution of the power to sell did not invalidate the deed.

Contract upon a written agreement entered into on June 2, 1879, by the terms of which the plaintiff agreed to sell, and the defendant agreed to buy, a parcel of land in Leominster for $100, and an undivided half of another parcel of land in the same town for $40, the plaintiff to convey the same to the defendant within thirty days, "by a sufficient deed to give him a clear title thereto, free of all incumbrances." The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on an agreed statement of facts in substance as follows:

The plaintiff within the thirty days tendered to the defendant a deed of said land, properly executed and sufficient in form to give the defendant a clear title thereto, free of all incumbrances,

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and demanded of him the sums agreed to be paid therefor, but the defendant refused to receive the conveyance or pay the consideration therefor, on the ground that the plaintiff had no title to the land, or, if he had any title thereto, that the land was not free of all incumbrances, and the plaintiff could not give him such a title as the agreement required.

The plaintiff's title to both tracts of land was derived through a mortgage deed given by Joseph Collins, dated January 1, 1876, and duly recorded, in which, in consideration of a certain sum to him paid "by Dwight B. Look and the estate of William Tilton," the premises were conveyed "unto the said Dwight B. Look and Tilton estate, their heirs and assigns," *habendum* "to the said Look and Tilton estate, and their heirs and assigns;" and it was provided that upon breach of condition "the said grantees, or their executors, administrators or assigns, may sell." The plaintiff, claiming to be sole mortgagee of the whole land covered by the mortgage which had not been released, including that in question, sold the land under the power to himself.

The plaintiff was the only surviving partner of the late firm of Tilton & Look, composed of himself and William Tilton, referred to in said mortgage, who died on December 7, 1873, leaving a large amount of personal property after paying his debts, besides his interest in the firm. At the time of Tilton's death, the firm held a note for $2700, given to it by Collins, and secured by a pledge of railroad stock. At the date of the mortgage, Collins desired to use the stock so pledged and still held by the plaintiff, and proposed to give the latter in place of the note and stock a new note for $2700, secured by a mortgage on real estate, which the plaintiff consented to take, and the above mortgage and a note, payable to Dwight B. Look and William Tilton estate, were duly executed and delivered by Collins to the plaintiff, who thereupon transferred the stock to Collins.

Prior to August 8, 1876, the plaintiff, as surviving partner, and also being sole administrator of the estate of Tilton, had so far settled up the affairs of the firm as to have agreed with the parties interested therein that, as a portion of his share of the assets of the firm, he would take the note and mortgage made by Collins, and allow therefor the amount due thereon, and had accounted to them for the same.

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On August 8, 1876, Collins sold one of the tracts of land covered by the mortgage, but not including any part of the land in question, for $600, and paid the money to the plaintiff, who indorsed it on the note, leaving $2100 and interest due thereon, and released the land sold from the mortgage. The balance of the debt secured by the mortgage has never been paid nor the mortgage discharged.

The case was argued at the bar in October 1879, by *C. H. Merriam*, for the plaintiff, and *H. C. Hartwell*, for the defendant, and arguments in writing were submitted by the same counsel in January 1880.

GRAY, C. J. By our statutes, the legal title in a mortgage of real estate held by a deceased person, as well as the debt secured thereby, vests in his executor or administrator, and may be foreclosed or discharged by him; and he is seised of all mortgages, under which possession has been taken, in trust for those who would be entitled to the money in case of redemption. Gen. Sts. *c.* 96, §§ 9, 10. The mortgage reciting the payment of the consideration money "by Dwight B. Look and the estate of William Tilton," conveying the land "unto the said Dwight B. Look and Tilton estate," and containing a power of sale to "said grantees," sufficiently designated as one of the grantees the administrator of the estate of Tilton; and it being agreed that Look was such administrator, the whole legal title vested in him, one half to his own use and the other half as administrator of Tilton's estate in joint tenancy. *Shaw* v. *Loud*, 12 Mass. 447. *Lawrence* v. *Fletcher*, 8 Met. 153. *Pomeroy* v. *Latting*, 2 Allen, 221. Gen. Sts. *c.* 89, § 14. The whole legal estate and the power of sale being vested in Look only, and he having undertaken to convey the whole estate in execution of the power, the deed was not invalidated by the omission to describe himself therein as holding one half as administrator, but conveyed a clear title which will support this action. *Cook* v. *Griffin*, 1 Dane Ab. 581. *Cooper* v. *Robinson*, 2 Cush. 184. *Sheldon* v. *Smith*, 97 Mass. 34. *Hall* v. *Bliss*, 118 Mass. 554.

Judgment for the plaintiff.

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INHABITANTS OF BROOKFIELD *vs.* INHABITANTS OF WARREN

Worcester. Oct. 4, 1879. — Feb. 25, 1880. ENDICOTT & LORD, JJ., absent.

In an action by one town against another for the support of W., a pauper, the issue was whether W. had left the defendant town in 1856, with the intention of acquiring a domicil in the town of A. It appeared that W. went from the defendant town to A. in May 1856, taking with him his tools for shoemaking, some household furniture, and one of his two children, and, after living there two weeks in the house of a relative, returned to the defendant town. The defendant offered to show by a witness that, in the spring of 1856, he met W. at a stable in the defendant town, and W. said to him that he had his goods loaded and was going to A. to live; that he was going to work on a farm some of the time and at shoemaking the rest; and that he did not see W. again until he returned to the defendant town. *Held*, that it did not appear that the declaration accompanied the act of removal; and that it was properly excluded.

A man is under no legal obligation to support his stepchild; and the fact that such child receives aid from a town as a pauper, upon the application of the stepfather, will not make the latter a pauper.

CONTRACT upon an account annexed for money expended by the plaintiff town in the relief of Albert Walker, a pauper, whose settlement was alleged to be in the defendant town. Answer, a general denial. At the trial in the Superior Court, before *Pitman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

W. S. B. Hopkins, for the defendant.

F. T. Blackmer, for the plaintiff.

MORTON, J. The plaintiff contended that Walker, the pauper for whose support this action is brought, acquired a settlement in Warren by a residence of ten years, from 1847 to 1857, and the payment of taxes for five years during that period. One question at the trial was whether his residence had been interrupted by his removal to Wales in 1856 with the intention of making his residence there. It appeared that, in May 1856, Walker went to Wales from Warren, taking with him his tools for shoemaking, some household furniture, and one of his two children, and remained in Wales about two weeks, when he returned to Warren. The question whether he went to Wales with the intention of making his residence there was a material question of fact.

The defendant offered the testimony of a witness to the effect "that some time in the spring of 1856 (the date not being

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exactly fixed) he met Walker at a stable in Warren, and Walker said to him, that he had his goods loaded and was going to Wales to live, that he was going to work on a farm some of the time and at shoemaking the rest, that he saw no more of Walker in Warren till his return from Wales." The court excluded the testimony, "on the ground that it was a mere declaration not accompanying any act."

The rule is, that declarations, which accompany and give character to an act which is itself competent evidence, are admissible, on the ground that they are parts of the act or *res gestæ*. *Wright* v. *Boston*, 126 Mass. 161. *Weld* v. *Boston*, 126 Mass. 166. The fact that the pauper removed his furniture from Warren to Wales was competent, and any declarations accompanying the act of removal, and tending to show his purpose and intent, were admissible. But the evidence in this case does not show that the declaration by the pauper that "he was going to Wales to live" accompanied the act of removal. It seems to have been a casual remark, not made in the course of business, and was the statement of his future intentions not accompanying and giving character to any act which he was then doing. In other words, it was not shown to have been part of any transaction which was itself competent evidence. We cannot say that there was any error in law in the ruling of the presiding justice that it was inadmissible.

The facts, that Walker had applied to the overseers of the poor of Warren to have his stepchildren taken to the almshouse, and that they had been supported by the town, did not prevent his acquiring a settlement in Warren. If he, or, with his consent, his wife or children whom he was bound to support, had been aided as paupers, it would have interrupted his residence in Warren and prevented his acquiring a settlement there. *Charlestown* v. *Groveland*, 15 Gray, 15, and cases cited. But he was under no legal obligation to support the children of his wife by a former marriage, either at common law or under our pauper acts. *Freto* v. *Brown*, 4 Mass. 675. *Worcester* v. *Marchant*, 14 Pick. 510. Gen. Sts. *c.* 70, § 4. The fact, therefore, that his stepchildren, upon his application, received aid from the town, would not operate to make him a pauper.

Exceptions overruled.

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LUCINDA B. GEORGE vs. PETER GOBEY.

Worcester. Oct. 4, 1879. — Feb. 26, 1880. ENDICOTT & LORD, JJ., absent.

A master is liable to the penalty imposed by the St. of 1875, c. 99, § 16, if his servant, in the course of his master's business, sells intoxicating liquor, after notice requesting the master not to do so, to a person who has the habit of drinking intoxicating liquor to excess, although the master has instructed the servant not to make a sale to such person, and the sale is without the knowledge and consent of the master.

TORT to recover the penalty provided by the St. of 1875, c. 99, § 16, for selling intoxicating liquors to Obadiah George, the husband of the plaintiff, within twelve months after written notice by her to the defendant that her husband was in the habit of drinking intoxicating liquors to excess, and requesting the defendant not to sell or deliver such liquors to him. Answer, a general denial.

At the trial in the Superior Court, before *Pitman*, J., without a jury, the plaintiff offered evidence of sales of liquor to her husband, after notice to the defendant, by Hiram Emerson, the bar-keeper of the defendant.

The defendant did not controvert this evidence; but offered evidence tending to show that, after such notice, he did not personally make any sales to the plaintiff's husband; and that he ordered Emerson not to sell to him, and, if any sales were made by Emerson, it was without the knowledge and consent of the defendant; and asked the judge to rule that, "if the defendant forbade his servant making sales of liquor to the plaintiff's husband, and the defendant's servant nevertheless made such sales without the knowledge and consent of the defendant, the defendant is not liable in this action by reason of the acts of his servant." The judge declined so to rule, and found for the plaintiff. The defendant alleged exceptions.

J. Hopkins, for the defendant.

J. E. Day, for the plaintiff.

SOULE, J. At common law, the master is responsible for the wrongful acts of his servant done in the execution of the authority given by the master, and for the purpose of performing what the master has directed, whether the wrong done be occasioned

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by the mere negligence of the servant, or by a wanton and reckless purpose to accomplish the master's business in an unlawful manner. But if the servant goes outside the scope of his employment, and does a wrongful act, for a purpose of his own, and not in the performance of his master's business, the master is not responsible for such act. *Howe* v. *Newmarch*, 12 Allen, 49. *Ramsden* v. *Boston & Albany Railroad*, 104 Mass. 117. *Hawks* v. *Charlemont*, 107 Mass. 414. *Hawes* v. *Knowles*, 114 Mass. 518. *Levi* v. *Brooks*, 121 Mass. 501. The fact that the act done is contrary to an express order of the master will not exonerate him. *Philadelphia & Reading Railroad* v. *Derby*, 14 How. 468.

We see no reason why the general principle which governs the responsibility of the master for the acts of his servant should not apply in the case at bar. The action is brought under a statute which makes that a tort which was not so before, and provides for the recovery of damages against the tortfeasor. The tort consists in selling intoxicating liquor to one who has the habit of using it to excess, after notice of his habit and a request from his wife not to sell such liquor to him. The defendant engages in the business of selling liquor voluntarily. He chooses to intrust the details of the business to a servant. If he forbids the making of sales to the intemperate person, and his servant negligently, through forgetfulness of the instruction given him, or through a failure to recognize the person, continues to make sales to that person, there is no reason why the defendant should not be responsible for the wrongful act. The sale is his sale, made in the performance of his business, and is an act within the general scope of the servant's employment. The ruling which the defendant asked was properly refused. It does not state a combination of circumstances which would relieve the master from responsibility.

It is to be borne in mind that this is a civil action, and that the rules which govern it differ from the rules which govern criminal proceedings. *Roberge* v. *Burnham*, 124 Mass. 277.

What would be the result if it appeared that the servant, knowing the instruction given by his master, made the sales with the intention of disobeying him, and for his own purposes, and not for the purpose of doing his master's business, we have not considered, because that question is not before us. And we

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have treated the ruling asked for as intended to present the case of instructions given to the servant in good faith; for it would hardly be contended that instructions not to sell, which both master and servant understood to be a mere form of words, exonerated the master from the consequence of a wrongful sale made by the servant. *Exceptions overruled.*

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JAMES BRIERLY *vs.* DAVOL MILLS.

Worcester. Oct. 3, 1879. — Feb. 27, 1880. ENDICOTT & LORD, JJ., absent.

In an action for the price of a loom attachment, sold under an agreement that it should work successfully, the evidence was conflicting on the point whether it did so work; and the plaintiff was permitted, against the defendant's objection, after introducing evidence that the defendant's loom and another loom were substantially alike in their mechanical arrangements, though differing somewhat in details, to put in evidence that the attachment had worked successfully on the latter loom; but the evidence as to the similarity of the two looms was conflicting. *Held*, that the evidence objected to was rightly admitted; and that the question of the similarity of the two looms was properly submitted to the jury.

CONTRACT upon an account annexed for the price of four loom attachments. At the trial in the Superior Court, before *Pitman*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which appears in the opinion.

J. M. Morton, Jr. & A. J. Jennings, for the defendant.

F. T. Blackmer, for the plaintiff.

AMES, J. It was not denied at the trial that the defendant purchased the attachments with the purpose of applying them to its own looms, which were the Davol looms, so called. The defendant contended that the contract was that it was not to pay for the attachments, unless upon trial it should be found that they would operate successfully when so applied. And evidence was introduced to the effect that one of the attachments was sent to the defendant's mill, and applied, under the plaintiff's direction, to one of the Davol looms. There was a conflict of evidence as to the success of the experiment; the plaintiff's

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testimony tending to show that the loom and attachment were put in successful operation; and the defendant, on the other hand, introducing evidence tending to show that, after a trial of two or three weeks, under the plaintiff's superintendence, and after a further trial by the defendant, for several weeks, the attachment failed to work successfully, and the attempt to use it was abandoned.

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To rebut the evidence of the defendant on this point, the plaintiff offered to show that the same attachment had been successfully applied to the Whitin loom, so called, and, upon objection being taken to this evidence, he was required by the court to show that the two kinds of loom were alike; and, against the objection of the defendant, the plaintiff was allowed to testify that, at the part of the loom where the attachment was applied, the mechanical arrangement of the two looms was the same, and the principle of the two substantially alike, and that the mechanical operation of the motions upon the two looms was identical. On cross-examination, he admitted that there were also certain differences of construction, width of the looms, and castings for applying the attachment; and generally there was a conflict of evidence upon the question as to the similarity of the two kinds of looms in their mechanical operation. In this state of the evidence, the plaintiff was allowed to introduce testimony to the effect that his attachment was in successful operation when applied to a large number of the Whitin looms. The propriety of allowing this evidence to be given depends entirely upon the substantial identity of the two kinds of loom. The question as to that identity, so far as the working of the looms was concerned, was for the jury, and not for the court. The jury were instructed that, in all particulars affecting the use of these attachments, if they were not satisfied that the two were substantially the same, they could draw no comparison, and must disregard the testimony as to the application of the motion to the Whitin loom; but if they were satisfied they were substantially the same, they might consider it. These instructions were carefully guarded and limited, and the verdict shows that, upon a case of conflicting evidence, the jury must have been satisfied that the identity of the two kinds of loom was sufficiently made out. *Exceptions overruled.*

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MARSHALL WETHERBEE, administrator, *vs.* GEORGE C. WINCHESTER.

Worcester. Jan. 7. — Feb. 27, 1880. COLT & LORD, JJ., absent.

Under the Gen. Sts. *c.* 129, § 46, a defendant is bound to answer interrogatories as to such matters only as tend to support the plaintiff's claim, and not as to matters which relate exclusively to his own defence.

If matters which a defendant is not, as well as matters which he is, bound to answer, are included in a single interrogatory, under the Gen. Sts. *c.* 129, § 46, he is not required to take the risk of separating the two; and cannot, under a general order to make further answers, with which he has complied in apparent good faith, be defaulted for imperfections in such answers, without a specific order of the court as to the particulars in which they are insufficient, and opportunity to amend them.

If, after interrogatories to a defendant, under the Gen. Sts. *c.* 129, § 46, have been filed and answered, an additional interrogatory is filed without leave of court, the defendant cannot be defaulted for not answering it.

CONTRACT by the administrator of the estate of Milton Lane, deceased, for the balance of a mutual account between the defendant and Lane.

In the Superior Court, on May 21, 1878, the plaintiff filed interrogatories to the defendant, under the Gen. Sts. *c.* 129, § 46, one of which was as follows: "State whether or not you have an account with the plaintiff's intestate upon your books; and, if so, state what balance, if any, is shown due to the plaintiff's intestate by your book account, and annex a copy of said account to your answer to this interrogatory." To this interrogatory the defendant answered as follows: "I have an account of charges upon my books against the said Milton Lane, and an account of sums which I have credited him for the lumber which he sawed for me and merchandise sold by him to me, and the balance due to him upon my books is about $300; but this sum, by agreement, is to be applied in part payment of certain notes held by me against said Lane, one of which notes being for the sum of $2500, the agreement between the said Lane and myself being that the balance at any time due the said Lane upon our accounts should be applied upon and in part payment of said notes held by me against said Lane. My books do not show the amount of balance without reference to the saw-mill account."

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On June 8, the plaintiff represented to the court that the defendant had not fully answered said interrogatory, in that he did not state the exact balance due the plaintiff's intestate upon the books, and did not annex a copy of his book account, nor any part thereof, to his answer; and, upon a hearing, the court ordered "fuller answer to be filed by July 15, 1878."

On October 9, 1878, the defendant, by consent, filed the following additional answer: "I have upon my various books an account of debt and credit with said Lane, and the balance due said Lane is $293.61. This balance is obtained by deducting the charges upon my books against said Lane, for money paid and merchandise sold to him by me, from the amount with which said Lane has charged me for work done as per his bill rendered. This balance is by agreement to be applied in part payment of certain notes held by me against him, the said Lane, the agreement between said Lane and myself being that the balance at any time due the said Lane upon our accounts should be applied upon and in part payment of said notes held by me against said Lane."

In October 1878, the plaintiff, without leave of court, also filed this additional interrogatory: "In your amended answer to the second of the plaintiff's interrogatories in the above entitled action, you state that, by virtue of a certain agreement with the plaintiff's intestate, any balance which was due from you to the plaintiff's intestate was to be applied upon and in part payment of certain notes held by you against said intestate. State what notes were held by you against said plaintiff's intestate, to which, under said agreement, any balance due was to be applied, and annex copies of the same to your answer to this interrogatory." The defendant had due notice of the filing of this additional interrogatory, but filed no answer.

More than ten days after the filing of the last-named interrogatory, the defendant's counsel said to the counsel for the plaintiff, that he had sent the interrogatory to his client, but had received no answer from him, but said nothing further to the plaintiff's counsel, and made the objection that said interrogatory was filed without leave of court, for the first time, when the plaintiff made the motion for default for not answering the same.

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At November term 1878, before *Bacon*, J., the plaintiff moved that the defendant be defaulted for neglecting to answer properly the first interrogatory, and to annex a copy of his account with Lane to his answer to said interrogatory, and for neglecting to answer the additional interrogatory.

The defendant asked the judge to rule that he had properly answered the first interrogatory, and was under no legal obligation to annex a copy of his book account with the plaintiff's intestate, giving items of debit and credit; and, at the same time, offered to file, within such time as the court should order, a copy of all credits upon his books due to the plaintiff's intestate; and also asked the judge to rule that he was under no obligation to answer the additional interrogatory. The plaintiff made no demand for the books themselves.

The judge refused to rule as requested; and ordered that the defendant be defaulted. The defendant alleged exceptions.

H. C. Hartwell, for the defendant.

G. A. Torrey, for the plaintiff.

GRAY, C. J. Under the Gen. Sts. *c.* 129, § 46, a defendant is bound to answer interrogatories as to such matters only as tend to support the plaintiff's claim, and not as to matters which relate exclusively to his own defence. *Wilson* v. *Webber*, 2 Gray, 558. *Sheren* v. *Lowell*, 104 Mass. 24. *Baker* v. *Carpenter*, 127 Mass. 226. If he neglects or refuses to answer a proper interrogatory, he may be defaulted. Gen. Sts. *c.* 129, § 56. But if matters which he is not, as well as matters which he is, bound to answer, are embraced in a single interrogatory, he is not required to take the risk of separating the two; and cannot, under a general order to make further answers, with which he has complied in apparent good faith, be defaulted for imperfections in such answers, without a specific order of the court as to the particulars in which they are insufficient, and opportunity to amend them. *Amherst & Belchertown Railroad* v. *Watson*, 8 Gray, 529. *Hancock* v. *Franklin Ins. Co.* 107 Mass. 113. Hare on Discovery (2d ed.) 105.

In the present case, the defendant, having stated in his answers the balance of the account between the parties, was not bound to disclose the items of credit entered on his own books; for these related wholly to the matter of his own defence, by

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way of payment or set-off, against the plaintiff's claim. Independently, therefore, of the question of the irregularity of the first interrogatory, as calling for copies which he was not bound to make, instead of for an inspection of the original books, the defendant was in no default with respect to that interrogatory. And he might properly disregard the additional interrogatory subsequently filed, because the court had not granted leave to file it. *Hancock* v. *Franklin Ins. Co.* above cited. The default was therefore wrongly entered, and should be set aside.

Exceptions sustained.

ADELINE GREENWOOD *vs.* ANDREW J. BRADFORD.

Plymouth. Jan. 28. — Feb. 27, 1880. MORTON & SOULE, JJ., absent.

The Gen. Sts. *c.* 133, § 7, and *c.* 115, § 14, authorizing "the court," upon overruling a motion for a new trial, to enter judgment as of a former term, confer no authority upon a judge in vacation to enter judgment, where the case has not been continued *nisi*.

CONTRACT, with a count in tort. The record and the clerk's docket showed the following facts: At the trial in the Superior Court, at June term 1878, before *Brigham*, C. J., the jury returned a verdict for the plaintiff. The defendant, at the same term, moved to set aside the verdict and for a new trial. On July 17, 1878, the judge overruled the motion, and ordered judgment "as of the last day of June term last." In August 1878, the judge ordered the case to be continued for judgment. At October term 1878, judgment was entered on the verdict for the plaintiff; and the defendant appealed to this court.

D. E. Damon, for the defendant.

C. G. Davis, for the plaintiff.

GRAY, C. J. The judges, either of the Superior Court or of this court, have no authority in vacation to order final judgment in actions at law which have been continued generally from one term to another, but only in those which have been continued *nisi*, that is to say, continued to the next term "unless" before

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that term some order shall be made as of the previous term. Gen. Sts. *c.* 112, §§ 31, 32. St. 1878, *c.* 145. The Gen. Sts. *c.* 133, § 7, and *c.* 115, § 14, authorizing "the court," upon overruling a motion for a new trial, or in any case in which justice requires it, to enter judgment as of a former term, confer no authority upon a judge in vacation. "The court," as used in the statutes, means the court held, whether by one or by more judges, at a term established by law. Gen. Sts. *c.* 112, §§ 18, 26, 27, 28, 38; *c.* 114, §§ 2, 16; *c.* 115, §§ 13, 16, 20; *c.* 122, §§ 2, 3; *c.* 133, § 1. Whenever the Legislature has intended to authorize the judges to act in vacation, without regard to any term, it has made express provision to that effect; as in suits in equity, interlocutory orders at law or in divorce, writs of habeas corpus, and arraignments for murder. Gen. Sts. *c.* 113, §§ 6, 7, 16, 18, 24; *c.* 129, §§ 59, 64; *c.* 144, §§ 3, 5. Sts. 1861, *c.* 91; 1862, *c.* 90; 1866, *c.* 148; 1869, *c.* 433, § 2; 1870, *c.* 119; 1874, *c.* 339. The full bench of this court has never assumed to exercise the power of ordering final judgments in vacation, without a continuance *nisi*, in actions at law. The law term for the Commonwealth, held at Boston on the first Wednesday of January in each year, is uniformly adjourned from time to time until the Tuesday before the first Wednesday of January in the following year; and in the law terms held in other counties all matters pending before the full court are always continued *nisi* by a general order at the end of the term. If an order, made at any term of either court, to continue a case *nisi*, should by mistake not be recorded, it would of course be within the power of the court at a subsequent term to order the record to be amended so as to conform to the truth. *Fay* v. *Wenzell*, 8 Cush. 315.

An appeal from a judgment of the Superior Court to this court lies only for error in matter of law apparent on the record. Gen. Sts. *c.* 114, § 10. Until the record is fully extended, the clerk's docket is the record. *Read* v. *Sutton*, 2 Cush. 115. The record in this case does not show any continuance *nisi* from the June term. It does show that the order for judgment as of the last day of that term, and the order to continue the case for judgment, were both made in vacation, and were therefore invalid. The case then stood continued generally to the next

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term, like any other unfinished case not continued *nisi;* and the judgment for the plaintiff, which appears by the record to have been entered at the next term, is the final judgment in the case, and must be *Affirmed.*

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BRISTOL COUNTY SAVINGS BANK *vs.* THOMAS J. KEAVY.

Bristol. Oct. 28, 1879. — Feb. 27, 1880. COLT & AMES, JJ., absent.

A treasurer of a savings bank may direct a suit to be brought on an overdue note; and if, judgment being obtained, and land taken on execution set off to the bank, the attorney of the bank, acting under the direction of the treasurer and of a trustee, to whom such matters have been entrusted, accepts seisin, and brings a writ of entry to recover possession of the land, it is no objection to the proceedings that a previous vote of the trustees authorizing them has not been passed.

On the issue whether a conveyance of real estate is fraudulent as to creditors, evidence of the register of deeds for the district in which the estate lies, that he has searched the records of the registry, and found that there was no other property standing in the name of the grantor, is admissible.

A real-estate broker and auctioneer, who has been accustomed for five years to value and sell real estate in various parts of a city in which a parcel of land is situated, and who has appraised land on the street where the land lies, is qualified to testify to the value of the land, although he has not sold land on that street.

At the trial of a writ of entry to recover possession of a parcel of land, set off to a creditor of A. on execution, and alleged to have been previously fraudulently conveyed to the tenant by A. with the intent to hinder, delay and defraud his creditors, the tenant asked the judge to rule that, if he bought the property from A. knowing that the effect of it would be to deprive the creditors of the power of reaching the property of A. by legal process, it was not fraud at common law. The judge declined so to rule, and ruled that, if such was the fact, it was not of itself fraud at common law, but had some tendency to prove fraud; and also ruled that the demandant must satisfy the jury either that there was no real sale to the tenant, or that, if there was a real sale, it was made by A. for the purpose of hindering, delaying and defrauding his creditors, and that the tenant knew of and assisted in such fraudulent purpose. *Held*, that the tenant had no ground of exception.

WRIT OF ENTRY, dated February 1, 1878, to recover possession of a parcel of land in Fall River. Plea, *nul disseisin.* Trial in the Superior Court, before *Brigham*, C. J., who allowed a bill of exceptions in substance as follows:

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The demandant contended that the demanded premises were fraudulently conveyed to the tenant on April 1, 1876, by James Keavy, with intent to hinder, delay and defraud his creditors. It appeared in evidence that the demandant recovered judgment against James Keavy upon a note which was due and payable at the time said conveyance was made; that execution issued on January 15, 1877, and, on February 5, 1877, was levied under the Gen. Sts. *c.* 103, § 1, by setting off the demanded premises to the demandant, seisin thereof being delivered to and accepted by the attorney who brought the action.

The tenant contended that this suit was brought without any authority given by the demandant, and that the acceptance of seisin by the attorney was also unauthorized by the demandant. It appeared that the business of the demandant was conducted by trustees and a board of investment; that no vote had been passed by the trustees or board of investment authorizing the bringing of the suit in which the execution was issued, or the acceptance of seisin by the attorney, or the bringing of this suit, until June 3, 1879, when, at a legal meeting of the trustees, the following vote was passed: "Voted, That all proceedings in the matter of Bristol County Savings Bank *vs.* Daniel Malone and others, including the attachment and set-off to said bank of the property of Daniel Malone, and of the property of James Keavy, the record title of which stood in the name of Thomas J. Keavy, the acceptance of seisin of the same on behalf of the bank, and the bringing of a writ of entry against Thomas J. Keavy in the name of said bank to recover said premises, are hereby accepted, ratified and confirmed as the acts of said bank."

The demandant's treasurer testified that he had general charge of the business of the bank; that matters relating to Fall River loans were left in the charge of Joseph E. Wilbar, one of the board of investment, who received applications for Fall River loans, which were referred to the committee of investment; that these loans were so managed, at the request of the other officers of the bank, but there was no vote or resolution to this effect; and that the witness and Wilbar placed the matter in the hands of an attorney, with directions to proceed against the parties on the note; but there was no record of any vote or resolution

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authorizing the same, or the bringing of the writ of entry, except the above vote of June 3, 1879.

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Joseph E. Wilbar testified that the management of the Fall River loans, as above referred to, had fallen upon himself in connection with the treasurer; that the applications for the same were always sent to him; that he had a talk with an attorney about the note of James Keavy, and authorized the attorney to bring suit against the parties on the note, assuming that he had authority to do so, but gave no notice to the rest of the board of investment that he had authorized the suit to be brought, and no person authorized him to bring it; that he was notified that the property had been set off to the bank on the execution, and he recorded the execution; that the matter of bringing the writ of entry was talked over by him and the attorney, and instructions given to the latter to bring it; and that the witness was present at the time the vote of ratification was passed, which was subsequent to the commencement of this suit.

Upon this evidence, the tenant asked the judge to rule "that the bank had not authorized the commencement of this action, that the subsequent ratification was too late, and that the bank had not authorized any person to accept seisin." The judge refused so to rule; and ruled that the action was properly authorized, and could be maintained.

The treasurer was asked, against the tenant's objection, "What knowledge did the directors of the bank have of the commencement of this suit from any information you gave them?" The witness answered, "On June 3, 1879, I made a communication to the trustees that there had been a set-off of this property of James Keavy held in the name of Thomas J. Keavy, and they then ratified the acceptance of seisin and commencement of this suit, as appears by the vote of record."

It also appeared that Wilbar was the register of deeds for the North Bristol District; and, as tending to show that James Keavy had not, at the time of the alleged fraudulent conveyance, any other property than that so conveyed, the demandant, against the tenant's objection, was allowed to ask the witness whether he had searched the records of his registry to see whether at the time of the conveyance to Thomas J. Keavy there was any other property standing in the name of James

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Keavy on said records; and what he found. The witness answered that he had searched the records for this purpose, and had found nothing.

Henry T. Buffington was called as a witness by the demandant, to show the value of the premises at the time of the conveyance from James Keavy to the tenant, and testified that he was the officer who set off the premises on execution; that he was a real-estate broker, and had been since March 1879; that he had also been an auctioneer for five years, and during that time had been accustomed to value and sell real estate in different parts of the city; that he had not sold land on the street where the property in question was situated, but had appraised land on that street about the time this land was conveyed. He was then asked by the demandant, "How much in your judgment were the premises worth at the time they were conveyed?" This question was objected to by the tenant, on the ground that the witness was not qualified, but was allowed by the judge.

The tenant asked the judge to rule as follows: "If Thomas J. Keavy bought the property from James Keavy, and knew at the time of the purchase that the effect of the purchase would be to deprive the creditors of the power of reaching James Keavy's property by legal process, it is not fraud at common law." The judge declined so to rule, but ruled as follows: "If Thomas J. Keavy bought the property from James Keavy, and knew at the time of the purchase that the effect of the purchase would be to deprive the creditors of the power of reaching James Keavy's property by legal process, it is, in and of itself, not fraud at common law, but has some tendency to prove fraud, the force and effect of which the jury will determine."

The following instructions were also asked for by the tenant, and given by the judge: "The burden of proof is on the plaintiff to show fraud on the part of Thomas J. Keavy; even though James Keavy meant to cheat, hinder or delay his creditors, if Thomas J. Keavy did not intend to assist him, then there is no fraud. Although the effect of the sale of the property is to keep the Bristol County Savings Bank from collecting their debt from James Keavy, still, if Thomas J. Keavy did not intend to assist James Keavy to cheat, hinder or delay the

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bank, or his creditors, it is not fraud on the part of Thomas J. Keavy."

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The judge, without objection on the part of the tenant, also instructed the jury that the demandant must satisfy them upon the whole evidence in the case, either that there was no real sale of the property to the tenant, that it was a mere paper conveyance for a fraudulent purpose to hinder, delay and defraud creditors, or that it was a real sale made by James Keavy for the purpose of hindering, delaying and defrauding his creditors, and that the tenant knew of and assisted in such fraudulent purpose.

The jury returned a verdict for the demandant; and the tenant alleged exceptions.

J. W. Cummings, for the tenant.

A. J. Jennings, (*J. M. Morton, Jr.* with him,) for the demandant.

SOULE, J. The evidence of the treasurer of the demandant, that the proceedings for enforcing the claim which was the foundation of the original suit were begun by his direction, being uncontrolled, showed that the original suit was duly authorized by the demandant. *Wallace* v. *Townsend Parish*, 109 Mass. 263. It would be a great obstacle to the successful management of savings banks and other corporations, if no suit for the collection of a debt could be instituted except by vote of the trustees or directors. The treasurer of the demandant might well cause suit to be brought to collect an overdue debt. And the subsequent steps of levying execution, accepting seisin, and bringing this action to try the title to the premises levied on, are merely incidental to the original suit to collect the debt, and absolutely necessary in order that the fruit of that suit be not lost. It might well be held that it needs no additional authority to attorneys regularly employed to collect a debt, to empower them to bring a writ of entry to try the title to land levied on to pay the judgment obtained, when such action is necessary to save the title acquired by the levy; but when the whole proceedings are had under the immediate direction of one of the officers of the demandant corporation, who has special charge of that class of matters to which the one in question belongs, it is clear that the whole proceedings are had with due authority from the demandant.

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The evidence of the treasurer, as to the communication which he made to the trustees when the vote of ratification was passed, was competent for the purpose of showing the circumstances under which that vote was passed. It was not offered to prove the truth of anything which the communication recited, but only to prove that the communication was made, as part of a transaction.

The evidence of the register of deeds as to the result of his examination of the records was properly admitted. *Commonwealth* v. *Hatfield*, 107 Mass. 227. The whole evidence is not reported, but it is clear that the question, whether James Keavy had any other property than that in dispute when he conveyed to the defendant, was an important one to decide, in ascertaining whether the conveyance was fraudulent or not.

The witness Buffington was plainly qualified to testify as to the value of the land. He was a real-estate broker and an auctioneer, and was accustomed to sell and value lands in various parts of the city, and had appraised land on the street where the premises are situated.

The instructions given to the jury were sufficiently favorable to the defendant. He was not entitled to the ruling asked for, without qualification, and, as qualified, the instructions fully protected him in his rights. Under them, the jury could not have returned a verdict against him, without finding that James made the conveyance with the purpose of hindering his creditors, and that the defendant intended to assist him in hindering and defrauding them. *Exceptions overruled.*

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James B. Westgate *vs.* Francis H. Wixon.

Bristol. Oct. 29, 1879. — Feb. 27, 1880. Colt & Ames, JJ., absent.

A., who was in possession of a parcel of land under a bond for a deed, erected a barn upon the land, the sills of which rested in part on large stones imbedded in the soil, and in part upon the soil itself. There was no agreement between A. and the owner of the land as to whose property the barn should be in case A. did not fulfil the obligations of the bond. After a breach of the bond, but while A. was in possession of the land, the barn was attached by a creditor of A., and removed from the land. *Held*, in an action of tort in the nature of trover, by the owner of the land against the attaching officer, after a demand, that the barn was part of the realty, and was not subject to attachment; and that the action could be maintained.

Tort. The declaration contained two counts. The first was in the nature of trover for the conversion of a barn. The second was for breaking and entering the plaintiff's close, removing a barn annexed to the freehold, and converting it to the defendant's use. The answer contained a general denial; and alleged that the barn was the property of John H. Abbott, and was duly attached by the defendant, a deputy sheriff, on a writ against Abbott in favor of Benjamin Barker and others. The case was submitted to the Superior Court on an agreed statement of facts, which, after stating that the pleadings were made a part thereof, proceeded as follows:

On April 2, 1877, the plaintiff executed to John H. Abbott, a bond for a deed of a parcel of land in Fall River, the condition of which recited that the plaintiff had bargained and sold to Abbott a certain parcel of land for the sum of $3700, and that Abbott had agreed to pay $30 a month, on the first of each month, until the whole sum with interest was paid, and was to pay taxes and insurance, with the privilege of paying the principal sum at any time and demanding a deed; and on breach of any of the conditions, the obligation was to be void.

Abbott was in actual occupancy of the premises at the time of the alleged tortious acts of the defendant. The defendant seized the building as the property of Abbott, on a writ in favor of Benjamin Barker and others against Abbott. No question is made as to the legality of the writ and service, or that Abbott was indebted to the plaintiffs in the writ. At the time of the

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attachment, Abbott had defaulted in the obligations imposed upon him in the bond for a deed, in that he had not paid the taxes on the estate; but no measures had been taken by the plaintiff to evict him, or to assume possession of his estate in any way.

The building in question was a barn built in October 1877 by Abbott on the plaintiff's land, described in the bond, and was used for the stabling of horses. It rested upon the ground; four of the corners were supported upon large stones, which were imbedded in the soil, and on which there were sills. The floor first lay upon the stones and blocks of wood, and at some places the soil was cleared away. The sills under the floor lay upon large stones, with two joists in the middle and running under the barn on all sides. On two sides, the sills were imbedded in the ground as they had sunk in, but not otherwise. Under the barn was an opening eighteen by ten feet, which was begun for a cellar, but which was given up on account of the leaking of water. There was no other underpinning except the above. The dimensions of the barn were about twenty-three by twenty-five feet. At the time the barn was built by Abbott, he did not ask permission of the plaintiff, nor had he asked or received from the plaintiff the right to remove the barn in case of an abandonment of the contract in the bond for a deed. When the barn was nearly done, the plaintiff visited the premises, and saw it, and made no objection to its staying on his land or being completed.

When the defendant made the attachment, the plaintiff made a proper demand for it upon him, and the building was moved off the premises by the defendant after this demand. The attachment was made and building moved on March 7, 1878.

On the above facts and pleadings, if the plaintiff could maintain the action, judgment was to be entered for him in the sum of $330, with interest from the date of writ; otherwise, judgment for the defendant.

The Superior Court ordered judgment for the plaintiff, and the defendant appealed to this court.

M. Reed, for the plaintiff.

H. K. Braley, (*M. G. B. Swift* with him,) for the defendant.

MORTON, J. Upon the facts of this case, the Superior Court was justified in finding that the barn, for the removal of which

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this suit was brought, was a part of the realty, and was therefore not attachable as the personal property of Abbott.

As a general rule, buildings are a part of the realty, and belong to the owner of the land on which they stand. Even if built by a person who has no interest in the land, they become a part of the realty, unless there is an agreement by the owner of the land, either express or implied from the relations of the parties, that they shall remain personal property. *Webster* v. *Potter*, 105 Mass. 414, and cases cited. The facts of this case do not take it out of this general rule. There was no express agreement by the plaintiff that Abbott might remove the barn, and the relations of the parties were not such as that the law will imply such an agreement. Abbott was in the occupancy of the land under a bond, by which the plaintiff agreed to convey the land to him upon the performance of certain conditions stipulated therein. While he thus occupied, Abbott built the barn in question. The legal title to the land was in the plaintiff, but Abbott had an equitable interest in it, a right to obtain a title to the soil upon performance of the conditions of the bond. He was not therefore a mere stranger, who erected a building upon land of another with the consent of the owner, in which case an agreement that he could remove it might more easily be implied. Nor can he be regarded as a tenant of the plaintiff, so that the liberal rules in regard to fixtures, which prevail between a lessor and lessee, can be applied. The essential features of a tenancy upon which those rules rest are wanting; he was not under any liability to pay rent, and he was not compelled to surrender the estate at a fixed time, as upon the expiration of the term; but, upon performing the conditions of the bond, all the additions and improvements made by him would enure to his own benefit. *King* v. *Johnson*, 7 Gray, 239. The relations between Abbott and the plaintiff more nearly resemble those existing between mortgagor and mortgagee, in which case any additions made or fixtures annexed to the realty enure to the benefit of the mortgagee.

The barn in question was a substantial structure. It is clear from the facts agreed that Abbott built it, not for any temporary purpose, but for the permanent improvement of the land, which he expected to become his property according to the terms of

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the bond. When built, it became a part of the realty, and enured to the benefit of the plaintiff as additional security for the performance of the conditions of the bond. Abbott had no right to remove it, and his creditors had no right to attach it as his personal property. *Milton* v. *Colby*, 5 Met. 78. *Eastman* v. *Foster*, 8 Met. 19. *Murphy* v. *Marland*, 8 Cush. 575.

The defendant contends that the plaintiff cannot maintain his action in the present form, because at the time he removed the barn Abbott was in the occupancy of the premises.

To maintain an action of tort in the nature of trover or trespass *de bonis asportatis*, it is sufficient if the plaintiff proves a title to, and the right to the immediate possession of, the goods converted or carried away. *Woodruff* v. *Halsey*, 8 Pick. 333. *Ayer* v. *Bartlett*, 9 Pick. 156. *Fairbank* v. *Phelps*, 22 Pick. 535. *Codman* v. *Freeman*, 3 Cush. 306. In the case at bar, the bond does not contain any stipulation that Abbott, the obligee, is to enter into the present possession of the premises, and the facts agreed do not state how he came into the occupancy. But we assume, as fairly to be inferred, that he entered under the bond, by virtue of the license implied from its terms, and not by virtue of any independent license or title. This being so, his right to the possession ceased when there was a breach of the condition of the bond, and the plaintiff had an immediate right of possession. There had been a breach of the conditions before the defendant removed the barn. It follows that, at the time the defendant unlawfully removed the barn, the plaintiff was the owner of the land and barn, with the right of immediate possession. When the barn was severed from the realty, it ceased to be real estate and became personal. The plaintiff still remained the owner of it, entitled to the immediate possession, and could maintain an action of tort in the nature of trover, either against the person who unlawfully severed it, or any other person who, after it was severed, converted it to his own use. *Riley* v. *Boston Water Power Co.* 11 Cush. 11. *Phillips* v. *Bowers*, 7 Gray, 21.

Judgment affirmed.

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COMMONWEALTH *vs.* THOMAS L. ALLEN.

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Bristol. Jan. 8. — Feb. 27, 1880. COLT & LORD, JJ., absent.

The attorney general has the right, in the name and behalf of the Commonwealth, at his own discretion, to file an information against one usurping a public office; the court has no authority to grant or to withhold leave to file it; and the mention of relators in the information is mere surplusage, which does not affect the validity of the information, or the form of the judgment to be rendered thereon.

The lapse of four months and a half after the usurpation of a public office does not bar an information in the nature of a quo warranto, by the attorney general, in the name of the Commonwealth, against the intruder.

Under the St. of 1876, *c.* 80, providing that, "in all cases in which appointments are directed to be made by the mayor and aldermen in any city of the Commonwealth, the mayor shall have the exclusive power of nomination, being subject however to confirmation or rejection by the board of aldermen," a person nominated can only be confirmed by receiving the votes of a majority of the aldermen voting upon the question; the authority to appoint police officers, conferred by the St. of 1876, *c.* 92, upon the mayor and aldermen of the city of New Bedford, must be exercised in the manner prescribed by the former statute; and if there is anything repugnant to this in an ordinance of the city, it is void.

If a person nominated for an office by the mayor of a city is not duly confirmed in the manner prescribed by the St. of 1876, *c.* 80, the facts, that the mayor announces that he is confirmed, without objection by the aldermen, that they approve his bond after he has taken the oath of office, and that he performs the duties of the office, do not supply the want of the proper vote of confirmation.

An information by the attorney general in the name and behalf of the Commonwealth is the proper process to oust a person who holds *de facto*, and not *de jure*, a public office which is vacated only by death, resignation or removal of the incumbent.

INFORMATION in the nature of a quo warranto, filed August 11, 1879, by the attorney general, in behalf of the Commonwealth, and at the relation of two citizens of New Bedford, alleging that the defendant was usurping the office of chief of police of the city of New Bedford. The case, as it appeared from the information, answer, and demurrer to the answer, on which it was reserved by *Soule*, J., for the determination of the full court, was as follows:

The St. of 1876, *c.* 80, provides that "in all cases in which appointments are directed to be made by the mayor and aldermen in any city of the Commonwealth, the mayor shall have the exclusive power of nomination, being subject however to

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confirmation or rejection by the board of aldermen; but if a person so nominated shall be rejected, it shall be the duty of the mayor to make another nomination within a month from the time of such rejection."

The St. of 1876, c. 92, entitled "An act to amend the charter of the city of New Bedford," provides, in § 1, that "the mayor and aldermen of the city of New Bedford may, from time to time, appoint such police officers and constables for said city as they may judge necessary, subject to removal by the mayor;" by § 3, authorizes the mayor and aldermen to require any person appointed a police officer or constable to give a bond with sureties; by § 5, was to take effect upon its acceptance by the city council of New Bedford; and was duly accepted on May 4, 1876.

An ordinance of the city of New Bedford, passed on January 7, 1879, provides that "the police department shall consist of a chief of police, one deputy chief of police, two captains of police, and such number of lieutenants and other policemen as the city council may from time to time direct, all the members of which department shall be appointed and removed in accordance with the provisions of the charter and laws of the state; and they shall severally hold their offices until vacated by death, resignation, or until they may be removed by the mayor." It is further provided by an ordinance of said city, that, "whenever there is a vacancy in any of the offices aforesaid, the mayor shall nominate persons to fill them, and in case the board of aldermen shall reject any nomination for the police force made to them, the mayor shall make new nominations to fill the vacancies within two weeks after such rejection;" that "before entering upon his duties each member of the police department thus appointed shall be sworn to the faithful discharge of the duties of his appointment;" that "the chief of police and the deputy chief of police and the two captains of police shall severally give bonds to the city treasurer, in amounts and with sureties to the satisfaction of the mayor and board of aldermen, for the faithful performance of the duties of their office."

On January 8, 1879, a vacancy existed in the office of chief of police of said city, and on that day William T. Soule, the mayor of the city, nominated the defendant to the board of aldermen.

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to fill such vacancy, and put the question in this form. "Shall the nomination be confirmed?" Two aldermen voted in favor of, and four against, confirmation. On January 23, the mayor again nominated the defendant to fill the said vacancy, and put the question in the same way. Three aldermen voted in favor of, and three against, confirmation. Eight times afterwards the mayor made the same nomination, with the same result; and on March 25, 1879, again nominated the defendant, and put the question in this form: "Shall the nomination be rejected?" No objection was made to the form of putting the question; three of the aldermen voted in favor of, and three against, rejection; and the mayor thereupon declared the nomination not rejected, and announced that the defendant was appointed chief of police. No objection was made to this announcement, and the meeting thereupon adjourned without day. On March 26, 1879, the defendant took the oath to faithfully perform the duties of his office as chief of police, and gave a bond as required by law, which bond was approved by the mayor, in accordance with an order passed by the board of aldermen; and has since performed the duties of the office; and no other person is now claiming the office.

W. C. Parker, Jr., for the Commonwealth.

F. A. Milliken, for the defendant.

GRAY, C. J. This is an information at common law, not regulated by any statute, for the usurpation of an office, which the attorney general has the right to file *ex officio* in the name and behalf of the Commonwealth, at his own discretion, and leave to file which the court has no authority to grant or to withhold; and the mention of relators is mere surplusage, and does not affect the validity of the information or the form of the judgment to be rendered thereon. *Commonwealth* v. *Fowler*, 10 Mass. 290. *Goddard* v. *Smithett*, 3 Gray, 116. Cole on Informations, 196. The lapse of time between the defendant's assumption of the office and the institution of this proceeding, whatever effect it might have as against a private person, cannot bar the right of the Commonwealth suing by its attorney general.

By the St. of 1876, *c.* 80, it is enacted that, "in all cases in which appointments are directed to be made by the mayor and aldermen in any city of the Commonwealth, the mayor shall

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have the exclusive power of nomination, being subject however to confirmation or rejection by the board of aldermen." The manifest intent and necessary effect of this enactment are that a person nominated by the mayor to any office must receive the votes of a majority of the aldermen voting upon the question, in order to be confirmed, and that, if he does not receive such majority of votes, his nomination is rejected. The authority to appoint police officers, conferred by *c.* 92 of the statutes of the same year upon the mayor and aldermen of the city of New Bedford, must be exercised in the manner prescribed by the previous statute.

The provision in the ordinance of New Bedford, that, "in case the board of aldermen shall reject any nominations for the police force, made to them, the mayor shall make new nominations to fill the vacancies within two weeks after such rejection," evidently contemplates rejection by failure to confirm, and, if construed as the defendant contends, would be repugnant to the statute, and therefore void.

The mayor could not, by the form of putting the question, or of announcing the result, constitute the defendant chief of police, without the requisite majority of the board of aldermen; nor could the silence of the aldermen at the time of such announcement, nor their subsequent approval of the defendant's bond after he had taken the oath of office and become chief of police *de facto*, supply the want of the necessary vote of the board of aldermen to make him such *de jure*.

The defendant holding *de facto*, and not *de jure*, an office which, under the ordinance of 1879, does not expire with the year, but will be vacated only by the death, resignation or removal of the incumbent, this information is the proper process to oust him from the office to which he has no legal title. *Attorney General* v. *Simonds*, 111 Mass. 256. *Commonwealth* v. *Hawkes*, 123 Mass. 525. *Judgment of ouster.*

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ATTORNEY GENERAL *vs.* MAYOR OF NEW BEDFORD.

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Suffolk. Jan. 8. — Feb. 27, 1880. COLT & LORD, JJ., absent.

No exception lies to a refusal to grant a writ of mandamus to the mayor of a city to compel him to make a nomination to the board of aldermen for the office of chief of police, while a person is holding that office *de facto*, and no one but the incumbent is claiming it; and while an information, in the nature of a quo warranto, is pending to try his title to the office.

PETITION filed August 9, 1879, by the attorney general, at the relation of two citizens of New Bedford, for a writ of mandamus against the mayor of that city and Thomas L. Allen, to compel the mayor to nominate some proper person, other than Allen, who was alleged to be ineligible, to fill the office of chief of police in said city.

The case was heard on the petition and answers, which set forth the same facts as appear in *Commonwealth* v. *Allen*, *ante*, 308. By the amended charter of New Bedford, the mayor of that city is elected annually on the first Tuesday of December, enters upon the duties of his office on the first Monday of January following, and holds office for one year. *Lord*, J., dismissed the petition; and the petitioner alleged exceptions.

W. C. Parker, Jr., for the Attorney General.

F. A. Milliken, for the respondent.

GRAY, C. J. We have grave doubts whether a writ of mandamus can be granted to the mayor now that the term of office which he held at the time of filing the petition has expired. *United States* v. *Boutwell*, 17 Wall. 604. *Commissioners* v. *Sellew*, 99 U. S. 624. And we are quite clear that in a case in which no one but the incumbent was claiming the office of chief of police, and while an information was pending to try his title to that office, it cannot be said to have been erroneous, in matter of law, to refuse a writ of mandamus to the mayor to make a new nomination. *Oakes* v. *Hill*, 8 Pick. 47. *Strong's case*, 20 Pick. 484, 497. *Ellis* v. *County Commissioners*, 2 Gray, 370, 375. *Exceptions overruled.*

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JOHN McNEIL *vs.* MATTHEW COLLINSON.

Essex. Nov. 6, 1879. — Feb. 24, 1880. COLT & AMES, JJ., absent.

In an action to recover the penalty provided by the St. of 1875, c. 99, § 15, for the sale of intoxicating liquor to a minor, an allegation in the declaration that the defendant was licensed may be rejected as surplusage.

MORTON, J. This action is brought under the St. of 1875, c. 99, § 15, which provides that "whoever, by himself or his agent or servant, shall sell or give intoxicating liquor to any minor, or allows a minor to loiter upon the premises where such sales are made, shall forfeit one hundred dollars for each offence, to be recovered by the parent or guardian of such minor in an action of tort."

It is entirely clear, that, in order to state a cause of action under this section, it was not necessary for the plaintiff to allege that the defendant was licensed under the statute. The liability is incurred equally by any person, licensed or unlicensed, who sells or gives intoxicating liquor to a minor, or allows a minor to loiter upon the premises where such sales are made. But the plaintiff having in his declaration alleged that the defendant was licensed and sold to a minor in violation of his license, the question is whether he is required to prove this allegation.

If this allegation should be rejected as surplusage, the declaration will still state a good cause of action against the defendant. The first count would then allege that the defendant, in violation of the statute, sold intoxicating liquor to the minor son of the plaintiff. These allegations include all the essential elements necessary to institute the plaintiff's cause of action under the statute. The same remarks are true as to the second and third counts.

The general rule, applied both in civil and criminal cases, is that the plaintiff or prosecutor is bound to prove no more than is necessary to make out his case, and that any allegations beyond this need not be proved, unless they are descriptive of the identity of the cause of action or charge, or of some essential part of it. *Commonwealth* v. *Pray*, 18 Pick. 359. *Commonwealth* v. *Hart*, 11 Cush. 130. *Lyons* v. *Merrick*, 105 Mass. 71. In *Commonwealth* v. *Baker*, 10 Cush. 405, a question similar to the

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one arising in the present case was decided. In that case, the complaint alleged that the defendant, "not being then and there first duly licensed, according to law, as an innholder or common victualler, and without any authority, or license therefor duly had and obtained," sold intoxicating liquor to one Metcalf, in a dwelling-house. It appeared that the defendant was duly licensed as an innholder, but without authority to sell in the place where the sales were made. The court held that the averment that the defendant was not licensed as an innholder might be rejected as surplusage, and that proof of the other averments in the complaint warranted his conviction.

In the case at bar, the plaintiff's cause of action is entirely independent of the question whether the defendant was licensed or not. The allegation that he was licensed is not descriptive of the identity of the cause of action; it is not an essential element of the legal proposition to be proved, and may be stricken out without getting rid of anything essential to the plaintiff's claim. It is rather a description of the person or character of the defendant, as if he had been alleged to be a married man. We are of opinion that it may be rejected as surplusage, and therefore need not be proved.

The argument of the defendant, that this allegation is material because it might affect the rights of sureties of the defendant, is not well founded. A judgment for the plaintiff will not preclude any one hereafter alleged to be a surety from contesting the question whether he had duly executed and delivered a bond as the surety of the defendant as a licensee. The issues, whether the defendant was licensed, whether he filed a bond, and whether any one duly executed the bond as surety, are not involved in this case, and therefore a judgment would not upon these issues be binding as to any person alleged to be a surety. The result and legal effect of the judgment are the same whether the defendant was a licensed or unlicensed dealer in liquors, and therefore the allegation on this point is immaterial.

As the Superior Court ruled that the plaintiff was bound to prove this allegation, it follows that there must be a

New trial.

T. Lamson, for the plaintiff.

S. B. Ives, Jr., for the defendant.

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WILLIAM P. DOLLIVER & others *vs.* ST. JOSEPH FIRE & MARINE INSURANCE COMPANY.

Essex. November 7, 1878; March 12, 1879. — February 25, 1880.

A policy of insurance against fire contained the following provisions: "If the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or if any change takes place in title or possession, or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, the policy is void." "If the interest of the assured be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." The assured at the time the policy was issued was the owner in fee of the property insured, but had mortgaged it, and also leased it for a term of years. The policy contained no statement of these incumbrances. *Held*, that the policy was not thereby avoided.

SOULE, J. The plaintiffs are the assignees in bankruptcy of Abraham Day, who, being the owner in fee of the buildings described in his policy, subject to certain mortgages and to a lease running for about three and one half years, obtained the policy sued on; and, the buildings having been destroyed by fire, bring this action to recover the amount for which they were insured. The plaintiffs were appointed assignees after the loss. The defendant contended, and the Chief Justice at the trial ruled, that the action could not be maintained, because no mention is made in the policy of the incumbrances on the title to the property destroyed. This ruling was based on the following provision of the policy: "4. If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." This provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy, and at the same time accord with the established rules of law, such construction must be adopted.

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It has long been settled in this Commonwealth that, as to all the world except the mortgagee, a mortgagor is the owner of the mortgaged lands, at least till the mortgagee has entered for possession. *Willington* v. *Gale*, 7 Mass. 138. *Waltham Bank* v. *Waltham*, 10 Met. 334. *White* v. *Whitney*, 3 Met. 81. *Ewer* v. *Hobbs*, 5 Met. 1. *Henry's case*, 4 Cush. 257. *Howard* v. *Robinson*, 5 Cush. 119. *Buffum* v. *Bowditch Ins. Co.* 10 Cush. 540. *Farnsworth* v. *Boston*, 126 Mass. 1. This being the law, and the mortgagees not being in possession of the premises, the plaintiff's assignor might well be described in a policy of insurance as the owner of the property insured; and, inasmuch as his estate was in fee simple, not an estate for life, and not a base, qualified or conditional fee, it might well be described as the entire and unconditional ownership; and, as he had no joint tenant nor tenant in common, his estate was well described as the sole ownership. As between him and the defendant, the mortgages and the lease were mere incumbrances on his title, not affecting its character as entire, and not changing it from an absolute to a conditional estate or ownership. Even as between him and the mortgagees, the mortgagees' estate was the conditional one, determinable by satisfaction of the condition set out in the mortgage deed. There was no joint tenancy nor tenancy in common of the mortgagor and the mortgagees. All the characteristics of such tenancies are lacking in their relations to the property.

The lease for years created only a chattel interest in the premises, not affecting the ownership of the fee. It was merely an incumbrance. It has been held by the Supreme Court of the United States, in a recent case, that an outstanding lease did not invalidate a policy in which the ownership of the assured was described as entire, unconditional and sole. *Insurance Co.* v. *Haven*, 95 U. S. 242. And we do not understand that the ruling in the case at bar was supposed to rest on the existence of the lease.

The policy sued on provides, in the condition numbered 1 that, "if the property be sold or transferred, or upon the passing or entry of a decree of foreclosure, or on a sale under a deed of trust, or if the property be assigned under any bankrupt or insolvent law, or any change takes place in title or possession, . . . or if the interest of the assured, whether as owner, trustee,

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consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, the policy is void." It is evident from the first branch of this condition, that the parties did not intend that the placing of a mortgage on the insured property should be regarded as a change of title, or have any effect on the rights of the parties to the contract of insurance, but that the entry of a decree for foreclosure should avoid the policy, although such decree would not destroy the insurable interest of the mortgagor. The language of the second branch of the condition excludes the idea that a mortgagee or a lessee is to be regarded as in any sense an "owner" of the property, and the whole condition numbered 1 aids in arriving at the construction of the condition numbered 4, on which the defendant relies. *Jackson* v. *Massachusetts Ins. Co.* 23 Pick. 418. The plaintiffs' assignor owned the fee. There was no adverse interest in the property, except that of the mortgagees and the lessee. The policy, in its terms, indicates that mortgaging the property is not intended to affect the policy, though a decree for foreclosing a mortgage shall avoid it. Furthermore the policy discriminates between owners and the holders of incumbrances, and nowhere contains any language which indicates that mortgagees or lessees are to be regarded, for any purposes of the policy, as owners of the property.

It is to be borne in mind, further, that the terms of the condition relied on by the defendant are not those which would naturally direct the attention of the insured to the question whether or not his estate is incumbered. If the defendant intended that the validity of the policy should be affected by the failure to mention existing incumbrances, that intention could easily have been made clear by inserting the word "unincumbered," or other phrase equivalent thereto, in the fourth condition of the policy, after the word "sole." It has already been held by this court that a requirement of the policy that the proof of loss should state the "whole value and ownership of the property insured," did not require any statement as to incumbrances, the property being under mortgage. *Taylor* v. *Ætna Ins. Co.* 120 Mass. 254. In Tennessee, it has been held that the assured, who had bought the property and given the seller a lien for part of the purchase money, was the uncon-

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ditional and sole owner of it. *Manhattan Ins. Co.* v. *Barker*, 7 Heisk. 503.

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This case does not require us to consider whether a subsequent mortgage should be regarded as "a change of title" which would avoid a policy containing nothing to explain the sense in which those words were used. See *Edmands* v. *Mutual Safety Ins. Co.* 1 Allen, 311; *Shepherd* v. *Union Ins. Co.* 38 N. H. 232; *Commercial Ins. Co.* v. *Spankneble*, 52 Ill. 53; *Hartford Ins. Co.* v. *Walsh*, 54 Ill. 164.

On consideration, we are all of opinion that, on the peculiar language of the policy sued on, the ruling that the interest of the assured was not sufficiently expressed in the policy, and that the policy was therefore void, was erroneous. The case must therefore *Stand for trial.*

S. B. Ives, Jr. & L. S. Tuckerman, for the plaintiffs.

A. S. Wheeler, for the defendant.

Edward Kenady *vs.* City of Lawrence.

Essex. Nov. 5, 1879. — Feb. 27, 1880. Colt & Ames, JJ., absent.

In an action against a city for personal injuries occasioned by a defect in a highway, evidence that, on the day after the injury, a police officer of the defendant called to see the plaintiff, who then informed him of the time, place, and cause of the injury, but did not indicate in any way that he made or intended to make any claim against the defendant for his injury, is not sufficient evidence of a notice under the St. of 1877, *c.* 234, §§ 3, 4.

Tort for personal injuries occasioned to the plaintiff, on January 9, 1878, by an alleged defect in a sidewalk of one of the streets in the defendant city. Answer: 1. A general denial. 2. That the plaintiff failed to give the defendant the notice required by the St. of 1877, *c.* 234. At the trial in the Superior Court, before *Gardner*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, the substance of which is stated in the opinion.

E. T. Burley, for the defendant.

J. K. Tarbox, for the plaintiff.

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SOULE, J. The St. of 1877, c. 234, materially changed the law relating to the liability of cities and towns for injuries from defects in highways. The change which bears on the plaintiff's action is wrought by the provisions of § 3, which make it a condition precedent to the maintenance of an action for such injury, that the person injured shall within thirty days thereafter give notice to the county, town, place or persons by law obliged to keep the highway in repair, of the time, place and cause of the said injury or damage. § 4 provides that the notice, in the case of a city, may be given to the mayor, city clerk or treasurer, or to any police officer.

It is plain that the purpose of these provisions is to render it, as nearly as may be, impossible for towns and cities to be imposed upon by fraudulent claims and suits for injuries alleged to have been sustained long before any demand for compensation or notice of any kind has been given to the municipality, and under such circumstances that the city or town has no means of showing whether the alleged defect actually existed, or whether the alleged injury was actually sustained. In order that this purpose of the statute may be effected, it is necessary that in the case of a city, where the notice may be given to any police officer, as well as to the mayor, clerk or treasurer, the notice itself should show affirmatively, either by a form of words, or by the circumstances under which it is given, that it is intended by the party giving it as a notice for the purpose of fixing his right of action. It is not notice to the city if, in a casual conversation, the person injured narrates to his neighbor, who chances to be a police officer, the facts connected with the accident by which he was hurt, even though the narration includes a statement of the time, place and cause of the injury. Else, the statute might have made a knowledge of the facts by the town or city, within thirty days after they occurred, the condition precedent to the right of action. If the narration is made to the officer in his official character, his attention being officially called to it, the question might be raised whether, under all the circumstances, the notice was sufficient under the statute.

In the case at bar, the evidence relied on as proof of notice was a conversation at the plaintiff's house the day following the injury, testified to by one Neal. He was assistant marshal of

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the defendant, and called to see the plaintiff, who then informed him of the time, place and cause of the injury, but did not indicate in any way that he made or intended to make any claim against the defendant for his injury. The only legitimate inference from this evidence is that the information was given to the witness casually, merely as a part of a conversation with a friend, and that no suggestion was made that the communication was designed as an official one. This being so, the defendant was affected by the information coming to its police officer thus in no other way than if the same information had come to him from some other source. There was nothing of the character of notice in this communication. It did not indicate that the plaintiff understood that he had any claim against the city. It contained nothing which made it the duty of the police officer to inform other of the city authorities of what he had heard. It gave no warning to any one that the city was in fault, or that its highway was defective, and did not, therefore, put the city on inquiry, as the notice required by the statute is intended to, into the truth of the statements made by the plaintiff, with a view of determining whether he ought to be compensated for his injuries, or his demand contested. No statement of the facts of the injury or accident can be regarded as notice under the statute, unless it appears to have been made with the intention of giving that notice. There is nothing in the evidence which tends to show that the plaintiff wished or attempted to give any notice to the defendant.

We are of opinion, therefore, that the judge of the Superior Court erred in refusing to instruct the jury that there was no evidence that the defendant was duly notified under the statute.

Exceptions sustained.

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DANIEL M. HARRIS *vs.* INHABITANTS OF NEWBURY.

Essex. Nov 6. 1879. — Feb. 27, 1880. COLT & AMES, JJ., absent.

A town is bound to erect barriers or railings where a dangerous place is in such close proximity to a highway as to make travelling on the highway unsafe.

A traveller, in a wagon, on a highway, after dark and in a snow-storm, came to a place where the travelled part of the road forked, one branch going down a hill and the other continuing on a level. The ground was covered with snow and there were no marks of other vehicles. Not knowing which was the true road, he walked his horse keeping midway between the walls on the sides of the roads, and his wagon was overturned by the wheels on one side going off of the travelled part of the road into a gully about two feet deep, caused by the difference of grade in the two roads, and within the location of one of the roads. *Held*, that whether there was a defect in the highway, and whether the traveller was in the exercise of due care, were questions for the jury.

In an action against a town for personal injuries caused by a defect in a highway, evidence that, on the day after the accident, the plaintiff's son went to one of the defendant's selectmen, and, for and in behalf of his father, took the selectman to the place of the accident and told him all about it; and that the plaintiff's attorney, on the same day, wrote a letter to the selectmen, notifying them of the accident and asking for compensation, will warrant the jury in finding that sufficient notice of the accident, under the St. of 1877, c. 234, was given by the plaintiff to the defendant.

An action against a town for personal injuries caused by a defect in a highway, since the St. of 1877, c. 234, is not prematurely begun, although brought within thirty days after the injury and notice thereof to the town.

TORT for injuries occasioned to the plaintiff's person and carriage by a defect in a highway in the defendant town. Writ dated January 29, 1879. Answer: 1. A general denial. 2. That the defendant did not receive a sufficient notice of the plaintiff's injury, as required by law.

At the trial in the Superior Court, before *Bacon*, J., it appeared in evidence that, on January 2, 1879, the plaintiff and his son, who were travelling in a light buggy from Stratham, New Hampshire, to Salem in this Commonwealth, arrived in the defendant town about a quarter of an hour before sunset on that day; that there was a thick snow-storm at the time, the snow having then fallen to a depth of from six to eight inches; that it was so dark that, as the plaintiff testified, while they could see the walls on either side of the road, they could not see one hundred feet ahead; and that the place of the accident was at Brown's Hill in Newbury, at a spot where the road branches, the travelled

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road leading to the left, and an old road leading nearly straight on to the right.

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The plaintiff's evidence further showed that, when he came near to the fork of the roads, which was about half-way down the hill, he was in doubt which was the true road, as both roads looked alike, each being smoothly covered with snow, and no sign-boards or carriage-tracks being visible; and that, while thus in doubt, walking his horse slowly, and keeping as near as he could midway between the walls on either side of the road, and trying to discover some indication of the true road, the left wheels of his buggy suddenly sunk down into a gully, and the buggy was overturned and broken, and his person injured, the horse remaining standing on the bank.

The left hand or new road, which the defendant admitted to be a way which the town was bound to support, had a descent of about one foot in twenty; while the right hand or old road, the location of which it denied to be a road which the town was bound to keep in repair, ran along upon the side of a hill at about the same level with the fork of the two roads. The difference in the level of the two roads at the place of the accident was about two feet. The travelled portion of the new road was graded, at a point opposite the place of the accident and ten feet distant from it, about six inches above a gutter which ran alongside of the road, and was formed by the grading of the road on one side of it and by the sloping bank on the other. The graded portions of the two roads near the place of the accident were about eight feet apart. From the bottom of the gutter to the grade of the old road at the place of the accident, the sloping bank was about two feet in height, varying from nothing at the point where the new road diverged from the old, and increasing to two and a half feet a little beyond the place of the accident. No claim was made that the travelled part of the way of either road was not of sufficient width, or was of improper construction, or was out of repair.

The defendant admitted that the spot where the accident occurred was within the located limits of the new way. It was also in evidence, that the old way was formerly the old county road leading to Rowley, and had never been closed to the public by bars, signs or notices of any kind since the new way was

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laid out and opened for travel in 1847, but was at the time of the accident still open for travel, and was occasionally so used. But, at the trial, it was agreed that it was immaterial whether the old way had been discontinued or not.

To show notice of the accident to the defendant, the plaintiff put in the following letter from his attorney to the defendant's selectmen, dated January 3, 1879: "Mr. D. M. Harris of Salem has desired me to inform you that he yesterday received serious damage to himself and carriage while riding over one of your roads from Newburyport to this place, owing to a defect in the highway for which he holds your town responsible." And the plaintiff's son testified that, on the morning after the accident, he went to one of the defendant's selectmen, and, for and in behalf of his father, took the selectman to the place of the accident and told him all about it. The plaintiff testified that, when his son came home at night and reported what he had done in thus notifying the selectmen, he assented to it.

The defendant asked the judge to rule as follows: "1. There is no evidence that the injuries for which the plaintiff seeks to recover were received by reason of any defect in the highway, or by reason of any want of a sufficient railing. 2. A sloping bank, such as the evidence in this case discloses, rising about two feet from the level of the travelled way and varying from eight to nine feet therefrom, with a gutter six inches deep between the grade of the road and the bank, is not a defect which would render the town liable; nor is it such a dangerous place as to make it incumbent upon the town to erect a railing in order to render the way reasonably safe and convenient for travel. 3. The evidence is insufficient in law to support a verdict for the plaintiff. 4. No sufficient notice to meet the requirements of the St. of 1877, c. 234, was ever given. 5. The injuries for which damages are claimed having been received January 2, and this action having been commenced January 29, the action was prematurely brought. 6. The absence of a guide-board at the point in dispute would not be such a defect as to render the town liable to a traveller who leaves the travelled part and thereby suffers injury."

The judge declined to give the first, second and third rulings requested, saying that whether there was a defect in the highway,

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whether the injuries which were received were by reason of and on account of the defect, and whether the evidence upon all these points was sufficient, were matters he should leave to the jury, with proper instructions, especially upon the question whether the alleged defect was a defect, as the jury had not only heard all the testimony, but had had actual view of the premises where the accident took place; and gave general instructions as to all these matters, to which no exception was taken. As to the fourth ruling asked for, the judge instructed the jury that if they found that, by the letter of the plaintiff's counsel and by the communication of the plaintiff's son to the selectmen, taken together or singly, the town or selectmen had notice of the time, place and cause of the accident, given in behalf of the plaintiff, it was sufficient notice under the statute. The judge also declined to give the fifth request, but gave the sixth as requested.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

D. L. Withington, (*E. W. Cate* with him,) for the defendant.

N. J. Holden, for the plaintiff.

SOULE, J. The question whether the injury complained of was caused by a defect in the highway, either in the road-bed, or in the want of a sufficient railing, was properly left to the jury. The evidence did not present a case in which the danger, if any, to be guarded against, lay at a distance without the limits of the road, but raised the question whether the land immediately outside the highway fell off so precipitously that there was such risk of a traveller, using ordinary care in passing along the road, being thrown or falling into a dangerous place, that a railing was necessary to make the way safe and convenient. *Murphy* v. *Gloucester*, 105 Mass. 470. *Adams* v. *Natick*, 13 Allen, 429. *Puffer* v. *Orange*, 122 Mass. 389.

The case was properly submitted to the jury on the question of due care on the part of the plaintiff. The whole facts as to the conduct of the plaintiff in the management of his horse, as to the speed at which he was going, as to the unbroken condition of the snow, as to the difficulty of seeing objects at a distance, and as to the characteristics of the place where the accident occurred, were in evidence, and it was for the jury to say whether the plaintiff was using due care. It would have been error in

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the presiding judge to rule that there was no evidence which would warrant them in finding that he was.

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The refusal to rule that no sufficient notice under the St. of 1877, *c.* 234, was given by the plaintiff to the defendant, was correct. It is true that the notice must be such a communication made to the defendant, through its proper officer, as, either from the form of words used or from the circumstances under which it is made, indicates that it is made as a notice for the purpose of fixing the right of action of the person by whom or in whose behalf it is made. *Kenady* v. *Lawrence*, *ante*, 318. But the statute does not require it to be given in any particular form of words, and expressly permits it to be given by another for and in behalf of the person injured.

It appeared that the plaintiff was a resident of Salem, that he was injured while on his way from Stratham in New Hampshire; and that on the day after the injury the son of the plaintiff, for and in behalf of his father, called on one of the selectmen of the defendant town, took him to the place of the accident, and told him all about it. This evidence taken by itself might perhaps have warranted the jury in finding, from the circumstances under which the communication was made to the selectman, by a person, apparently a stranger, in behalf of his father who had been hurt, that it was intended as notice of a claim for compensation. And as this communication was followed by a letter from an attorney, asking for compensation, we can have no doubt that the requirement of the statute as to notice was fully complied with.

The action was not prematurely brought. The statute does not require that the notice be given, nor that the injury be sustained, thirty days before suit brought. It requires the notice to be given within thirty days after the injury, but does not call for any delay of suit after the notice. The requirement that the notice be given thus early after the injury is for the protection of the municipality, to prevent the bringing of actions on fictitious claims, and to enable towns and cities to investigate all claims for injury from defects in the highway soon after the injury is said to have been sustained, and while all important evidence, both as to the condition of the way and as to the fact of the injury, is likely to be within reach of diligent inquiry.

Exceptions overruled.

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AMOS L. SPOFFORD *vs.* BOSTON & MAINE RAILROAD.

Essex. Nov. 7, 1879. — Feb. 27, 1880. COLT & AMES, JJ., absent. LORD, J., did not sit.

A., who was a student over twenty years of age, paid to a railroad corporation the regular price of a season ticket entitling him to transportation over its road, between two stations, for three months. The directors of the corporation had authorized its president, upon special application, and in his discretion, to allow season tickets to be sold to students over twenty years of age, for the same term, between the same stations, for one half the price A. paid, and such tickets had been sold. *Held*, in an action by A. to recover of the corporation one half of the amount paid by him, that there was no violation of the St. of 1874, c. 372, § 138; and that the action could not be maintained.

CONTRACT, to recover $16, alleged to have been overpaid to the defendant for a season ticket between Haverhill and Boston for the quarter ending December 31, 1878. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on the following agreed facts:

The defendant owns and operates a railroad between Haverhill and Boston, and the regular price for season tickets for three months in 1878 was $32. The defendant's directors had adopted a rule, authorizing their president, upon special application made to him therefor, and in such cases as he judged expedient, to allow the sale of season tickets between Haverhill and Boston, to students, (including students of the Harvard Medical School,) over twenty years of age, at the reduced price of $16 for three months, that being the regular price for students under that age. Under this regulation, the president had, upon special application and in his discretion, authorized the sale of such tickets at such reduced price of $16, which tickets had, in such cases, been issued and honored by the defendant, and the holders of such tickets carried over the railroad, during the quarter ending December 31, 1878.

The plaintiff was intending to attend the Harvard Medical School during the last quarter of 1878, and, having such intention, applied to the defendant's ticket-seller at Georgetown, and inquired whether he, being over twenty years of age, could obtain a quarterly season ticket for less than the regular price of $32. The ticket-seller, being ignorant of the rule above recited,

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and acting in good faith, informed the plaintiff that there was no way in which he could obtain a ticket for less than $32. The plaintiff, who was also ignorant of this rule, thereupon paid the sum of $32, and received an ordinary season ticket, and used it during the three months. Subsequently, having learned that in some cases, upon special application, the president had authorized the issue of season tickets to medical students over twenty years of age, for $16 a quarter, he applied to the president for a return of the excess so paid by him, but the president refused to comply with his request.

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If, upon these facts, the plaintiff was entitled to recover, judgment was to be entered for him in the sum of $16; otherwise, for the defendant.

J. P. Jones, for the plaintiff.

S. Lincoln, Jr., (*S. B. Ives, Jr.* with him,) for the defendant.

SOULE, J. The plaintiff seeks to recover from the defendant the sum of sixteen dollars, being half the amount paid for a season ticket for three months, which entitled the plaintiff, during that period, to ride daily, Sundays excepted, on the defendant's cars from Haverhill to Boston, and back to Haverhill.

It appears that the sum paid for the ticket was the regular price of a season ticket, established by the directors. It is not contended that the price was unreasonably large for the service to which it entitled the purchaser. The plaintiff contends that he is entitled to recover, because certain other persons obtained season tickets for the same term, between the same stations, for one half the price which he paid. These persons, it appears, were, like the plaintiff, students twenty years old, who, for reasons which do not appear, were permitted by the president of the defendant corporation, in the exercise of a discretion given him by the directors, to buy their tickets for the sum of sixteen dollars each, which was the regular price of such tickets to students less than twenty years old. The plaintiff's position is that, although the defendant had established a price for a season ticket, not unreasonable in itself, and had sold him a ticket at the regularly established price, it violated the provisions of the St. of 1874, *c.* 372, § 138, by selling like tickets to certain other persons for a less sum.

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The statute referred to requires every railroad corporation to give to all persons or companies reasonable and equal terms, facilities and accommodations for the transportation of themselves, their agents and servants, and of any merchandise and other property, upon any railroad owned or operated by such corporation. Section 135 of the same chapter provides that any railroad corporation may make contracts for the conveyance of passengers on designated trains for a specific distance, at fixed times, at such reduced rates of fare as the parties may agree upon. Section 179 provides that any railroad corporation may establish, for its sole benefit, fares, tolls and charges upon all passengers and property conveyed or transported on its railroad, at such rates as may be determined by the directors thereof, subject to revision by the Legislature. It is plain, from the language of these sections, that the Legislature did not intend that railroad corporations should be obliged to require of all persons, under all circumstances, precisely the same sum for the same service. The person riding under a special contract between Haverhill and Boston might be obtaining the passage for one third the amount of the regular fare between the stations, but this is permissible under § 135. The plaintiff's claim cannot be sustained except by recognizing the doctrine that, under peculiar circumstances, special arrangements for reduced rates of carriage may be made. His season ticket is sold at a reduced rate, or it would not be worth the buying, but it does not appear to come within all the provisions of § 135. If it does, the power given by that section is to make such special contract as the parties agree upon, and there would be no reason for the plaintiff to complain. But we do not propose to put the decision of this case on any refinement of construction of § 135. We prefer to place it on what seems to us to be the reasonable interpretation of the provisions of the statute relating to fares of passengers, taken together, and in view of the law as it stood before the statute was enacted.

The provisions of § 138 are reënacted from the St. of 1867, *c.* 339, previously to which statute there was no legislative enactment of the sort. In the year 1859, it was decided by this court in *Fitchburg Railroad* v. *Gage*, 12 Gray, 393, that the common law requires of carriers equal justice to all; that "the equality

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which is to be observed in relation to the public and to every individual consists in the restricted right to charge, in each particular case of service, a reasonable compensation, and no more. If the carrier confines himself to this, no wrong can be done, and no cause afforded for complaint. If, for special reasons, in isolated cases, the carrier sees fit to stipulate for the carriage of goods or merchandise of any class for a certain time, or in certain quantities, for less compensation than what is the usual, necessary and reasonable rate, he may undoubtedly do so without thereby entitling all other persons and parties to the same advantage and relief." The court, referring to the right of the corporation to establish rates of toll on passengers and merchandise, which under the Rev. Sts. *c.* 39, § 83, was substantially the same as it is under the existing statutes, said, "This right however is very fully and reasonably subjected to legislative supervision and control; a provision which may be believed to be sufficient to guard this large conceded power against all injustice or abuse. And in view of this large and unqualified, and therefore adequate supervision, the right of railroad corporations to exact compensation for services rendered, may be considered as conforming substantially to the rule of the common law." The St. of 1867, *c.* 339, reënacted in the St. of 1874, *c.* 372, § 138, was passed after this court had thus defined the meaning of the words "equal justice" as applied to the dealings of carriers with their customers. The similar language, "reasonable and equal terms," used in the statute, is to be interpreted in the light of this definition, especially as it appears, from a comparison of different parts of the statute, that the words cannot have been used in a strict literal sense.

We are of opinion, therefore, that, as the defendant exacted from the plaintiff only the regularly established price for the season ticket which he bought, and as there is no evidence that the price was unreasonable, the fact that, for special reasons which do not appear, the president of the defendant permitted certain individuals, students, like the plaintiff, more than twenty years old, to buy like tickets for half that price, did not constitute a violation of the statute, nor give the plaintiff a cause of action against the defendant. *Judgment affirmed.*

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NATHANIEL CUSHING *vs.* CITY OF BOSTON.

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Suffolk. Nov. 12, 22, 1879. — Feb. 9, 1880. MORTON & SOULE, JJ., absent.

The St. of 1824, *c.* 16, providing that door-steps shall not project into a street of Charlestown for more than a given distance, is constitutional, and steps erected within that distance do not constitute a defect in the highway for which the city is liable.

Under the Gen. Sts. *c.* 19, § 13, authorizing cities to "make such rules and regulations for the erection and maintenance of balustrades, or other projections upon the roofs or sides of buildings therein, as the safety of the public requires," a city has no power to pass an ordinance prohibiting the maintenance of door-steps within the limits of a highway, which are lawfully there; nor is such power conferred by its charter, which authorizes it to make "all such salutary and needful by-laws, as towns, by the laws of this Commonwealth, have power to make."

TORT for personal injuries caused by an alleged defect in Bartlett Street, in that part of Boston formerly Charlestown. Writ dated June 24, 1875. After the former decision, reported 124 Mass. 434, the case was tried in the Superior Court, without a jury, before *Allen*, J., who found for the plaintiff in the sum of $2000; and the defendant alleged exceptions.

E. P. Nettleton, for the defendant.

W. Gaston & C. L. B. Whitney, (*C. S. Lincoln* with them,) for the plaintiff.

ENDICOTT, J. The facts now presented in this case, in regard to the position, construction and condition of the steps which constituted the alleged defect in the highway, do not differ from those stated in the former bills of exceptions, as reported in 122 Mass. 173, and 124 Mass. 434. On both occasions it was held that, under the St. of 1824, *c.* 16, § 3, these steps, which projected less than three feet into the highway, and were properly constructed and in good repair, could be lawfully maintained by the abutter, were not a nuisance, and did not constitute an illegal obstruction in the highway. Whether they rendered the highway unsafe for a traveller in the night-time, using due care, was entirely immaterial: they were authorized by law; the defendant could not remove them; and was under no obligation to place railings or other safeguards around them for the protection of travellers. It was also held, that it was within the power of the Legislature to make this provision in regard to the erection

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of door-steps within the limits of the highways in Charlestown, and we find nothing in the argument now addressed to us by the plaintiff which leads us to reconsider that question. 122 Mass. 173.

When the case was last before us, it appeared that, in 1869, the city of Charlestown passed an ordinance, which was a re-enactment of a similar ordinance passed in 1849, prohibiting the erection and maintenance of door-steps in the highway without the permission of the mayor and aldermen; but, for reasons then stated, it could not properly form any part of the defendant's bill of exceptions. 124 Mass. 434. It is now before us, and the question is presented, whether, under the Gen. Sts. *c.* 19, § 13, (reënacting the St. of 1848, *c.* 278,) by which cities are authorized to make "such rules and regulations for the erection and maintenance of balustrades, or other projections upon the roofs or sides of buildings therein, as the safety of the public requires," Charlestown had the power to pass an ordinance prohibiting the maintenance of door-steps in the highway, which were lawfully there under the provisions of the St. of 1824, *c.* 16, § 3. In this connection, it is also to be noticed that the city of Charlestown, under its charter, was empowered to make "all such salutary and needful by-laws, as towns, by the laws of this Commonwealth, have power to make and establish." St. 1847, *c.* 29, § 20.

We are of opinion that these statutes did not authorize Charlestown to pass such an ordinance. The power conferred by the Gen. Sts. *c.* 19, § 13, is limited to "balustrades or other projections upon the roofs or sides of buildings;" and undoubtedly, under this provision, they may be allowed or forbidden as each city may determine. The words "balustrades or other projections," as applied to the roof of a building, would seem to refer to those additions or structures upon the roof, which might under certain circumstances render a highway unsafe for travellers; but it is unnecessary in this case to determine precisely what projections on a roof are included in these words. As applied to the sides of a building, which is the only matter to be considered here, the words "other projections" clearly refer to those portions of, or attachments to, the sides, which are near the line of a highway, or which project over and therefore in

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one sense into the highway, such as balconies, canopies, windows, cornices, gutters, signs, or other additions supported by the building itself, which do not obstruct the travel on the highway. These may project so far as to be insecure, or, by reason of the use to which they may be put, or through want of proper repair, may fall and endanger the safety of travellers; and the Legislature might well consider them a proper subject of regulation by the authorities of cities.

But the words of the statute are not broad enough to authorize cities to make rules and regulations for the erection and maintenance of door-steps within the actual limits of a highway. Such door-steps, though connected with and a part of the building, are not necessarily supported by it, and are not, properly speaking, projections on the side of it, but are rather structures erected in and occupying a part of the highway itself. The fair construction of the language of this section is, that it intends to deal with those parts of a building which may project near or over the line of a highway, and which, if not properly constructed and maintained, may endanger the safety of the public; and that it does not attempt to deal with those additions to or parts of a building which may occupy the highway itself, or obstruct travel thereon, and thus constitute a nuisance in the highway, if not authorized by law. In other words, cities are authorized to regulate the erection and maintenance of such projecting parts of a building, standing upon or near the line of a highway, which do not in any way obstruct the use of the highway, or constitute a defect therein, although under some circumstances they may endanger the safety of the public; but they are not authorized to regulate the erection and maintenance of permanent structures or additions to a building, which stand in the way itself, or create an obstruction therein.

There are grave reasons why the Legislature should not give cities authority to permit door-steps and other structures connected with buildings to encroach and to obstruct travel upon a highway, which all the citizens of the Commonwealth have the right to use; thus leaving to the discretion of a municipal corporation to determine to what extent the highways within its limits may be permanently encroached upon and devoted to private uses. In the absence of express words, or the use of such

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words as by necessary implication include such a grant of power, we cannot presume it was intended to be conferred. These considerations also afford an answer to the argument that Charlestown had authority to pass this ordinance under the power conferred by its charter to make such by-laws as towns may establish.

The case of *Commonwealth* v. *Goodnow*, 117 Mass. 114, is relied on as an authority by the plaintiff. In 1799, an act was passed prohibiting any person from erecting and maintaining any bow window, which should project more than one foot from the front of his house into any street in the town of Boston; thereby by implication allowing a bow window to project not more than one foot. St. 1799, *c.* 31; 2 Mass. Spec. Laws, 340. An ordinance was passed by the city of Boston under the authority conferred by Gen. Sts. *c.* 19, § 13, prohibiting all persons under a penalty from constructing any window which should project into the street. A bow window is clearly a projection on the side of a building, and, the city having authority to make rules and regulations on that subject, it was held that the ordinance was valid. If the city had passed no ordinance on that subject, the statute of 1799 would have remained in force; but, having passed an ordinance relating to the projection of windows, the provision of the statute of 1799 was superseded.

But this has no application to the case at bar. The city of Charlestown had no authority to pass an ordinance regulating the erection and maintenance of door-steps in the highway; and the provisions in regard to door-steps in Charlestown, contained in the St. of 1824, *c.* 16, § 3, were not superseded. That statute was therefore in force at the time of the alleged injury.

Exceptions sustained.

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JOHN D. BATES & another, administrators, *vs.* ALEXANDER DEWSON & others.

Suffolk. May 8, 1879. COLT & AMES, JJ., absent.
November 18, 1879. — February 13, 1880.

A testator by his will directed that a house be purchased at a cost not exceeding one thousand dollars, to be held in trust for the benefit of his servant D. during his life, and "to revert to his family on his decease." D. died in the lifetime of the testator, leaving a widow, one child, and a stepson who had lived in D.'s family and been supported by him since his marriage. *Held*, that the question whether the legacy lapsed could not be determined on a bill in equity by the trustees under the will to determine the distribution or disposition of the legacy, without making the residuary devisees parties. *Held*, *also*, after they had been made parties, that the bequest did not lapse at D.'s death; that, in the absence of words manifesting a different intention, D.'s "family" meant his widow and child, and did not include his stepson; and that the sum of one thousand dollars should be paid to the widow and child in equal shares.

BILL IN EQUITY by the administrators with the will annexed of the estate of William H. Bordman, against Alexander Dewson, Edwin G. Walker and Eliza Dewson, to determine the distribution or disposition of the sum of $1000, held by the plaintiffs under the following clause in the will of the testator, dated Nov. 30, 1841: "To Alexander Dewson, my servant, I give a house to be purchased not exceeding in cost one thousand dollars, and an annuity during his life of one hundred dollars per annum. The house to be held in trust by Stephen H. Williams, and to be so legally placed as not to be liable for his debts, but to revert to his family on his decease; a sum of money sufficient to produce the sum of one hundred dollars interest per annum to be placed in the hands of said Williams, and the annuity to be paid to said Dewson personally."

The case was heard upon bill and answers, and reserved by *Morton*, J., for the determination of the full court, and was as follows:

Alexander Dewson, mentioned in the will, died in May 1851, leaving a widow, Eliza, a son named Alexander, and Edwin G. Walker, his stepson, the child of Eliza by a former husband. When Alexander and Eliza were married, this child was about three years of age, and lived with, was supported by, and formed one of the family of, Alexander from the time of the latter's

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marriage to Eliza until his death. The testator died on June 15, 1872. Williams declined to accept the trust; and no trustee has been appointed in his place. All the defendants contended that the legacy of $1000 did not lapse by the death of Alexander Dewson named therein. The son contended that that sum should be paid to him as sole heir at law of his father. The widow and stepson contended that each was entitled to one third of this sum.

G. A. James, for the son.

C. A. Prince, for the widow and stepson.

THE COURT held that the question whether the legacy of $1000 lapsed by the death of Alexander Dewson before the death of the testator could not be decided, because the residuary devisees were not made parties, and *Discharged the report.*

The bill was then amended by making the residuary devisees parties; and they answered, submitting their rights to the judgment of the court. The case was heard upon bill and answers, and reserved by *Ames*, J., for the determination of the full court; and was argued by the same counsel.

GRAY, C. J. The testator directed a house to be purchased, at a cost not exceeding one thousand dollars, to be held in trust for the benefit of Alexander Dewson during his life, and to be conveyed to his family at his death. The gift in remainder to "his family" did not lapse by his death in the lifetime of the testator. "His family," in the absence of words manifesting a different intention, must be taken to mean his widow and child; *Bowditch* v. *Andrew*, 8 Allen, 339, 342; and not to include his stepson. No provision being made as to the proportions in which his widow and child shall take, and the reasons for investing the money in a house having ceased with his life, the sum of one thousand dollars is to be paid to them in equal shares. As to the annuity of one hundred dollars, no question is presented by the bill. *Decree accordingly.*

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D. W. SALISBURY & others *vs.* WILLIAM T. ANDREWS & others.

Suffolk. Nov. 18, 19, 1879. — Feb. 16, 1880. MORTON & SOULE, JJ., absent.

Two tenants in common of a large tract of land, fronting on a highway in a city, laid out over it a way running from the highway towards the rear of the tract and then turning and running at a right angle and parallel with the highway. Fronting on this way they erected four houses and one house whose front abutted partly on the way. They also purchased a parcel of land adjoining their other land in part, and on which was a private way called D. Court, running from the highway towards the rear of the land. Subsequently they divided both parcels among themselves by a deed of partition, excluding that part over which the way ran. In this deed, one of the boundary lines was described as running "to land left and now used for a passageway in C. Court;" other lines were described as running by "the way" or by "the way or court;" monuments were described as being at a certain distance from the houses in "said court;" the houses were described as being "in C. Court;" and the width of the way in different places was stated. The deed also provided that all of the land first bought, not therein conveyed, should "be left and always lie open as a way for the common use and benefit of both of said parties and their said respective estates;" and that the "court" should be continued over the land last bought to D. Court, and that each party should have a right of way over D. Court "for the common use and benefit of themselves and of their respective estates;" that each party might make sidewalks "in the said court" in front of the lots assigned to him, and maintain steps in front of the houses, "so as the said sidewalk and steps shall never be extended or widened to obstruct the convenient passing of carriages in said court." On one of the lots conveyed by this deed was a house the front of which abutted on C. Court for only a few feet, the rest of the front abutting on the grantee's land set off to him in the same deed. He subsequently conveyed this house by a deed which did not contain the usual clause, "with all privileges and appurtenances," and which described the house as being "No. 4 in C. Court," and conveyed it by metes and bounds, the front line being "on a line with the front of said house," together with the land in front of the house, under the stone steps "with a right to pass and repass on foot and with horses and carriages to said house and land through said C. Court at all times." *Held*, that the last-named grantee had not only a right of way over C. Court, but also a right to have the whole court kept open for light and air.

BILL IN EQUITY, filed October 12, 1878, by the owners of a parcel of land with a building thereon situated in Central Court in Boston, alleging that the first-named defendant was the owner of an adjoining parcel of land and of a parcel on the opposite side of the court, and the other defendants were the lessees of the same; that the defendants were erecting a bridge over the court to connect the buildings on the two estates,

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whereby egress from the plaintiffs' land would be greatly obstructed, and the light and air shut off; that the plaintiffs were entitled to a right of way over Central Court, and to the full use and enjoyment of the same.

The prayer of the bill was for an injunction to restrain the defendants from erecting the bridge; that they be ordered to remove the portion already built; and for further relief.

The defendants answered admitting the building of the bridge, and their respective ownerships in the two estates, denying that the plaintiffs had any rights in the court except a right of way, and also denying that this was obstructed.

The case, as it appeared at the hearing before *Morton*, J., was as follows:

In 1803, Jonathan Mason, the owner of an estate on Newbury (now Washington) Street in Boston, conveyed the same to Isaiah Thomas and Ebenezer T. Andrews, as tenants in common. They laid out over the land a private way, which ran from Newbury Street in a southeasterly direction about a hundred and fifty feet, and then turned at a right angle and ran in a southwesterly direction, parallel to Washington Street; and on this way erected a block of four houses and another house standing by itself.

On May 1, 1806, David Soley and John Larkin, who derived their title from John Soley, respectively conveyed to Ebenezer T. Andrews a piece of land adjoining in part that conveyed by Mason and fronting on Demming's Court, so called, which ran from Newbury Street in a southeasterly direction.

On July 23, 1806, Thomas and Andrews executed a deed of partition by which both parcels of land, excluding the way laid out by them and Demming's Court, were divided between them in severalty. The boundary line of the first lot, set off to Thomas, was described as beginning at a certain point on Newbury Street, and thence running northeasterly by said street "to land left and now used for a passageway in Central Court," thence "by said way" to a point a certain distance "from the block of four houses built by said Thomas and Andrews in Central Court," and "distant twenty-one feet and six inches from the single house built by them in said court;" thence southerly "by the way" to a certain point, "at which point the way

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aforesaid is twenty-seven feet and six inches wide from the front of said block of houses;" thence southwesterly "by the way" to land formerly of John Soley. By this deed Thomas also took in severalty two of the block of four houses, "situate in Central Court aforesaid," and bounded by metes and bounds "on the way or court."

By this deed there was set off by metes and bounds to Andrews a piece of land, "situate in said Central Court," on which were the remaining two houses in the block of four houses, and the single house. One of the boundary lines was described as running "by the way or court aforesaid," and two of the other lines as running "by said way." This deed also conveyed to Andrews the land conveyed to Andrews by Larkin and Soley, and recited that this land had been previously conveyed to Andrews alone, but in trust for Thomas as to one moiety thereof.

The deed of partition also contained these clauses: "And it is hereby further covenanted, granted and agreed by and between the said parties to these presents, that all that part of the above-mentioned land conveyed to them by said Jonathan Mason, and which is not herein above assigned, set off and released to either of said parties, shall be left and always lie open for the passageway or court aforesaid, for the common use and benefit of both of said parties and their said respective estates. And also that so much of the land above mentioned formerly belonging to John Soley, deceased, as lies opposite to the southwest end of said way or court shall be in like manner left and always lie open as a way for the common use and benefit of both of said parties and their said respective estates, so that said court shall be continued in a straight line across the land formerly belonging to said Soley, to Demming's Court above mentioned, and also that each of said parties shall retain and have an equal right of way in and over said Demming's Court for the common use and benefit of themselves and of their said respective estates. And it is further agreed by and between said parties, that each party may make sidewalks in the said court, in front of the several parcels of land above assigned to them, respectively, in said court, and may also make and maintain convenient and necessary steps in front of their respective houses, and of any houses that may be hereafter built on said court, so as the said sidewalks

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and steps shall never be extended or widened to obstruct the convenient passing of carriages in said court."

A plan used at the hearing showed that the front of the most northerly of the two houses set off to Andrews abutted upon Central Court, as laid out in the deed of partition, seven feet and two inches, and the remainder of the front abutted upon land set off to Andrews by the same deed.

On March 28, 1808, Thomas conveyed to Andrews the first parcel of land set off to Thomas in the partition deed, fronting on Newbury Street and running back to Central Court.

On April 24, 1824, Ebenezer T. Andrews conveyed to Henry Homes the most northerly of the two houses set off to Andrews in the deed of partition, described as follows: "A brick house, and the land under and adjoining the same, being No. 4 in Central Court in Newbury Street in Boston aforesaid, bounded and measuring as follows, viz. beginning in front of said house at the centre of the brick partition wall between this and the adjoining house, and running easterly on a line with the centre of said walls, and of the wooden partition between the wood-houses and necessaries of this and the adjoining estate, until it comes to land of S. P. Gardner (including half the wall situated between the two estates), about eighty feet nine inches; then turning and running northerly on a bevel line, bounded on said Gardner's land, until it comes to land of Samuel Salisbury, about twenty-seven feet six inches; then turning and running westerly, bounded northerly on said Salisbury's land, until it comes on a line with the front of said house, about eighty-five feet five inches; then turning and running southerly on a line with the front of said house, about twenty-seven feet two inches, until it comes to the centre of the brick partition wall first mentioned, together with the land in front of said house, under the stone steps, with a right to pass and repass on foot and with horses and carriages to said house and land through said Central Court at all times; said Homes to pay one half the expense of keeping the well in good order, and the expense of keeping the sidewalk in front of said house in good repair." The habendum of this deed was as follows: "To have and to hold the aforegranted premises to the said Homes, his heirs and assigns, to his and their use and behoof forever."

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On April 28, 1831, Homes conveyed these premises, by the same description, to Samuel Salisbury, from whom the plaintiffs derived their title, which, for the purposes of the hearing, it was agreed was in fee.

On August 16, 1825, Ebenezer T. Andrews conveyed by metes and bounds to Charles Ewer, the lot of land conveyed to him by Larkin "in a place formerly called Demming's Court, but more recently a part of Central Court," "excepting a strip of land of about twenty feet wide on the easterly end of the estate, as then described, which was added to Central Court, to connect the same with Demming's Court;" and released to Ewer and his heirs and assigns all his right, title and interest in Demming's Court, and consented to the discontinuance of the same, on condition that the entrance of Central Court should be continued to the new court lately opened by Ewer, and remain forever open of the width of twenty-nine feet nine inches, "as at present established, and said new court, from Central Court to Washington Street, shall be a free passage for all the abutters on said Central Court."

Ebenezer T. Andrews acquired in 1832, by deed from the devisees of Isaiah Thomas, the two houses in the block of four set off by the partition deed to Thomas; and died, October 9, 1851, intestate, leaving as his only child and heir at law the defendant William T. Andrews, who it was agreed inherited all the rights of his father.

In the fall of 1878 William T. Andrews built the bridge complained of, which connected the estate conveyed by Thomas to Andrews in 1808, and the estate conveyed by the devisees of Thomas to Andrews in 1832. The lowest part of this bridge was seventeen feet and eight inches above the roadway, and the bridge itself, no part of which touched the roadway, was covered over, with windows in the sides, and was thirteen feet and six inches high and ten feet broad. The nearest point of the bridge to the plaintiffs' house was between thirty-seven and thirty-eight feet.

Central Court was extended to Demming's Court, as contemplated in the partition deed between Andrews and Thomas. Demming's Court was afterwards discontinued, and Central Court was afterwards extended to Avon Place, now Avon Street.

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The first-named plaintiff testified that the premises of the plaintiffs were the same as those conveyed by Ebenezer T. Andrews to Homes, then known as No. 4 Central Court, now being No. 7 Central Court; that the house standing thereon was one of the block of four houses mentioned in the partition deed; that the house never covered the whole of the premises conveyed by the deed to Homes, but on the north side thereof was an alley-way, something over four feet wide, leading to the rear of the house, at the front end of which alley-way, on a line with the front of said house, there is now and always has been a gate-way opening upon the sidewalk; that a door is now and always has been maintained, leading under the steps of the house on the northerly side, and opening upon said sidewalk, which sidewalk was embraced in the land set off in fee to Andrews by the partition deed; that when the house was conveyed by Andrews to Homes the house was two stories high above the basement, since which time a third story has been added.

The tenant of the plaintiffs testified that the bridge was an obstruction to light and sun in the first story above the basement of the front part of the house; that the sun used to come in there in the afternoon for two or three hours, but now does not come in at all; that the bridge is an objection in rainy and snowy weather; that the water and melted snow run down in streams on either side of the bridge, and during sleighing it is a further objection that underneath the bridge is a place bare from snow, making bare ground under the bridge; that the bridge obstructs the view of his lantern from Avon Street.

The plaintiffs also put into the case the report of the case of *Salisbury* v. *Andrews*, 19 Pick. 250.

The case was reserved for the determination of the full court, and for such judgment as justice might require.

H. G. Parker, (*H. W. Suter & F. Dabney* with him,) for the plaintiffs.

J. D. Ball, for the defendants. 1. By the deed of partition between Thomas and Andrews, executed in 1806, merely a passageway was laid out. The land was "always to lie open for the passageway or court aforesaid;" a portion of the Soley land was also to lie open "as a way;" each party was to have an equal "right of way" over Demming's Court; and sidewalks and steps

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in Central Court were never to be extended so as to obstruct the convenient passing of carriages.

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2. Whatever might be the effect of the deed of partition as between the parties thereto, yet, when either of them conveyed any portion of his land, he had the right to impose such limitations and restrictions as he pleased. *Grant* v. *Chase*, 17 Mass. 443. *Ritger* v. *Parker*, 8 Cush. 145. *Atwater* v. *Bodfish*, 11 Gray, 150. *White* v. *Chapin*, 12 Allen, 516. In the deed from Andrews to Homes, under which the plaintiffs claim, the front boundary is on a line with the house, the land under the steps is conveyed, "with a right to pass and repass, on foot and with horses and carriages, to said house and land, through said Central Court, at all times;" and this is all. The grantor is so careful to guard and qualify the rights given to the grantee, that he omits the words "privileges and appurtenances."

As the plaintiffs have not a right to light and air, but merely a right of way, and as this right of way has not been interfered with, there should be judgment for the defendants. *Atkins* v. *Bordman*, 2 Met. 457.

LORD, J. In this case there is no material fact in dispute between the parties. The controversy is solely as to their respective rights in law, upon undisputed facts.

In 1803 the whole of the land, on which are the passageway in question and the estates of the plaintiffs and defendants, was owned in equal parts by Isaiah Thomas and Ebenezer T. Andrews, as tenants in common in fee simple. Between 1803 and 1806 they had laid out this passageway, and had so wrought or constructed it as to indicate to a great extent its nature and purposes. A single building and a block of buildings had been erected fronting upon it, and sidewalks of brick, if not then actually made, were evidently in contemplation, as appears not only from the width of the court, but from the first deed of conveyance by Andrews of the estate now owned by the plaintiffs, in which the sidewalks are particularly mentioned, and provision made for their being kept in repair; and between such actual or contemplated sidewalks was a passageway left suitable for carriages and vehicles drawn by horses or other animals. After this had been done, Thomas and Andrews, in 1806, by their deed of partition, conveyed to each other their respective

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moieties in certain portions of the undivided property, so that each came to own his respective share in severalty; and then, for the first time, this passageway was accurately defined and described, and that description and the use to which it was then devoted are quite decisive of the character of the way.

On referring to the partition deed of 1806, it will be observed that, in bounding the first parcel which is to be held in severalty, the phrase is used "thence running to land left and now used for passageway in Central Court;" and the next reference is in these words: "from the block of four houses built by said Thomas and Andrews in Central Court;" and, again, "distant from the single house built by them in said court." And so through the whole partition deed, although the way is sometimes referred to simply as a way, yet when it is designated in any mode, it is called Central Court; and the deed itself provides that that way, as first located, "shall be left and always lie open for the passageway or court aforesaid for the common use and benefit of both the said parties and their said respective estates," and there was the further covenant between them as to the land as purchased in the name of Andrews, but in the interest of both, that so much of such land "as lies opposite to the south-west end of said way or court shall be in like manner left and always lie open as a way for the common use and benefit of both of said parties and their said respective estates, so that said court shall be continued in a straight line across the land formerly belonging to said Soley, to Demming's Court above mentioned, and also that each of said parties shall retain and have an equal right of way in and over said Demming's Court for the common use and benefit of themselves and of their respective estates."

It is thus manifest from this partition deed that the laying out of Central Court was for the purpose of bringing into use and into the market certain back or rear lands in such manner as that the same could properly and advantageously be used as dwellings or residences. A portion of the land thus divided by this deed of partition was in 1824 sold by Andrews to one Homes, who subsequently conveyed it to Salisbury, the father of the first-named plaintiff, and their rights in respect to said court were afterwards a subject of dispute before this court, in the case

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of *Salisbury* v. *Andrews*, 19 Pick. 250; and Chief Justice Shaw, with his usual fertility and exhaustiveness of discussion, has expounded the principles upon which instruments of this kind are to be construed, which not only throw much light upon, but, in our judgment, settle the rights of the parties to this controversy. The result of that exposition is, that not only every clause and phrase in a deed, but every word, is presumed to have been used for some purpose and to accomplish some result, and that result is the intention of the parties; and while no evidence is competent to show that the parties meant something different from what the ordinary import of their language expresses, yet where the language used is of doubtful import, and where the precise purpose and intent of the parties is not expressly defined in words, the facts and circumstances surrounding the transaction, "such as the actual condition and situation of the land, buildings, passages, water-courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense, in which particular words were probably used by the parties, especially in matters of description," are always proper to be considered.

Applying these principles, we have no doubt that the intention of the parties to that deed of partition was to establish what in cities is technically known as a court, and that that court was to be of the higher class of courts, not confined to one single mode of access and egress, but to be so connected with other avenues as that there might be passage through it, and not simply entrance into it with return only in the same mode as entered upon. It is clearly manifested also by said conveyance that the parties to it intended, not only that the buildings erected upon it should be fit for residences, but that the class and character of such residences had been indicated by the fact that they had jointly, while owning in common, built not only a single dwelling-house, but a brick block of four dwelling-houses; and that their purpose was to bring the remaining land into the same use, by themselves or their grantees, by attaching to their entire lands that court for the common use and benefit of themselves and their respective estates. And the language used by them has a peculiar force and significance in this respect. It says nothing of a right of way, or right to pass and repass either

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over and through it or to or from any particular estate, but its language is especially adapted to the constitution of an open court partaking largely, if not entirely, of the nature of a public street. The language is: "And it is hereby further covenanted, granted and agreed by and between the said parties to these presents, that all that part of the above-mentioned land conveyed to them by said Jonathan Mason, and which is not hereinbefore assigned, set off and released to either of said parties, shall be left and always lie open for the passageway or court aforesaid, for the common use and benefit of both of said parties and their said respective estates."

The use and benefit of such a court became, therefore, attached to every part of their respective estates, and a grant of any part of the estate, even without express words, would carry such use and benefit as appurtenant to the land, and could not be detached from the land itself except by contract. It is therefore clear that this is not simply a right of way in the plaintiffs, and attached to their estate, but their right is to the use and benefit of an open court, and that right extends as well to the light and air above as to actual travel upon the surface of the earth; and, without the evidence of the tenant that the sun is now wholly excluded from the house in the afternoon, while formerly there were several hours of sunshine, the erection of such a structure, as that erected by the defendants is conceded to be, is of itself an infringement of the plaintiffs' right, and a nuisance to their estate, which they have a right to have abated.

Decree for the plaintiffs.

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WILLIAM WYMAN *vs.* EASTERN RAILROAD COMPANY.

Suffolk. March 25, 1878. — Feb. 25, 1880. ENDICOTT & LORD, JJ., did not sit.

Under the St. of 1873, *c.* 360, authorizing the Eastern Railroad Company to take land for a freight station, and providing that the general railroad acts shall be applicable to and govern the proceedings, except that, instead of the county commissioners, three commissioners shall be appointed by this court to adjudicate the damages, from whose decision "an appeal to a jury shall lie" in behalf of any owner of land taken, "as is provided in case of lands taken for railroad purposes," the award of commissioners so appointed is to be returned to this court; and the application for a jury, by way of appeal from their decision, is to be made, and the trial by jury had, at the bar of this court.

PETITION to this court, under the St. of 1873, *c.* 360, § 3, to appoint three commissioners to adjudicate the damages for the taking by the respondent corporation for a freight station, under § 2 of that act, of land in Charlestown owned by the petitioner. The Chief Justice, to whom the petition was presented, entertaining doubts upon the question whether, under the Constitution and laws of the Commonwealth, the court had authority to appoint commissioners as prayed for, reserved that question, at the request of the parties, for the consideration of the full court, according to whose opinion commissioners were to be appointed, or the petition dismissed.

H. W. Paine & W. W. Vaughan, for the petitioner.

C. Robinson, Jr., for parties who had filed similar petitions, was allowed to file a brief in support of the petition.

R. Olney, for the respondent.

GRAY, C. J. This is a petition for the appointment of commissioners to assess damages for the taking of land by the Eastern Railroad Company for a freight station, under the St. of 1873, *c.* 360, § 2.

The third section of this statute, upon the construction and effect of which the decision of the question reserved depends, is as follows: "All general laws, relating to the taking of land for railroad purposes and the location and construction of railroads, shall be applicable to and govern the proceedings in the taking of lands provided for in the second section of this act, except that, instead of the county commissioners, three disinterested

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persons shall be appointed by the Supreme Judicial Court as a board of commissioners to adjudicate the damages for the taking of said lands and property, from whose decision an appeal to a jury shall lie in behalf of any party whose land may be taken, or who may suffer any damage by reason of said taking or location, or of any act done by said company under said second section, as is provided in case of lands taken for railroad purposes."

By the general laws referred to, damages occasioned by taking land for a railroad are to be estimated in the first instance by the county commissioners; and "either party, if dissatisfied with the estimate made by the commissioners, may, at any time within one year after it is completed and returned, apply for a jury to assess the damages." Gen. Sts. *c.* 63, §§ 21, 22. Under those laws, the estimate of the commissioners being returnable before themselves, the application for a jury is of course to be made to them, and the jury to be ordered by them is a sheriff's jury, whose verdict is certified to the Superior Court. See Gen. Sts. *c.* 43, §§ 19 *& seq.* The alternative allowed by the St. of 1873, *c.* 261, of a trial by jury at the bar of the Superior Court, is limited to cases in which it is provided by law that a sheriff's jury may be had.

The statute now before us imposes the duty of adjudicating the damages, which ordinarily rests with the county commissioners, upon commissioners to be appointed by this court, and enacts that from their decision "an appeal to a jury shall lie" in behalf of the landowner. It contains no provision as to the return or recording of the award of these commissioners, and does not specify in what tribunal the application for a jury shall be made or the trial by jury had. But it is settled, by repeated decisions, that commissioners appointed by this court and deriving all their powers from their judicial appointment must, by necessary implication, without any express statute direction, return their award to the court which appoints them, to be there examined, and, if no sufficient cause to the contrary is shown, confirmed and recorded. *Charles River Mills* v. *Mill Creek Mills*, 7 Pick. 207. *Boston & Worcester Railroad* v. *Western Railroad*, 14 Gray, 253. *Hingham & Quincy Bridge* v. *Norfolk*, 6 Allen, 353, 356. *New London Railroad* v. *Boston & Albany Railroad*, 102 Mass. 386, 388. *Case of Supervisors of Election*, 114 Mass.

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247. *Brayton* v. *Fall River*, 124 Mass. 95. The jury is therefore to be applied for after the award of the commissioners has been returned into and accepted by this court, and by way of appeal from the award so accepted. The reasonable, if not the necessary, construction of the statute appears to us to be, that the application for the jury should be made and the trial had at the bar of this court, in which the whole record of the case from the beginning remains, rather than that the Legislature should be presumed to have intended that a proceeding in the nature of an appeal should lie from a judgment of the highest court of the Commonwealth to an inferior tribunal.

This construction of the statute avoids the grave constitutional difficulties attendant upon holding that the Legislature meant, either to confer upon this court the duty of appointing independent officers who do not aid in the performance of its own duties, and whose proceedings are not returned to it or subject to its direct control or revision, or else to allow an application, in the nature of an appeal from a judgment of this court, to the county commissioners.

The course of legislation and decision in other like cases affords no sufficient grounds to control our conclusion.

The Sts. of 1872, *c.* 356, and 1869, *c.* 291, the validity of which was upheld in the cases of *Eastern Railroad* v. *Boston & Maine Railroad*, 111 Mass. 125, and of *Roberts* v. *Boston & Lowell Railroad*, 115 Mass. 57, respectively contained precisely similar provisions to that now before us; but the question, whether the trial by jury by way of appeal from the award of the commissioners should be had at the bar of this court, was not considered, or even suggested. In the one case, the constitutionality of the statute was impugned solely because it authorized the taking of land already appropriated to a public use, and did not make sufficient provision for compensation. In the other case, the only point argued, as stated at the beginning of the opinion, was whether the application for a jury was seasonably made.

Other similar statutes have expressly provided that the trials by jury by way of appeal from the award of commissioners appointed by this court should be applied for in this court and had at its bar, or at least the warrant issued by and the verdict returned to this court. Sts. 1869, *cc.* 142, 161. *Carter* v. *Cambridge*

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Brookline Bridge, 104 Mass. 237. Sts. 1865, *c.* 132; 1869, *c.* 462. See also Sts. 1795, *c.* 62; 1867, *c.* 308; *Dingley* v. *Boston*, 100 Mass. 544; *Cobb* v. *Boston*, 109 Mass. 438, and 112 Mass. 181.

Several recent statutes, which in terms provide that any party, dissatisfied with the award of the commissioners appointed by this court, may apply to the county commissioners for a jury, have indeed been assumed to be constitutional. St. 1862, *c.* 177. *Hingham & Quincy Bridge* v. *Norfolk*, 6 Allen, 353. *Gill* v. *Scituate*, 100 Mass. 200. St. 1868, *c.* 309. *Salem Turnpike* v. *Essex*, 100 Mass. 282. St. 1871, *c.* 177. *Northampton Bridge Case*, 116 Mass. 442. St. 1875, *c.* 175. *Sunderland Bridge Case*, 122 Mass. 459. But in none of these cases was the question of the invalidity of the statute for this reason argued or adjudged, and we express no opinion upon it because it is unnecessary to the decision of this case. *Commissioners to be appointed.*

MARY ANN DORR *vs.* TREMONT NATIONAL BANK.

Suffolk. Nov. 21, 1878.—Feb. 27, 1880. COLT & MORTON, JJ., absent.

Under the statutes of this Commonwealth, rulings in matter of law at the trial of issues of fact in equity may be brought before the full court by bill of exceptions.

In a suit in equity against a corporation to compel a certificate of stock to be issued to the plaintiff, the answer admitted that the plaintiff had been the owner of the certificate, but alleged that she had executed a power of attorney authorizing its transfer, and that it had been transferred accordingly; and a justice of this court passed this order: "The defendant alleges that the plaintiff signed and executed an instrument purporting to be a power of attorney; and the plaintiff denies that she ever signed or executed said instrument; and it is ordered by the court, on motion of the plaintiff, that an issue be tried by a jury of this court whether the plaintiff signed and executed said instrument." *Held*, that the issue was not only directed, but framed, and that no more formal issue was necessary. *Held*, *also*, that on the trial of this issue the plaintiff had the right to open and close.

No exception lies to the refusal to receive further evidence upon a point expressly admitted by the adverse party.

BILL IN EQUITY, filed October 26, 1875, alleging that, on June 13, 1870, the plaintiff was the owner of forty-one shares in the capital stock of the defendant corporation, standing in her name

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on its books, and held a certificate therefor; that prior to that time she had employed Abraham Jackson to collect the dividends on these shares, and had entrusted to him the certificate thereof; that Jackson, without the authority of the plaintiff, fraudulently caused Henshaw & Brother, a firm of stock auctioneers, on or about June 13, 1870, to sell thirty-nine of her shares, and caused the certificate of the forty-one shares to be delivered to Henshaw & Brother, who were permitted to transfer on the defendant's books thirty-nine of the shares to persons to whom they had sold them, and to transfer the other two shares to Jackson; that Henshaw & Brother delivered to the defendant the certificate of forty-one shares, and the defendant issued and delivered new certificates to the purchasers and to Jackson; that the plaintiff did not authorize Jackson to sell her shares of stock, nor Henshaw & Brother to transfer them, and that the defendant carelessly and negligently permitted the transfer to be made; that Jackson received and converted to his own use the two shares and the proceeds of the sale of the thirty-nine shares; that Jackson, after the transfer of the stock, continued to pay to the plaintiff the dividends declared thereon until April 1875; and that the plaintiff was ignorant until that time that the transfer had been made and new certificates issued. The bill then alleged a demand for a new certificate of forty-one shares, and a refusal by the defendant; and concluded with a prayer that the defendant issue a new certificate for forty-one shares, or pay her the value thereof in money; and for further relief.

The answer admitted that the plaintiff had originally owned the shares of stock; but alleged that she had executed a power of attorney in blank to transfer them, and had delivered this power to Jackson, who had given the power with the certificate to Henshaw & Brother; and that the transfer on the books of the defendant had been made without negligence on its part, and upon presentation of this power of attorney and surrender of the old certificate; and set up laches on the part of the plaintiff. Annexed to the answer was a copy of the power of attorney purporting to be signed by "Mary Ann Dorr," and dated January 29, 1870.

On December 5, 1876, *Endicott*, J., made the following order: "In the above-entitled case, the defendant alleges that the plain-

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tiff signed and executed an instrument, purporting to be a power of attorney, a copy whereof is annexed to the defendant's answer in said cause; and the plaintiff denies that she ever signed or executed said instrument; and it is ordered by the court, on motion of the plaintiff, that an issue be tried by a jury of this court whether Mary Ann Dorr, the plaintiff, signed and executed said instrument."

The case then came on for trial before *Lord*, J. Before the trial commenced, the defendant claimed the right to open and close, and called the attention of the judge to the issue as framed. The judge stated that he regarded the paper referred to, not as an issue, but as an order directing the framing of an issue; that there was no pleading between the parties, except the bill and answer; that either party might apply to him to have an issue framed, or, if both parties consented, they might go to the jury on the question whether the plaintiff signed and executed the instrument claimed to be a power of attorney, as a question to be answered by the jury; and asked the counsel on both sides whether they desired the framing of any further issues, saying that, if they did, he would either frame or direct an issue to be framed, and, if they did not, he would submit the question raised in the order to the jury, to be answered by them. Both counsel stated that they did not desire any further issues framed, or any change in the pleadings, and consented that the question might be submitted to the jury in the form suggested. The judge then directed the trial to proceed; and ruled that, as there were no pleadings except the bill and answer, the plaintiff was entitled to the opening and close. To this ruling the defendant excepted.

The plaintiff's counsel then opened the case to the jury. The plaintiff testified that she never authorized a transfer of the stock; and then rested her case. The defendant, after cross-examination of the plaintiff, offered evidence of the execution of the power; and the plaintiff, against the defendant's objection, was permitted to put in rebutting evidence.

It appeared that the plaintiff was a widow living in Keene, New Hampshire; and owned forty-one shares in the capital stock of the defendant prior to the transfer of that stock in June 1870, under the power of attorney which she contended was a

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forgery. There was evidence tending to show that as early as the year 1865 the plaintiff became acquainted with Abraham Jackson, a lawyer of Boston, and caused him to be appointed her trustee under her husband's will; that she had about the year 1868 employed him as her counsel in litigation in New York, which lasted several years; that she had visited at the house where Jackson boarded in Boston, and that he had visited her, at her request, at her house in Keene; that she had been in the habit of constantly consulting him upon her affairs, both as a man of business and as a friend, and of deferring to his judgment; and that her confidence in him, both as her friend and counsel, was unbounded down to a period long after June 1870, in which month she went abroad, leaving her certificates of other property of her own in his hands, with a power of attorney to collect interest on registered United States bonds.

The defendant contended that the relations between the parties rendered it exceedingly probable that she would have yielded to the advice and suggestions of Jackson, and would have given him the disposal of the stock on any ground ostensibly for her benefit by which he might have fraudulently sought to get the disposal of the stock, and made it extremely improbable that he should have resorted to forgery.

The defendant produced about one hundred and sixty letters from the plaintiff to Jackson, written from 1865 to the spring of 1875, and which had been submitted to the examination of the plaintiff's counsel, with notice that they would be offered in evidence; and, having given notice to the plaintiff to produce the letters of Jackson during the same period, offered to put in the whole correspondence as showing the relations between the parties, both before and after the giving of the paper in question. Sixteen of these letters had already been put in evidence, during the cross-examination of the plaintiff, and otherwise. The genuineness of all the letters was conceded, and they were all admitted as standards of the plaintiff's handwriting, and for the purpose of showing that her usual signature was "Mary A. Dorr." The defendant then offered the whole correspondence as showing the relations between the plaintiff and Jackson; and the judge ruled, that the correspondence could not be admitted as a whole for this purpose, but that each letter must be offered

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and passed upon separately; and to this ruling the defendant excepted. www.libtool.com.cn

The defendant then offered in evidence two letters from the plaintiff to Jackson. In the first, dated July 12, 1865, was this language: "There must be something due to you and Mr. Farnsworth. You have both been indefatigable in my cause, which I shall ever remember with gratitude. I shall give myself no anxiety about matters when they are completely in your hands, only to remind you of the taxes of 1862 and 1863, and I don't know how many years before." In the second, dated July 19, 1867, the plaintiff wrote of her thinking of going to Europe; said she wrote to ask him if he thought it advisable, "for your judgment is everything to me;" spoke of renting her house to a certain person, and said, "I did not enter into any agreement, of course, as I wish to consult you in every particular."

The plaintiff's counsel admitted that the relations between the plaintiff and Abraham Jackson were intimate; that she sought his advice on matters of business, and consulted him, and had entire confidence in him; and that she trusted him implicitly in all matters in which she had any interest, to the fullest extent claimed by the defendant as herein stated.

The judge declined to allow the letters to be read for the mere purpose of showing the relation of the parties, because such relation had been fully admitted; but ruled that any letter which was offered would be admitted, if there was anything in it bearing upon the issue on trial.

The jury returned a verdict that the plaintiff did not sign the power of attorney; and the defendant tendered a bill of exceptions, which was allowed by the judge.

The case was afterwards heard before *Colt*, J., who made a report thereof for the determination of the full court, in which, at the defendant's request, the bill of exceptions was incorporated, in order that its rights might be preserved as if a motion for a new trial had been made for the causes therein stated. The report then set forth the testimony of the cashier of the defendant, to the effect that a member of the firm of Henshaw & Brother, respectable stock auctioneers, presented the old certificate and a power of attorney purporting to be signed by the plaintiff, and he directed the transfer to be made on June 30.

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1870; that there was nothing in the transaction to excite, or which did excite, his suspicion; and that no objection was made to the transfer until after the insolvency and arrest of Jackson in the spring of 1875. The report also stated the evidence at length bearing upon the question of the plaintiff's laches, which is omitted, as presenting merely a question of fact. Upon the testimony the judge found that there was nothing in the conduct of the plaintiff to preclude her from maintaining the bill; and that, upon the whole case, she was entitled to a decree as prayed for, subject to the determination of the full court on the question of a new trial on the issue as to the signature of the power of attorney, and on the questions presented at this hearing.

R. M. Morse, Jr., (*F. V. Balch* with him,) for the defendant.

N. Morse & E. W. Hutchins, for the plaintiff.

GRAY, C. J. 1. In the practice of most courts of chancery, a bill of exceptions is unknown, and the rulings of a judge presiding at the trial by jury of issues out of chancery can be revised only upon motion for a new trial in the court which ordered the issues. *Lewis* v. *Armstrong*, 3 Myl. & K. 45; 2 Cr. & M. 274. *Clayton* v. *Nugent*, 8 Jur. 867; *S. C.* 1 Collyer, 362; 13 M. & W. 200. *Ex parte Story*, 12 Pet. 339. *Watt* v. *Starke*, 101 U. S. 247. But by the statutes of this Commonwealth, and the practice of this court under them, bills of exceptions have long been allowable in cases in equity, as well as in actions at common law.

Under the Revised Statutes of 1836, and until 1859, no appeal lay from the decision of a single justice of this court in any branch of its jurisdiction; but his rulings in matter of law might be revised by the full court on report, on motion for a new trial, or on bill of exceptions. Rev. Sts. *c.* 81, §§ 26–30. Section 26 expressly permitted the reservation on report of any question of law arising "in any trial or other proceeding, either of a civil or criminal nature, at law or in equity;" and the succeeding sections, as to motions for new trials and bills of exceptions, were manifestly intended to be equally comprehensive, and were so understood in practice; and bills of exceptions to decisions upon questions of law at final hearings in equity were allowed by Chief Justice Shaw, and passed upon by the full court. *Parker*

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v. *May*, 5 Cush. 336, 355, 356. *Hancock* v. *Carlton*, 6 Gray, 39, 63.

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By the St. of 1853, *c.* 371, suits for certain objects, which had previously been of equity jurisdiction, were required to be by action at law, praying for relief in equity. Suits so brought were the only mode of enforcing equitable remedies in cases within that statute, until the right to proceed by bill in equity was restored by the Sts. of 1855, *c.* 194, and 1856, *c.* 38; and they were treated as, in their nature and incidents, suits in equity; yet rulings upon the admission of evidence, at the trial by a jury of issues ordered therein, were revised by bill of exceptions. *Crittenden* v. *Field*, 8 Gray, 621. *Irvin* v. *Gregory*, 13 Gray, 215. *Topliff* v. *Jackson*, 12 Gray, 565. *Crane* v. *Adams*, 16 Gray, 542.

The act of 1859, establishing the Superior Court, and providing for bills of exceptions to opinions, rulings, directions and judgments of that court in matter of law in any case, civil or criminal, did not affect the jurisdiction or the forms of proceeding in equity. St. 1859, *c.* 196, §§ 6, 27, 37, 50–52. The equity act of the same year, the provisions of which are substantially reënacted in the General Statutes, introduced the practice of courts of chancery elsewhere, so far as to require all cases in equity, and all motions and applications therein, to be heard in the first instance before a single justice, and to allow an appeal, on facts as well as law, from all his decrees, interlocutory or final, to the full court; empowered him, upon a hearing for final decree, to report the whole case to the full court for its decision; and provided that the full court, or any justice thereof, might frame issues in equity, and direct them to be tried at the bar, either of this court or of the Superior Court; but contained no express repeal of previous statutes. St. 1859, *c.* 237. Gen. Sts. *c.* 113. And by the Gen. Sts. *c.* 115, § 7, "in all cases, civil or criminal, whether according to the course of the common law or otherwise," any opinion, ruling, direction or judgment of a judge, either of this court or of the Superior Court, in matter of law, (except on pleas in abatement, or motions to dismiss for defect of form in process,) may be the subject of a bill of exceptions.

Under these statutes, bills of exceptions have been allowed and entertained to decisions of justices of this court sitting in

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equity, as well as to rulings at the trial of issues in equity before a jury, either in the Superior Court or in this court. *National Mahaiwe Bank* v. *Barry*, 125 Mass. 20. *Southbridge Savings Bank* v. *Exeter Works*, 127 Mass. 542. *Williams* v. *Robbins*, 15 Gray, 590. *Hodges* v. *Pingree*, 108 Mass. 585. *Brooks* v. *Tarbell*, 103 Mass. 496. *Cobb* v. *Boston*, 112 Mass. 181. In *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290, 298–300, exceptions were alleged, by counsel of great eminence and experience, at the trial by a jury of issues in equity, and were not allowed in the form of a bill of exceptions, merely because other questions in the cause were reserved for the determination of the full court, which could be more appropriately presented in the form of a report, and the exceptions were therefore incorporated in the report, in accordance with the practice in actions at law, as settled in *Aldrich* v. *Boston & Worcester Railroad*, 100 Mass. 31.

So in probate appeals, in which parties now have the same rights as in equity causes, including the right of appeal from a single justice in matter of fact or of discretion, as well as in matter of law; St. 1859, *c.* 237, § 12; Gen. Sts. *c.* 117, § 14; *Wright* v. *Wright*, 13 Allen, 207; questions of law arising at the trial of issues before a jury have been brought to the full court by bill of exceptions. *McKeone* v. *Barnes*, 108 Mass. 344. *Lewis* v. *Mason*, 109 Mass. 169. *Nash* v. *Hunt*, 116 Mass. 237. *Newell* v. *Homer*, 120 Mass. 277. *Davis* v. *Davis*, 123 Mass. 590. *May* v. *Bradlee*, 127 Mass. 414.

A thorough examination of the books of reports might disclose additional instances of bills of exceptions to rulings in matter of law at the trial before a jury of issues in equity or in probate causes. The reasons why they are not more numerous are, that very few issues in equity have been sent to the Superior Court for trial, and that the justices of this court, as a matter of courtesy to counsel, have generally reserved rulings made upon questions of importance in the form of a report, without requiring a bill of exceptions to be tendered.

Whether any and what issues in equity or probate shall be submitted to a jury is a subject of appeal under the Gen. Sts. *c.* 113, § 10, and not of a bill of exceptions, because it involves a question of discretion, and not merely of law. *Crittenden* v.

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Field, and *Brooks* v. *Tarbell*, above cited. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 102 Mass. 45. *Ross* v. *New England Ins. Co.* 120 Mass. 113. *Davis* v. *Davis*, 123 Mass. 590, 594. But the cases before referred to conclusively establish in this Commonwealth the authority to revise upon bills of exceptions rulings in matter of law at the trial of issues in equity before a jury.

When rulings at the trial of an issue by a jury have been brought before a court of chancery elsewhere, on a motion for a new trial and a report of the whole evidence, the court has indeed declined to set aside the verdict on account of the improper admission or rejection of testimony, when satisfied that, if the ruling had been different, the verdict ought to have been the same. *Hampson* v. *Hampson*, 3 Ves. & B. 41. *Barker* v. *Ray*, 2 Russ. 63, 76. *Apthorp* v. *Comstock*, 2 Paige, 482, 488. *Watt* v. *Starke*, 101 U. S. 247. But a bill of exceptions, under our practice, brings up nothing but questions of law, and presents those questions only for the decision of the full court.

The practice of revising rulings in matter of law in equity causes by bill of exceptions, which grew up, as we have seen, before appeals were allowed from a single justice sitting in equity to the full court, has been retained since such appeals have been authorized by statute, and often affords a convenient method of enabling a party, aggrieved by the ruling of a single justice in matter of law, to obtain relief, without obliging him to furnish a report of all the evidence, or compelling the full court to hear an argument upon the whole case.

The questions of law raised at the trial of the issue before the jury are therefore properly before us upon the bill of exceptions allowed by Mr. Justice Lord, who presided at that trial.

2. In the practice of this court, issues to a jury in equity or probate causes have commonly been framed in one of three forms:

First. By directing the parties to plead to issue, and submitting to the jury the issue joined on their pleadings, in accordance with the former practice in England and in New York. Seton on Decrees (3d ed.) 984. *Frank* v. *Frank*, 2 Mood. & Rob. 314. *Phillips* v. *Thompson*, 1 Johns. Ch. 131, 152. *Phelps* v. *Hartwell*, 1 Mass. 71. *Crowninshield* v. *Crowninshield*, 2 Gray, 524. *Hodges* v. *Pingree*, 2 Chit. Pl. (16th Am. ed.) 128; *S. C.*

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108 Mass. 585. *Briggs* v. *Titcomb*, Suffolk, April term 1865, in which the issues on file are in the handwriting of Chief Justice Bigelow.

Second. By reciting in the order what the one party alleges and the other denies, and directing the issue made by such allegation and denial to be tried by a jury, in substantial accordance with the form of a feigned issue, given in the St. of 8 & 9 Vict. *c.* 109, § 19, and with the order in this case, and usually in this form: "Whereas the plaintiff alleges, and the defendant denies," (stating the question in dispute,) "now therefore it is ordered that a jury be empanelled to try said issues." Instances of such orders made by Chief Justice Chapman are upon the files of the court in the suit in equity of *Vinton* v. *Simmons*, and in the probate appeal of *Winslow* v. *Coates*, Suffolk, April term 1870.

Third. By directing an issue framed in the form of a simple question, and recited in the order, to be tried by a jury. This mode of framing issues has been long used in this Commonwealth, and in some counties almost exclusively used. *Eames* v. *Eames*, Middlesex Rec. 1835, fol. 139; *S. C.* 16 Pick. 141. *Stockbridge Iron Co.* v. *Hudson Iron Co.* 107 Mass. 290, 297–299. *Barker* v. *Comins*, 110 Mass. 477.

When the order directing issues has been in the second or in the third of these forms, stating the question to be tried, and not directing any further pleadings, the order has generally been treated as of itself framing a sufficient issue, and the case has been tried on the issue stated in the order. By the order of Mr. Justice Endicott, in the present case, the issue to be tried was not only directed, but framed, and no more formal issue was necessary.

3. There was no error in the ruling that the plaintiff was entitled to open and close before the jury.

The tendency of decision in this Commonwealth has been to simplify the practice in this respect, and to hold the plaintiff to be entitled to the opening and close in all cases. Upon trials of actions at law in this court on the general issue only, without any other plea or specification, the plaintiff always had the right to open and close. In early times, if a justification was pleaded, as well as the general issue, the two issues were tried separately, and on the issue of justification the defendant had the opening

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and close. *Flagg* v. *Hobart*, Quincy, 332. *Morse* v. *Jewett*, 6 Dane Ab. 563, 564. And under the St. of 1792, *c.* 41, authorizing officers to plead the general issue and file a brief statement of any matter of defence, it was at one time a matter of doubt which party had the right to open and close. *Bangs* v. *Snow*, 1 Mass. 181. But afterwards the practice became settled to allow the plaintiff to open and close upon the whole case, whenever the general issue was pleaded, and to permit the defendant to open and close in those cases only in which by his plea he admitted the whole cause of action stated in the declaration, and undertook to remove or defeat it, as by a justification or a discharge. *Davis* v. *Mason*, 4 Pick. 156. *Ayer* v. *Austin*, 6 Pick. 225. Under the St. of 1836, *c.* 273, which allowed no other plea in bar than the general issue, the plaintiff was entitled to the opening and close, whatever specification of defence was filed. *Robinson* v. *Hitchcock*, 8 Met. 64. And since the new practice act has abolished the general issue in personal actions, and required an answer stating the defences intended to be relied on, the same rule has prevailed, even where the defendant admits the plaintiff's cause of action, and the only issue for the jury is upon a declaration in set-off. St. 1852, *c.* 312, §§ 12, 14, 18, 37. Gen. Sts. *c.* 129, §§ 15, 17, 20; *c.* 130, § 16. *Page* v. *Osgood*, 2 Gray, 260.

In probate appeals, upon the trial of the issue of the sanity of a testator, the executor who propounds the will for probate has always been held to have the right to open and close before the jury, whichever party is the appellant from the decree of the judge of probate, and independently of the form of the pleadings, or of the question of the burden of proof. The rule was as well established in times when by the approved practice the party contesting the will went forward in pleading; *Blaney* v. *Sargeant*, 1 Mass. 335; *Buckminster* v. *Perry*, 4 Mass. 593; and was held to have the burden of proving the insanity of the testator; *Brooks* v. *Barrett*, 7 Pick. 94, 98, 99; as it is to-day, when, in accordance with the earliest precedents, the executor pleads first, and it has been determined that the burden of proof rests upon him. *Phelps* v. *Hartwell*, 1 Mass. 71. *Crowninshield* v. *Crowninshield*, 2 Gray, 524, 527. *Briggs* v. *Titcomb*, above cited.

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In cases of assessing damages for land taken under the right of eminent domain, the proceeding is not in the form of an action at law or of a suit in equity, and the owner of the land is really the plaintiff, and therefore entitled to open and close before any tribunal authorized to assess his damages, whether, as in the case of highways, the petition for a jury can be presented by him only, or, as in the case of railroads, may be presented by either party, or, as in the case of land taken for a post-office, must be presented by the agent of the government resisting his claim. Sts. 1870, *c.* 75; 1874, *c.* 372, § 67; 1873, *c.* 189, § 2. *Parks* v. *Boston*, 15 Pick. 198, 208. *Connecticut River Railroad* v. *Clapp*, 1 Cush. 559. *Winnisimmet Co.* v. *Grueby*, 111 Mass. 543. *Burt* v. *Wigglesworth*, 117 Mass. 302.

There is no reason why the general rule of practice in this Commonwealth, by which the plaintiff is entitled to the opening and close, should not be adhered to in equity, and there is nothing in the form of the order for an issue in the present case to take it out of the general rule. We are not required to decide what the effect might have been, if the order, as is often the case in England, had directed that the defendant in the cause should be plaintiff at the trial of the issue. *Hippesley* v. *Homer*, Turn. & Russ. 48, 50, note; *S. C.* Seton on Decrees, 984. *Frank* v. *Frank*, 2 Mood. & Rob. 314. *Browne* v. *McClintock*, L. R. 6 H. L. 434, 435.

4. The exception to the exclusion of the correspondence offered in evidence by the defendant cannot be sustained. Whether further evidence shall be received upon a point expressly admitted by the adverse party is wholly within the discretion of the judge presiding at the trial. In *Priest* v. *Groton*, 103 Mass. 530, and in *Commonwealth* v. *McCarthy*, 119 Mass. 354, cited by the defendant, the decision was that the admission of such evidence afforded no ground of exception. In *Fisher* v. *Mellen*, 103 Mass. 503, the evidence excluded upon such a point was precisely similar to that admitted in *Bannister* v. *Alderman*, 111 Mass. 261, and exceptions to its exclusion in the one case and to its admission in the other were alike overruled. See also *Cushing* v. *Billings*, 2 Cush. 158; *Blair* v. *Pelham*, 118 Mass. 420; *Commonwealth* v. *Allen*, *ante*, 46.

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5. Upon the question of laches, we see no reason, upon a review of the whole testimony, to revise the decision of Mr. Justice Colt, who heard it from the lips of the witnesses. The fact that Jackson paid the plaintiff her dividends regularly, until within six months before the filing of the bill, was sufficient to put her off her guard, and to lull any suspicions created by his conduct in other respects.

Exceptions overruled, and decree for the plaintiff.

JAMES C. TUCKER & another *vs.* OWEN HOWARD.

Suffolk. Jan. 3. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A court of equity will not compel an innocent plaintiff, whose right in a passageway has been encroached upon by the building of a wall therein to his substantial injury, to sell his right at a valuation; but will compel the wrongdoer to restore the premises, as nearly as may be, to their original condition, and to pay the damages sustained by the plaintiff pending the suit.

BILL IN EQUITY for an injunction against obstructing a passageway running from Merrimack Street in Boston, by erecting the wall of a building within it. A preliminary injunction was refused; and the defendant completed the wall. Upon a hearing on the merits, it appeared that the plaintiffs owned the land on one side of the passageway, and the defendant owned the land on the other side of the passageway and in the rear of it; that the plaintiffs had by deed "the right to pass and repass in, upon and over" the passageway in question, which was described as "five feet wide and ten feet high;" and that the defendant had the right to build over the passageway, leaving it "five feet wide in the clear, and not less than ten feet high;" and it was decided that the plaintiffs had the right to a way of the dimensions stated, and not merely to a convenient right of way; and that the wall erected within the passageway was in violation of the plaintiffs' right. 122 Mass. 529.

The case was referred to a master to ascertain the manner in which the building could be altered so as to make the passage-

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way as wide as before, and the cost of such alteration, as well as the damages to the plaintiffs' estate if the wall should be allowed to remain in the passageway, and any damage suffered by the plaintiffs pending the suit. The master reported that the wall could be altered at a cost of $530, by taking down part of it, and substituting two iron columns with an iron beam thereon to support the wall above, so as to leave the passageway five feet wide, except that one of these columns would project a few inches into the passageway; that, assuming that the plaintiffs had the right to only so much light and air over the defendant's land as was necessarily incidental to the passageway, if five feet wide and ten feet high, and built over for its whole length, the permanent pecuniary damage to the plaintiffs' estate, if the present wall was allowed to remain, was $200; that if the plaintiffs had any greater right of light and air, this damage would be enhanced; and that the damage caused pending the suit and while the work of building was in progress, by excavations and driving piles and thereby causing the foundations of their house to settle, disturbing and interrupting the occupation thereof, and breaking in their drain, was $462.

At the hearing on the master's report, *Endicott*, J., entered a final decree, commanding the defendant to alter his building as above stated, and to pay to the plaintiffs the sum of $462, as reported by the master, and costs. The defendant appealed to the full court.

A. A. Ranney, for the plaintiffs.

C. A. Welch, for the defendant.

GRAY, C. J. The defendant, since the filing of this bill, has built a wall in the plaintiffs' passageway, which has been decided to be a violation of their right. *Tucker* v. *Howard*, 122 Mass. 529. The plaintiffs' right in the passageway included the right to so much light and air as was necessarily incident to the use of the passageway. *Atkins* v. *Bordman*, 2 Met. 457. The master finds that the permanent damage to the plaintiffs' estate, if the defendant's building is allowed to remain as it is, is $200, and that the building can be altered in the manner directed by the decree appealed from, at an expense of $530. The fact that no temporary injunction has been granted does not affect the kind or the extent of the remedy to which the

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plaintiffs are entitled upon establishing their right at the hearing on the merits. The defendant having, by the service of process, full notice of the plaintiffs' claim, went on to build at his own risk; and the injury caused to the plaintiffs' estate by the defendant's wrongful act being substantial, a court of equity will not allow the wrongdoer to compel innocent persons to sell their right at a valuation, but will compel him to restore the premises, as nearly as may be, to their original condition. *Dent* v. *Auction Mart Co.* L. R. 2 Eq. 238, 246, 255. *Aynsley* v. *Glover*, L. R. 18 Eq. 544, and L. R. 10 Ch. 283. *Krehl* v. *Burrell*, 7 Ch. D. 551, and 11 Ch. D. 146. *Schwoerer* v. *Boylston Market Association*, 99 Mass. 285. *Creely* v. *Bay State Brick Co.* 103 Mass. 514. *Nash* v. *New England Ins. Co.* 127 Mass. 91. *Salisbury* v. *Andrews*, *ante*, 336. The decree for a mandatory injunction, and for payment of damages suffered pending the suit, and for costs to the plaintiffs as the prevailing party, must therefore be *Affirmed, with costs.*

GEORGE E. SPAULDING *vs.* J. D. PUTNAM & another.

Middlesex. Jan. 13. — Feb. 5, 1880. COLT & LORD, JJ., absent.

A person, who, before the St. of 1874, c. 404, put his name on the back of a promissory note, before delivery to the payee, is liable as joint promisor; and it is immaterial that he indorsed the note without consideration, at the request of the maker, for the accommodation of the payee, if the payee did not authorize such a request, or know of its being made.

CONTRACT against J. D. Putnam and A. E. Conant, as joint promisors upon the following promissory note: "Boston, December 10, 1872. Four months after date I promise to pay George E. Spaulding or order ten hundred and twenty-six dollars, value received, with interest. J. D. Putnam." Conant's name appeared on the back of the note. Writ dated April 4, 1878. Trial in the Superior Court, without a jury, before *Putnam*, J., who found the following facts:

In 1872, the defendant Putnam owed the plaintiff for wood which the latter had sold to him. The plaintiff called upon him

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for payment, Putnam asked him to wait a little longer, and the plaintiff then told him that, if he would get a note signed by A. E. Conant, or by one Tripp, he would take such a note on four or six months' time in payment of the account. Putnam replied that he would come in a few days and bring him such a note. He came soon after and handed the plaintiff the note in suit, signed by himself, but with no other name upon it. The plaintiff took it and looked at it, and immediately handed it back to Putnam, saying that he would not take it. Putnam took the note again, said he would see Conant, and called on Conant about a week afterwards, and, producing the note, said, "Mr. Spaulding wishes me to ask you if you will indorse this note for his accommodation, so that he can get it discounted at some bank." Thereupon Conant, saying he was willing to indorse the note for Spaulding's accommodation, wrote his name upon the back of it, but without any consideration. The plaintiff did not authorize Putnam to say this to Conant, and did not know of the conversation. In the course of a month, Putnam sent the plaintiff the same note, with the name of Conant upon the back of it. The plaintiff retained the note, and applied it in payment of Putnam's account, and has held the note since that time.

Upon these facts, Conant contended that he was not legally liable on the note; and asked the judge so to rule. The judge declined so to rule; found that Conant put his name upon the note for the accommodation of Putnam, and not for the accommodation of the plaintiff, and before its acceptance by the plaintiff; and ordered judgment for the plaintiff, for the amount of the note and interest. The defendant Conant alleged exceptions.

R. B. Caverly, for Conant.

W. H. Bent & F. T. Greenhalge, for the plaintiff.

ENDICOTT, J. Upon the facts reported, the presiding judge was justified in finding that the defendant Conant was liable on the note as an original promisor. The note was made in 1872 by the defendant Putnam, payable to the plaintiff, and, before delivery, was indorsed by Conant. The conversation that passed between Putnam and Conant, at the time Conant was persuaded to put his name on the note, was immaterial, if not known to

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the plaintiff, and if he had not authorized Putnam to request Conant to indorse it for his own accommodation. If the intention or understanding with which Conant indorsed it was not known to the plaintiff when he received it, he had the right to rely upon the contract entered into by Conant, as it appeared in the note itself, and could properly assume that Conant intended to give him security for the debt of Putnam. The fraud of Putnam in procuring the signature of Conant cannot operate to the injury of the plaintiff. *Patch* v. *Washburn*, 16 Gray, 82. *Sweetser* v. *French*, 2 Cush. 309. *Wareham Bank* v. *Lincoln*, 3 Allen, 192. The St. of 1874, *c.* 404, has no application to this case. *Cook* v. *Goggins*, 126 Mass. 410.

Exceptions overruled

HORACE J. ADAMS *vs.* ALBERT S. BIGELOW.

Middlesex. Jan. 13. — Feb. 5, 1880. COLT & LORD, JJ., absent.

The owner of land, subject to a mortgage given by his grantor, and which he had not assumed, leased the land. A few days before an instalment of rent became due, the mortgagee entered and foreclosed the mortgage, and demanded rent of the tenant, and the latter attorned to him. *Held*, that the owner of the land could not maintain an action against the tenant for the whole or any part of this instalment; and that the St. of 1869, *c.* 368, § 1, did not apply.

CONTRACT for the rent of a house in Boston from June 15, 1878, to September 3, 1878. The case was submitted to the Superior Court, and, after judgment for the plaintiff, to this court, on appeal, on agreed facts in substance as follows:

On September 15, 1875, the plaintiff leased the house in question to the defendant, for the term of three years from that date, rent being payable quarterly at the rate of $1100 a year. At the time of executing the lease the plaintiff was the owner of the premises, subject to a mortgage given by the plaintiff's grantor for $12,000, which mortgage the plaintiff was not bound in law to pay.

On September 3, 1878, twelve days before the last quarter's rent was payable, the holder of the mortgage entered for a

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breach of the conditions of the mortgage and for the purpose of foreclosing the same, and notified the defendant that he must pay rent to him as a condition of his remaining, and demanded of the defendant payment of the quarter's rent payable by the terms of the lease on September 15. The defendant, without the knowledge and consent of the plaintiff, paid the rent to the mortgagee.

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If the plaintiff was entitled to recover, he was also to be entitled to interest from the date of the writ; otherwise, judgment for the defendant.

I. S. Morse & G. A. Morse, for the plaintiff.

D. L. Withington & E. W. Cate, for the defendant.

ENDICOTT, J. At the time the plaintiff leased the premises to the defendant, they were subject to a mortgage. Before the quarter's rent became due, which the plaintiff seeks to recover in this action, the mortgagee entered for condition broken and for the purpose of foreclosure, and notified the defendant that he must pay rent to him. No rent was then due, and the defendant upon demand paid the rent falling due soon after to the mortgagee, who was in possession. The tenant of a mortgagor is not liable to him for rent, after the mortgagee, who holds a mortgage given prior to the lease, has entered and notified the tenant to pay rent. *Cook* v. *Johnson*, 121 Mass. 326, and cases cited. *Knowles* v. *Maynard*, 13 Met. 352. See also *Russell* v. *Allen*, 2 Allen, 42; *Mirick* v. *Hoppin*, 118 Mass. 582.

The St. of 1869, *c.* 368, concerning the apportionment of rent, has no application to this case. It provides in § 1, that "when any lands are held by lease of a person having an estate therein determinable on a life, or on any contingency," and such estate shall determine before the day on which any rent is reserved or made payable, then such rent may be apportioned. And the plaintiff contends that the words "or any contingency" are broad enough to cover this case. But these words, taken in the connection in which they are used, clearly refer to the happening of some event affecting the nature and character of the estate itself, and an essential and necessary part of it, upon which the continuance of the estate depends. But the estate of a mortgagor, or of an owner of the equity of redemption, is not determined by the happening of any such event or contingency;

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it can only be determined through his own neglect to perform his contract, or to pay the debt which the mortgage is given to secure. Nor is the plaintiff's estate determined by the entry of the mortgagee; he has the right to redeem, and, if the plaintiff had redeemed in season, he would have been entitled to receive the rent he now seeks to recover. The mortgagee by his entry simply put an end to the right of the plaintiff to receive the rent while the mortgage is outstanding and the mortgagee is in possession. See *Pope* v. *Biggs*, 9 B. & C. 245. The plaintiff, therefore, cannot maintain this action.

Judgment for the defendant.

CHARLES T. GALLAGHER *vs.* JAMES GALLETLEY

Middlesex. Jan. 16. — Feb. 5, 1880. COLT & LORD, JJ., absent.

At the trial of a writ of entry, it appeared that, in August 1877, the demanded premises were attached by A., who obtained judgment, and execution issued in July 1878. The premises were duly levied upon and sold, in August 1878, to B., who at once conveyed them to the demandant. The tenant offered in evidence a mortgage of the premises made to him in June 1877, but not recorded until after A.'s attachment. In September 1877, the tenant assigned this mortgage to C., who, in October 1877, discharged it on the record, acknowledging full payment of the debt secured by it. Before taking his deed, the demandant examined the record and found the mortgage thus discharged. In January 1878, the tenant, under the power contained in the mortgage, sold and conveyed the premises to D., who, on the same day, conveyed them back to the tenant. A few days before the trial, and nearly two years after the demandant's deed, C. recorded a paper, stating that he made a mistake in discharging the mortgage, and intended to assign it to the tenant. *Held*, that the tenant's exception to a refusal to rule that, upon the above facts, the demandant was charged with notice of the unrecorded mortgage, must be overruled, with double costs.

WRIT OF ENTRY to recover a parcel of land in Somerville. Plea, *nul disseisin*. Trial in the Superior Court, without a jury, before *Putnam*, J., who found for the demandant; and the tenant alleged exceptions. The facts appear in the opinion.

D. F. Crane, for the tenant.

C. T. Gallagher & W. H. Orcutt, for the demandant, moved for double costs.

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ENDICOTT, J. There is no ground whatever upon which these exceptions can be sustained.

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The premises were attached by Josiah A. Hannum in August 1877. Hannum obtained judgment in his action, and, execution being issued in July 1878, the premises were duly levied upon and sold in August following to James W. Hannum, who at once conveyed the same to the demandant.

The tenant, to prove his title, offered in evidence a mortgage of the premises made to him in June 1877, but not recorded till after the attachment. This mortgage he assigned, in September 1877, to his son, who, in October following, discharged it on the record, acknowledging full payment of the debt secured by it. Before taking his deed, the demandant examined the record and found the mortgage thus discharged.

It also appears that, in January 1878, the tenant undertook, by virtue of the power contained in the mortgage, to sell and convey the premises to one Doty, who, on the same day, conveyed them back to the tenant. It is contended that this so-called foreclosure, and the deeds which were placed on record, gave notice to all persons of this mortgage, at the time the demandant took his deed. But this was no notice of any outstanding mortgage on the premises, but merely of the fact that a mortgagee, who had assigned his mortgage, undertook to sell premises in which he had no title whatever, and which had been discharged of the mortgage by his assignee. The paper recorded by the assignee a few days before the trial, and nearly two years after the demandant's title was perfected, in which he states that he made a mistake in discharging the mortgage, and intended to assign it to the tenant, cannot affect the demandant's title. Neither the demandant nor Hannum had any notice of this at the time of the levy and sale.

The presiding judge, upon these facts, could not rule as requested, that the demandant was charged with notice of the unrecorded mortgage, and properly directed judgment for the demandant. *Exceptions overruled, with double costs.*

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JEREMIAH C. HACKETT *vs.* MARY L. BUCK.

Middlesex. Jan. 13. — Feb. 13, 1880. COLT & LORD, JJ., absent.

Although the St. of 1874, *c.* 188, authorizes an estate not subject to a mortgage to be levied upon by sale instead of by extent, it does not authorize an estate, which is subject to a mortgage when attached, and which, at the time of the levy, is free from mortgage, to be levied upon and sold as an equity of redemption.

WRIT OF ENTRY to recover a parcel of land in Malden. Plea, *nul disseisin*. The case was submitted to the Superior Court, and, after judgment for the tenant, to this court on appeal, on an agreed statement of facts in substance as follows:

In April 1871, George H. McAllister, who was seised in fee of the demanded premises, conveyed the same in mortgage to Ezra Holden. On December 27, 1873, the demandant brought suit against McAllister, and attached all his real estate in this county. On March 3, 1874, the mortgage above mentioned was discharged, and the discharge was duly recorded. On December 10, 1875, McAllister conveyed the demanded premises to the tenant, by warranty deed, which was duly recorded the next day. On June 1, 1876, the demandant recovered judgment in his suit against McAllister for damages and costs, and on June 14 execution was duly issued on said judgment, and placed in the hands of an officer, who, on June 28, 1876, took on the execution "all the right in equity" which McAllister had on December 27, 1873, "of redeeming" the mortgaged estate, and conveyed to the tenant "all the right in equity which the said George H. McAllister had of redeeming the aforesaid mortgaged real estate, at the time aforesaid."

J. F. Colby, for the demandant.

W. S. Stearns & J. H. Butler, for the tenant.

GRAY, C. J. The St. of 1874, *c.* 188, has changed the law so far as to authorize an estate not subject to mortgage to be levied upon by sale instead of by extent, but not so far as to authorize the officer to levy upon, advertise and sell such an estate as an equity of redemption, or to sell less than the entire estate which is at the time of the beginning of the levy bound

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by the lien of the attachment. In this case, by the discharge of the mortgage, after the attachment and before the levy, the equity of redemption had ceased to exist; the advertisement that the right to be sold on execution was an equity of redemption only, tended to limit to the prejudice of the debtor the sums bid at the sale; and the deed of the officer, being in terms limited to the right in equity, which had ceased to exist and which could not be revived by any act of his, was a nullity, and passed no title to the purchaser. *Freeman* v. *M'Gaw*, 15 Pick. 82. *McGregor* v. *Williams*, 10 Cush. 526. *Perry* v. *Hayward*, 12 Cush. 344. *Gardner* v. *Barnes*, 106 Mass. 505.

Judgment affirmed.

GEORGE P. METCALF & another *vs.* FIRST PARISH IN FRAMINGHAM & others.

Middlesex. Jan. 13, 1879. — Feb. 26, 1880. COLT & SOULE, JJ., absent.

A testator, owning a large number of shares of stock in a certain railroad company, bequeathed to several persons shares of stock in that company, amounting in the aggregate to a less number than he owned at the time of making his will and at his death; and to some of these persons he also gave pecuniary legacies. To one person he directed that a legacy should be paid in the bonds of another railroad corporation at par, if he should possess them at his death. The will concluded with a residuary devise and bequest of "all the rest, residue and remainder of my estate" to his nephews and nieces, with a like direction for the payment in railroad bonds of the portions of the children of a brother; and a clause empowering his executors to sell all real estate and personal property, "excepting what I have hereinbefore disposed of." *Held*, that the bequests of the shares of stock were specific.

Where the reading of a whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court will supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared.

A testator bequeathed personal property in trust for the benefit of his wife's sister and her husband during their lives, as follows: During her life, to pay the net income to her semiannually; in case she should die before him, to transfer one half of the principal to a charitable institution, and to pay the income of the remainder to him during his life; in case he should die before her, then at her death to transfer the whole of the principal to the same institution. She died

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before her husband, and one half of the principal was paid to the institution and the other half kept in trust for him. *Held*, that on his death the institution was entitled to this part of the principal also, and that it did not pass to the residuary devisees; although a similar bequest for the benefit of another husband and wife contained an express direction for a transfer of the second half of the principal to the charitable institution upon the death of the survivor.

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BILL IN EQUITY by the executors of the will of George Phipps, to obtain the instructions of the court. Hearing before *Endicott*, J., who reserved the case for the determination of the full court, in whose opinion it is stated.

F. V. Balch, for the charitable institutions, cited, upon the first question presented, *White* v. *Winchester*, 6 Pick. 48; *Foote, appellant*, 22 Pick. 299; *Cuthbert* v. *Cuthbert*, 8 Yeates, 486; *Wallace* v. *Wallace*, 3 Foster, 149; *Cogswell* v. *Cogswell*, 2 Edw. Ch. 231; *Ashton* v. *Ashton*, Cas. temp. Talbot, 152; *Partridge* v. *Partridge*, Cas. temp. Talbot, 226; *Chester* v. *Urwick*, 23 Beav. 402; *Jacques* v. *Chambers*, 2 Collyer, 435; *Mullins* v. *Smith*, 1 Dr. & Sm. 204; *Miller* v. *Little*, 2 Beav. 259; *Bethune* v. *Kennedy*, 1 Myl. & Cr. 114; *Page* v. *Young*, L. R. 19 Eq. 501; *Kermode* v. *Macdonald*, L. R. 3 Ch. 584.

E. R. Hoar, for the residuary devisees, upon the same question, cited also *Stickney* v. *Davis*, 16 Pick. 19; *Robinson* v. *Addison*, 2 Beav. 515; *Tifft* v. *Porter*, 4 Selden, 516; *Hayes* v. *Hayes*, 1 Keen, 97; *Measure* v. *Carleton*, 30 Beav. 538; *Partridge* v. *Partridge*, 1 Atk. 417, note; *Sibley* v. *Perry*, 7 Ves. 522; *Webster* v. *Hale*, 8 Ves. 410; *Simmons* v. *Vallance*, 4 Bro. C. C. 345; *Bronsdon* v. *Winter*, Amb. 57; 2 White & Tudor's Lead. Cas. in Eq. (5th ed.) 243, notes to *Ashburner* v. *Macguire*; *Hinton* v. *Pinke*, 1 P. Wms. 540, note.

GRAY, C. J. The testator by the first article of his will bequeaths to the First Parish in Framingham "fifty shares of the stock of the Pittsburg, Fort Wayne and Chicago Railroad Company," and also "the further sum of five thousand dollars." By the second article he bequeaths to the town of Framingham the sum of five hundred dollars and fifty shares of the stock of the same corporation. By the third article he bequeaths fifty shares of the same stock to the Association for the Relief of Aged and Indigent Females, and by the fourth article a like number of such shares to the Home for Aged Men, each of which is a corporation established in Boston. Then follow other bequests, six

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of which are of various amounts of stock in the same corporation, and the rest are pecuniary legacies, as to one of which, to his brother Gardiner, the testator directs that it shall be paid to the legatee in Dayton and Michigan Railroad bonds at par, "provided I should be in possession of the same at the time of my decease." The will concludes with a residuary devise and bequest of "all the rest, residue and remainder of my property of every kind, real, personal and mixed," to and for the benefit of his nephews and nieces, with a like direction for the payment in railroad bonds of the portions of the children of his brother Gardiner; and a clause empowering his executors to sell and convey all real estate and personal property, "excepting what I have hereinbefore disposed of." The bequests of stock in the Pittsburg, Fort Wayne and Chicago Railroad Company collectively include six hundred and ten shares; and it is agreed that the testator at the date of his will, and also at the time of his death, owned one thousand and ninety shares thereof.

The first question presented by the bill is whether the bequests of shares in the stock of the Pittsburg, Fort Wayne and Chicago Railroad Company are specific or general. This depends on the apparent intent of the testator. We are unanimously of opinion that his intention that these bequests should be specific clearly appears upon a view of the whole will, and especially from the following considerations: 1st. He not only makes many bequests of stock in this corporation and many pecuniary legacies to different persons and institutions, but in the first and in the second items of the will he makes to the same legatees bequests both of stock and of money, a fact much relied on by Lord Chancellor Cairns in *Kermode* v. *Macdonald*, L. R. 3 Ch. 584, as showing that a legacy of a sum invested in stock was specific. 2d. He expressly makes the general legacies to Gardiner and his children payable in certain railroad bonds, if owned by the testator at the time of his death, and makes no such direction as to the legacies of the stock in question. 3d. In the clause empowering the executors to sell, the exception of "what I have hereinbefore disposed of" evidently refers to his numerous legacies of this stock, and not merely to the bonds mentioned only in the bequests to Gardiner and his children.

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The testator's intention to bequeath specifically shares which he owned appears to us to be much clearer than in *White* v. *Winchester*, 6 Pick. 48, in which the mere fact of the testator's owning stock exactly equal in amount to that bequeathed was held by this court, in a judgment delivered by Mr. Justice Wilde, after full consideration of the early English cases, to raise a strong presumption that the testator intended to give the stock of which he was the owner; and quite as plain as if the testator, in speaking of the shares bequeathed, had used the word "my," which is generally admitted to be sufficient to make a bequest specific. 2 Wms. Ex'ors. (6th Am. ed.) 1255. Upon a careful examination of the numerous and not always consistent cases cited at the bar, they do not appear to us to afford sufficient ground for a different conclusion.

The other question in the case arises under the tenth article of the will, which is as follows: "I give and bequeath unto George P. Metcalf, in trust and confidence however, one hundred shares of the stock of the Pittsburg, Fort Wayne and Chicago Railroad Company, for the benefit of Nancy Green, sister of my deceased wife, and William Green, husband of said Nancy, for and during their natural lives, as follows: First, during the life of said Nancy, the net income of the same shall be paid over semiannually to said Nancy. In case said Nancy should die before said William, then at the decease of said Nancy said trustee shall transfer one half of said stock in equal parts to said Association and said Home. The income of the remainder shall be paid to said William as aforesaid during his natural life. Second. In case the said William should die before said Nancy, then at the decease of said Nancy the whole of said stock shall be transferred in equal shares to said Association and said Home, and said trust estate shall cease."

The eleventh article contains another bequest in similar form in all respects, except in putting the testator's brother Charles Phipps in place of Nancy Green and his wife Sophronia Phipps in place of William Green; inserting after the words "her natural life" this clause: "and at her decease the remainder of said trust estate shall be transferred to said Association and said Home as aforesaid;" and adding at the end of the whole bequest the following: "By said Association and said Home, as

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mentioned in items 10 and 11, I mean and intend the Association for the Relief of Aged and Indigent Females named in item and the Home for Aged Men mentioned in items 3 and 4."

Nancy Green having died before her husband, and half the stock mentioned in the tenth article having been thereupon transferred to the two charitable institutions, the question is whether, upon the subsequent death of her husband, the remaining half of this stock is likewise to be transferred to the charities, or falls into the residue of the testator's estate.

The decision of this question doubtless depends upon the intention of the testator, as manifested by the words that he has used, and an omission to express his intention cannot be supplied by conjecture. But if a reading of the whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court must supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Ferson* v. *Dodge*, 23 Pick. 287. *Towns* v. *Wentworth*, 11 Moore P. C. 526. *Abbott* v. *Middleton*, 7 H. L. Cas. 68. *Greenwood* v. *Greenwood*, 5 Ch. D. 954.

In *Weston* v. *Weston*, 125 Mass. 268, for instance, the testator gave the residue of his estate to trustees, and directed them, out of the income, to support his wife during her life, and to pay annuities to his two children; and upon the death of the wife to transfer the principal to the children in equal shares, if they both survived her, and, if either of them died in her lifetime without issue, to transfer the principal to the survivor; and made no specific provision for the case of a child dying in the lifetime of the wife, leaving issue. But it was held that the title in half the principal vested in each child immediately, and upon its death leaving issue went to its representatives, and not to the testator's next of kin.

In a case decided by the House of Lords upon the advice of Lord Eldon and Lord Redesdale, which is not contained in the regular reports, but of which we have full statements by Lord St. Leonards, who was of counsel in the case, a devise, which mentioned estates in one county only, was held by implication from other provisions in the will to include distinct estates in

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another county. *Newburgh* v. *Newburgh*, Sugden's Law of Property, 367–369; *S. C.* cited 7 H. L. Cas. 108, 109.

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In *Sweeting* v. *Prideaux*, 2 Ch. D. 413, a testator devised £16,000 in trust to invest the same, and to pay the income of £8000, part thereof, to his daughter Ann for life on her separate receipt and not subject to the control or debts of her husband, and after her death to divide the £8000 among her children at twenty-one years of age; and directed his trustees to pay the income of the remaining £8000 to his daughter Sarah for life in the same manner in every respect and subject to the same control as he had directed as to his daughter Ann, it being his intention that his said daughters' fortunes should not be subject to the control or debts of their husbands; but made no further provision as to any division of capital among the children of Sarah. He then gave to the same trustees a sum of £6000 to invest and pay the income to his son for life, and to divide the principal among the son's children, and gave the trustees power to apply the income of both funds for the maintenance and education of the daughters' and son's children. Vice-Chancellor Hall held that upon the death of Sarah her children were entitled by implication to the sum of £8000, and no appeal appears to have been taken from his decision.

It is well settled in England that a devise or bequest to a widow for life, if she shall not marry, and, if she shall marry, then over to another person, gives the remainder to him if she dies unmarried. *Luxford* v. *Cheeke*, 3 Lev. 125. *Gordon* v. *Adolphus*, 3 Bro. P. C. (2d ed.) 306. *Eaton* v. *Hewitt*, 2 Dr. & Sm. 184. *Browne* v. *Hammond*, H. R. V. Johns. 210. *Underhill* v. *Roden*, 2 Ch. D. 494. In such cases, a general intent is implied to give the remainder over after the death of the tenant for life; and the event of her marrying again is treated as merely qualifying or cutting down her life estate, and not as prescribing the contingency upon which the remainder is to take effect.

The tenth article of the will before us begins by bequeathing the stock therein named in trust for the benefit of the testator's wife's sister, Nancy Green, and her husband, during their natural lives; and ends by providing that, if the husband shall die before the wife, then at her death the whole of the stock shall be transferred to the two charitable institutions in equal shares and

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the trust estate shall cease. The testator thus clearly manifests his intention to be twofold: to create a trust for the benefit of Nancy and her husband during their lives; and, subject to their equitable life estates, to give the legal title in remainder to the charities. The provision for Nancy is evidently more prominent in his mind than the provision for her husband; for he expressly directs that, so long as she lives, the whole income shall be paid to her, — so that her husband, during her life, will take nothing but what she may choose to give him. When the testator's primary object of providing for her has been accomplished, he directs, in the most explicit and formal terms, that, if the husband is no longer living, the whole principal shall go to the charities. The intermediate provision for the case of the wife dying before the husband, by which the testator directs that in that event half of the principal shall be at once transferred to the charities and the income of the other half paid to the husband during his life, does not appear to us to have been intended to impair in any degree either of the two chief purposes of the testator — the gift of the whole income to the wife during her life, and the ultimate gift of the whole principal to the charities; but only to make a provision for the husband during his life, if he happens to survive the wife, out of one half of the income, and thereby to postpone the enjoyment by the charities of the principal of that half.

This may perhaps be made more clear by transposing the provisions of this article of the will. If the testator, immediately after providing that, during the life of Nancy, the net income should be paid to her, had inserted the clause which provides that, if her husband shall die before her, then at her death the whole of the stock shall be transferred to the charities and the trust estate shall cease, and had followed this by the provision that, if she shall die before her husband, then at her death one half of the principal shall be transferred to the charities and the income of the other half be paid to the husband during his life, it could hardly have been doubted that the whole effect of this provision was merely to postpone the transfer of the principal and the termination of the trust, so far as regarded one half of the fund, until the death of the husband. And it is familiar law that the grammatical construction, or the order of particular sentences, is never allowed to defeat the general intention of

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the testator, as clearly manifested by all the provisions of the will taken as a whole.

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The insertion, in the corresponding bequest in the eleventh article of the will, of an express direction for a transfer of the second half of the principal to the charities upon the death of the person entitled to the income of that half, tends rather to prove an accidental than an intentional omission of such a direc tion in the tenth article.

The result is, that the legal effect of the tenth article is to create, first, an equitable estate for life in the wife in the whole fund; second, an equitable estate for life in the husband in one half of the fund; and, third, subject to these equitable life estates, a vested remainder in the whole fund in the charities. This conclusion does not rest upon extrinsic evidence, nor upon conjecture; but upon a conviction produced by reading the will as a whole, a conviction which, as it seems to us, can only be avoided by confining one's self to a dissection of the several clauses, and to a separate scrutiny of each in an aspect in which they cannot have been presented to the mind of the testator.

Decree accordingly.

JOHN DAVIS, administrator, *vs.* LUTHER W. COBURN.

Middlesex. Jan. 10. — July 24, 1879. COLT & ENDICOTT, JJ., absent January 15. — February 26, 1880.

An express trust in personal property may be created and proved by parol.

The statute of limitations does not begin to run in favor of a trustee against his *cestui que trust* until the trustee has repudiated the trust, and knowledge of the repudiation has come home to the *cestui que trust*.

An express trust to keep and invest the money of another involves the duty, on the part of the trustee, to pay over all income received, less a reasonable compensation for services; and, if a trustee mingles trust money with his own, he is liable for at least simple interest.

If the plaintiff, in an action to recover money alleged to have been received by the defendant in trust, puts in no direct evidence of any contract or conditions under which the money was received, but relies upon circumstances, the defendant may testify to the purpose for which he supposed the money was given him, and the understanding with which he received it.

A *cestui que trust* cannot maintain an action at law against a trustee while the trust is still open.

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CONTRACT by the administrator of the estate of Frederick A. Coburn. Writ dated February 26, 1877. The declaration contained three counts. The first count was for money had and received to the use of the plaintiff's intestate. The second count alleged that the intestate in 1851 sent from California to the defendant the sum of $2000; that the defendant received the same, and agreed to invest it for the use of the intestate, and afterwards did invest it for the use of the intestate and received interest thereon; that the plaintiff was duly appointed administrator of his intestate's estate and demanded payment of the defendant, who refused to pay the same. The third count was for money lent. The answer, among other defences, set up the statute of limitations. Trial in the Superior Court, without a jury, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff's intestate, who was the brother of the defendant, went from this Commonwealth to California in 1849, and resided there until his death in 1859. The defendant has always resided in this Commonwealth. The plaintiff was duly appointed administrator, and gave the usual bond and notice in September 1874, and in the spring of 1876 made a demand upon the defendant. The plaintiff relied upon evidence tending to prove that the defendant received from the intestate, in 1852, $1000 in gold, which the defendant retained and invested; and introduced no direct evidence of any contract or conditions under which the money was received, but relied upon circumstances to show the character in which the defendant held the money.

The defendant testified that he let the intestate have $100 to pay his passage to California; that the intestate then said to him, that, if he had good luck, he would send him as much more, and that he might send enough more to make the defendant rich; that, in 1852, the intestate sent from California about $1000 by a messenger, who delivered it to the defendant, saying, "Your brother Frederick sent this to you," and, at the same time, handed the defendant a letter from the intestate, saying, "This letter will tell you what to do with it;" that the letter had been in the defendant's possession within about a year; that it was now lost and could not be found, though diligent search

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had been made for it; and that the defendant knew and could prove its contents, and had a copy of the letter. But the defendant did not offer to prove the contents of the letter.

The defendant's counsel put to him the following questions: "Did you suppose and believe, when you received the gold, that it was intended to be given to you by your brother in payment of the $100, which he borrowed of you, and in fulfilment of his promise which he made when he borrowed the money?" "And did you so accept it?" "And have you ever since used it in that belief?"

The plaintiff objected to these questions, but not on account of their form, and the judge excluded them.

The judge found that the intestate sent to the defendant $900, to keep and invest for him; that the defendant received the money and invested it in his own name, keeping it separate from other moneys for two or three years, and after that mingling it with his own moneys, in various investments, keeping no separate account of the principal and income, and treating it as his own.

The defendant asked the judge to rule, that the action was barred by the statute of limitations; and that, if the action could be maintained, the defendant could not be charged with interest before the time of the plaintiff's demand. But the judge ruled, that the action was not so barred; that the defendant received the $900 in trust to invest and keep for the intestate; that the cause of action did not accrue against the defendant until the plaintiff's demand upon him; and that the defendant was liable for the $900, and the income received thereon by him to the time of the demand, after deducting proper allowance for his services; and found for the plaintiff in the sum of $2362. The defendant alleged exceptions.

J. N. Marshall & M. L. Hamblet, for the defendant.

G. F. Richardson, for the plaintiff.

SOULE, J. This case comes to us on exceptions to rulings of the judge before whom it was tried in the Superior Court, on certain matters of law. His findings of fact are not open to revision, but are conclusive; and we cannot consider the question whether they are warranted by the evidence before him and not reported to us.

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It was found in the Superior Court that the money, for which with its accumulations, the plaintiff sues, was sent to the defendant to keep and invest for the plaintiff's intestate. It was found, therefore, that it came to the defendant's hands, under an express trust. It remained in his hands without notice from him to the intestate of any repudiation of the trust during the life of the intestate, and no notice of such repudiation was given to the plaintiff till he demanded the money and the defendant refused to pay it. Under these circumstances and findings, it was correctly ruled at the trial that the action, though begun nearly twenty-five years after the money was received by the defendant, and about eighteen years after the death of the intestate, was not barred by the statute of limitations, it having been begun about two and a half years after the plaintiff was appointed administrator, and within two years after he demanded the money of the defendant. Express trusts in personal property may be created and proved by parol; and the statute of limitations does not begin to run, in favor of a trustee against his *cestui que trust*, till the trustee has repudiated the trust, and knowledge of the repudiation has come home to the *cestui que trust*. *Childs* v. *Jordan*, 106 Mass. 321. Perry on Trusts, §§ 86, 863, and cases cited. Ordinarily, no action at law to recover a trust fund lies against a trustee till the accounts have been settled, and it remains only to pay over an ascertained balance, and when, on a demand for the fund, the trustee denies that he is trustee, and asserts that the fund is held in his own right, the right of action accrues, and the statute of limitations begins to run. The trust to keep and invest for the intestate involved the duty to pay over all income received, less a reasonable compensation for services; so that the ruling asked for by the defendant, that he could not be charged with interest before the time of the plaintiff's demand, was properly refused. The only question which ordinarily arises as to the proper charge in this particular, in cases where a trustee has mingled trust funds with his own and has repudiated the trust, is whether he shall be charged simple interest or compound. The ruling made was sufficiently favorable to the defendant.

The defendant should have been permitted to answer the question put to him and excluded by the presiding judge, as to

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his supposition and belief, when he received the money, concerning the intention of the intestate in giving it to him. The whole case turned on the question whether the money was given to the defendant to his own use or in trust. There was no direct evidence of any contract or condition under which it was received. The plaintiff relied on circumstances to show the character in which the money was held by the defendant. It was pertinent, therefore, for the defendant to testify that he supposed the money came to him in payment of the sum which he advanced to the intestate, and in fulfilment of the promise made when he advanced it, and that he accepted it and used it in that belief. The fact that he received a letter with the money, which the messenger said would tell him what to do with it, is not evidence that the letter contained the terms of any trust; and, the contents of the letter not being in evidence from either party, the case stood as if no letter had been written. The defendant was entitled to show, by his own testimony, the purpose for which he supposed the money was sent to him, and the understanding with which he took it, in order to rebut the inference which the plaintiff sought to have the judge draw from the circumstances which he put in evidence. The weight and credibility of the evidence, when in, were for the tribunal which tried the facts. *Perry* v. *Porter*, 121 Mass. 522. On this point, therefore, the presiding judge erred, and the exceptions are *Sustained.*

The case was then tried before *Gardner*, J., without a jury. The plaintiff relied on the second count only; and, in addition to the facts which before appeared, there was evidence that the money was received in the form of gold dust; that the defendant paid $5.00 to the messenger who brought it, and $5.00 for having it coined, and that the intestate, when he went away, was indebted to the defendant in the sum of $100.

The defendant asked the judge to rule as follows: "If the defendant holds the gold dust and its avails in trust, and the plaintiff, as administrator, is entitled to the same, no account having been settled, and the amount due not having been established and made certain, the plaintiff cannot maintain this action at law against the defendant."

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The judge declined so to rule; and found for the plaintiff. The defendant alleged exceptions.

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Marshall & Hamblet, for the defendant.

Richardson, for the plaintiff.

SOULE, J. The plaintiff seeks to recover of the defendant as trustee under an express trust to invest and account for the proceeds of certain gold dust sent to him by the plaintiff's intestate. This trust was found by the judge, who presided at the trial in the Superior Court, to have been created and accepted. But it appeared in evidence that, when the gold dust was received by the defendant, the plaintiff's intestate was indebted to the defendant, and that no account has been rendered of the trust, and no settlement of the amount due under it has been made, either by computation or by adjustment. Under these circumstances, the only remedy for the *cestui que trust* is by a bill in equity. An action at law does not lie in his favor against the trustee while the trust is open. *Johnson* v. *Johnson*, 120 Mass. 465.

When this case was before us on the defendant's former exceptions, this point was made at the argument, but was not considered in the opinion of the court, because it was not properly before us, it not having been made in the Superior Court. A report, appeal or bill of exceptions does not transfer to this court from the Superior Court the case in which the report, appeal or bill of exceptions is made or allowed, but only the questions raised by such report, appeal or bill. Gen. Sts. *c.* 115, § 12. St. 1864, *c.* 111.

The objection to the maintenance of the action was seasonably taken at the last trial in the Superior Court, and was overruled. As the objection was well taken, the refusal to rule in substance as requested by the defendant was erroneous, and the entry must be

Exceptions sustained.

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RICHARD PAYNE & others *vs.* JAMES C. DAVIS.

Middlesex. Jan. 13. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A., the owner of a parcel of land, leased it to a religious corporation, which, pursuant to the terms of the lease, erected a wooden building on the land, the sills of which were fastened to posts driven in the ground, and used it as a church. Afterwards some of the members of the corporation withdrew therefrom, and formed an unincorporated religious society, two of whom and A., without authority of the corporation, signed a cancellation on the back of the lease. After this, the unincorporated society made a verbal agreement with A., by which, on payment of a sum of money and delivery of certain notes, he agreed to sell them the church building. They then paid him the money and delivered the notes, and he went with a committee of the society to the building, and, putting his hand upon it, said it was theirs. Subsequently certain members of the corporation to which the land was leased broke the lock upon the building and entered the same, A. being present at the time, but not entering the building. *Held*, in an action by the members of the unincorporated society against A., containing a count in trespass and a count for the conversion of the building, that the plaintiffs had no such title in the building as to give them a right of action; that there was no evidence that A. took any part in the alleged trespass; and that there was no evidence of a conversion of the building by him.

TORT for forcibly breaking and entering a building, ejecting the plaintiffs therefrom, and depriving them of the use and occupation of the building, and for breaking the lock on the door thereof; with a count for the conversion of the building. Answer, a general denial.

Trial in the Superior Court, without a jury, before *Pitman*, J., who reported the case for the determination of this court in substance as follows:

On July 1, 1875, the defendant, being then the owner of the land on which the building in question has since been erected, executed a lease of the land to a religious corporation in Cambridge, called "The Bethel African Methodist Episcopal Church," for the term of ten years, at a rent of $200 a year and taxes, with the privilege of purchasing the land at any time during the term for a certain sum, the lessee agreeing to erect upon the premises, within six months from the date of the lease, a building of the value of not less than $500. Pursuant to the terms of the lease, the lessee erected a wooden building, and used the same as a church. There was no cellar under the building, and it stood upon posts driven into the ground, to which the

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sills were spiked. In January 1878, some of the members of the corporation, being dissatisfied, withdrew therefrom, and formed an unincorporated religious society, of which the plaintiffs were members. On January 31, 1878, Isaac Brown, the former treasurer of the lessee, and Richard Payne, its then treasurer, both seceders from the lessee and members of the new society, and the defendant, signed the following, on the back of the lease: "This lease is hereby cancelled and the premises are hereby surrendered to the lessor." This act was done by Brown and Payne without any vote of the corporation, and it did not appear that any authority was given to them to sign the alleged cancellation. On February 21, 1878, the defendant sent to the agents of the plaintiffs the following letter: "I hereby state that I am the owner of the church property at the corner of Portland and Hastings Street, heretofore occupied by the African Methodist Episcopal Church, and that I have given permission to the First Union Methodist Church of Cambridgeport to occupy said church, and no other parties have any right there."

The plaintiffs introduced evidence tending to show that, after receiving the letter, they made a verbal agreement with the defendant, by which, on payment of $100 and delivery of certain notes by the plaintiffs to the defendant, he agreed to sell them the building; that, after this agreement, they paid him the money and delivered the notes, and the defendant went with the committee of the plaintiffs to the building, and, putting his hand upon the same, said it was theirs; and that, at the same interview, the defendant verbally agreed to let the land upon which the building stood for $10 a month. The plaintiffs never held any services in the building, but they cleaned the same and put a sign upon it.

In March 1878, the defendant was present when certain members of the African Methodist Episcopal Society broke the lock upon the church and entered the same; but there was no evidence that the defendant entered the church, or had ever been in it. One witness testified that the defendant stood on the step which projected into the sidewalk; that subsequently, on the same day, the defendant told the plaintiffs that he had made a mistake, that he was sorry for what he had done, but that the

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law compelled him to do it, and asked them for the key of the building, but they refused to give it to him; that, after this, the defendant offered to return to the plaintiffs the money and notes they had paid and delivered to him, but they refused to take them; and that the plaintiffs tendered the rent of the land to the defendant when due.

The judge, at the request of the defendant, ruled that, as matter of law, the plaintiffs, on this evidence, could not maintain their action on either count of the declaration; and found for the defendant. If the ruling was right, judgment was to be entered for the defendant; otherwise, a new trial was to be granted.

F. W. Griffin, for the plaintiffs.

J. W. Hammond, for the defendant.

AMES, J. We find no evidence in any of the facts reported in this bill of exceptions that the plaintiffs had any such title in the building as would enable them to maintain this action. The unauthorized attempt of certain seceders from the religious corporation to cancel the lease could have no effect to impair the rights of the lessee in the land or in the building. Until the lease had expired, or had become forfeited or duly cancelled, the defendant had no right to interfere with the lessee's use and enjoyment of the building, and of course could convey no such right to anybody else.

But, even upon the assumption that the defendant, by undertaking to sell the building and receiving the price, is estopped to deny that his sale gave a valid title to the purchaser, it does not appear, upon the facts reported, that he took any part in the trespass alleged to have been committed by members of the religious corporation to which the land had been leased, and which had erected the building. His presence at the time was not conclusive proof that he was a trespasser, and we must infer that the court found that he was not. As to the count in trover, it is enough to say that there is no evidence that he converted the building to his own use. *Judgment for the defendant.*

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LAWRENCE B. NORRIS *vs.* JOHN I. MUNROE.

Middlesex. Jan. 13. — Feb. 27, 1880. COLT & LORD, JJ., absent.

If the defendant files a declaration in set-off, appeals from a judgment against him, and enters into a recognizance to prosecute his appeal, the filing, by the plaintiff, after the entry of the appeal, of an answer to the declaration in set-off, is a waiver of any defect in the form of the recognizance.

CONTRACT for $24.60, goods sold and delivered. The defendant filed a declaration in set-off for $27.20. The trial justice before whom the action was commenced gave judgment for the plaintiff for $22.57 on September 21, 1878, and the defendant on September 23 appealed, and entered into a recognizance, with sureties, reciting his appeal from that judgment "to the next Superior Court to be holden at Lowell within and for the county of Middlesex on the first Monday of September, 1878," and conditioned that the defendant should "prosecute his appeal at said Superior Court with effect, and pay all intervening damages and costs."

In the Superior Court, the action was entered at September term 1878. At December term 1878, the plaintiff filed an answer to the defendant's declaration in set-off. At March term 1879, the attorneys for both parties signed an agreement to put the action on the trial list for that term; and, at the trial, the plaintiff moved to dismiss the appeal, because the appellant had not recognized to the plaintiff with sufficient surety or sureties, in accordance with the provisions of the St. of 1877, *c.* 236. *Putnam*, J., overruled the motion; and the plaintiff alleged exceptions, which, after judgment for the defendant in the sum of $2.80, were entered in this court.

G. W. Norris, for the plaintiff.

C. D. Adams, for the defendant.

GRAY, C. J. The only question of law which appears by the bill of exceptions to have been presented to the Superior Court is that arising upon the motion to dismiss the appeal for defects in the form of the recognizance. But at December term 1878 of the Superior Court, being the term at which the appeal should by law have been entered, and the appeal having been theretofore entered and being actually before that court, the plaintiff

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filed an answer to the defendant's declaration in set-off, and thereby waived any right to move to dismiss the appeal for such defects. Whether any action could be maintained on the recognizance, or whether the appeal was duly taken, is not before us.

Exceptions overruled

HARRIET A. GAY *vs.* CITY OF CAMBRIDGE.

Middlesex. Jan. 13. — Feb. 27, 1880. COLT & LORD, JJ., absent.

The notice required by the St. of 1877, c. 234, to be given to a city or town by a person injured by a defect in a highway, is a condition precedent to the plaintiff's right to maintain an action therefor, and cannot be waived by the city or town.

TORT for personal injuries occasioned to the plaintiff, on December 28, 1877, by a defect in a highway in the defendant city. Answer, a general denial. At the trial in the Superior Court, before *Colburn*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which are stated in the opinion.

S. J. Thomas, for the plaintiff.

J. W. Hammond, for the defendant.

MORTON, J. The statute in force at the time the plaintiff's alleged cause of action accrued requires that any person injured by a defect in a highway shall within thirty days thereafter give notice, to the city or town by law obliged to keep said highway in repair, of the time, place and cause of the injury, unless from physical or mental incapacity it is impossible for the person injured to give such notice, in which case he may give notice within ten days after such incapacity is removed. St. 1877, c. 234. This notice is a condition precedent to the right to maintain an action against the city or town.

It appeared at the trial of this case that the plaintiff gave no notice to the city of her injury until more than thirty days had elapsed; and the jury have found, under instructions not excepted to, that there was no physical or mental incapacity which excused her from giving such notice. It follows that she cannot

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maintain her action. *Kenady* v. *Lawrence*, *ante*, 318. *Harris* v. *Newbury*, *ante*, 321.

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It appeared in evidence that, about sixty days after the injury, the plaintiff gave notice thereof to the city, which notice was by the city council referred to a committee, who, as she contended, had full powers to settle with her, and the committee had negotiations with her as to a settlement, and made no objections as to the time when the notice was given. She contended, and asked the court to rule, that it was competent for the city to waive the statute notice in respect of time, and that such waiver might be inferred from the facts and circumstances in the case. The court rightly refused this ruling. The liability of cities and towns for defects in highways is created entirely by statute, and it cannot be extended by agreement of the city or town or its officers beyond the limits of the statute.

In this case, the plaintiff failed to give the notice which was a condition precedent to her right to maintain an action against the city. No liability ever attached against the city, and it was not within the power of the city council, or of its committee, to create a liability by any agreement or waiver. It is not necessary to consider whether, if there had been such power, the evidence would warrant the jury in finding a waiver.

Exceptions overruled.

SAMUEL M. BOARDMAN *vs.* STEPHEN CUTTER.

Middlesex. Jan. 13. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A contract for the sale of shares of stock in a corporation is a contract for the sale of "goods, wares, or merchandise," within the statute of frauds, Gen. Sts. c. 105, § 5; and the fact that the plaintiff, in an action for the refusal to take the shares in pursuance of an oral agreement to that effect, has been induced to become a stockholder by the defendant's promise that he would buy the stock of the plaintiff when he wished to sell, is immaterial.

CONTRACT for breach of an agreement to purchase shares of stock in a corporation. Answer: 1. A general denial. 2. The statute of frauds. Trial in the Superior Court, without a jury, before *Putnam*, J., who found the following facts:

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The plaintiff was in the employ of a firm in Lowell, consisting of the defendant and one Walker, who, in 1875, being desirous of forming a corporation, applied to the plaintiff to take ten shares of the stock of said corporation. The plaintiff at first declined to take any stock, whereupon the defendant said to him, "You run no risk in taking it; you take the stock, and any time you want your money, I will take your stock, and pay you par for it, barring interest." The plaintiff replied, "That is all right. I will take the stock on that understanding." This conversation was in February 1875, and was not reduced to writing. Two or three weeks afterwards, the plaintiff, the defendant, Walker and one Greenleaf signed the agreement necessary to form the corporation, and proper steps were taken thereon, and the corporation was duly organized on May 5, 1875.

Shares of the capital stock to the extent of 400, of the par value of $100 each, were issued as follows: 201 shares to the defendant, 179 shares to Walker, 10 shares to Greenleaf, and 10 shares to the plaintiff, the certificates being dated on May 5. The whole capital of the corporation consisted of the machinery, stock in trade, real estate and accounts, which had been the property of the firm, who conveyed the same to the corporation, and which were valued at $40,000. At the time the agreement declared on was made, the firm owed the plaintiff for services the sum of $1000, which debt, by the understanding of all parties, was turned in in payment for his ten shares at the time when he received his certificate for the same, the debt being thereby extinguished. In September 1878, the plaintiff, having kept his stock until that time, told the defendant that he wanted him to take the stock and pay therefor according to his agreement, and offered him the stock, but the defendant declined to take it.

The defendant contended, and asked the judge to rule, that the agreement declared on and proved was without consideration, and was contrary to and in violation of the Gen. Sts. c. 105, §§ 5, 6, and illegal and void, because the agreement was not in writing, and there was no other compliance with the provisions of the statute, and because the stock was not in existence at the time of the agreement. But the judge declined so to rule; ruled that the agreement was valid in law; and found as a fact, that the signing of the agreement to form the corporation, and the

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taking the ten shares of stock by the plaintiff, was by reason of the agreement made between the plaintiff and the defendant in the above conversation; that the agreement had not been complied with by the defendant, and that the plaintiff was entitled to recover the par value of the ten shares, whatever was the market value thereof, with interest from the time of the demand. The defendant alleged exceptions.

D. S. Richardson & G. F. Richardson, (*J. C. Abbott* with them,) for the defendant.

F. T. Benner, for the plaintiff.

AMES, J. The defendant's promise was in substance a contract, in a certain contingency, to purchase the stock of the plaintiff. The company was about to be formed and organized as a corporation, and the defendant was desirous, in order to complete the organization, to prevail upon the plaintiff to be one of the stockholders, to the extent of one thousand dollars. Among the inducements to the plaintiff to subscribe to that extent was the assurance of the defendant that he would purchase the shares at cost, less the interest, at any time that the plaintiff should be desirous to sell them. The plaintiff accordingly subscribed and paid for the shares, and they stood in his name as one of the stockholders for somewhat more than three years. At the end of that time, the plaintiff offered to transfer the stock to the defendant, and demanded of him the fulfilment of his promise.

It has been decided by this court that shares in a corporation are "goods, wares, or merchandise," within the statute of frauds. *Tisdale* v. *Harris*, 20 Pick. 9. *Baldwin* v. *Williams*, 3 Met. 365. There is some conflict in the decisions of other courts upon this point, (see *Somerby* v. *Buntin*, 118 Mass. 279,) but we do not feel called upon to overrule the two decisions above cited. As the defendant's contract in this case was not in writing, we see no ground upon which any action can be maintained upon it, without violating the statute of frauds. Gen. Sts. *c.* 105, § 5. The fact that the plaintiff was induced to become one of the stockholders by the defendant's promise that he would at some future time buy the stock of the plaintiff at a specific price, does not change the essential character of the transaction.

Exceptions sustained.

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JOHN A. MERIAM *vs.* A. L. BROWN & others.

Middlesex. Jan. 14. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A railroad corporation, which has constructed its track upon a person's land, without filing a written location or presenting a plan thereof, or paying or tendering to the landowner any damages for the land so taken, cannot enter upon the land for the purpose of removing the rails laid upon the road-bed and structures placed upon the land; such property becomes a part of the realty; and the fact that the original entry and construction were made without objection by a mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of his mortgage.

BILL IN EQUITY, filed July 25, 1879, against A. L. Brown, John C. Moulton, Adams Ayer and Frederick P. Moseley, for an injunction to restrain the defendants from removing from the land of the plaintiff in Billerica certain buildings, sleepers and iron rails, placed thereon by the Billerica and Bedford Railroad Company. The case was heard by *Colt*, J., upon the following agreed facts:

The plaintiff is the owner in fee and is in possession of the land under the following title: On December 5, 1866, Maria P. Grey, then owner in fee, mortgaged the premises to the plaintiff, but remained in possession. On April 11, 1879, the plaintiff foreclosed the mortgage and sold the land, under a power of sale contained in the mortgage, to William A. Meriam, and he, on the same day, conveyed the land to the plaintiff.

On July 1, 1877, the Billerica and Bedford Railroad Company, a corporation duly organized, under the general laws of this Commonwealth, to build and operate a narrow-gauge railroad, entered upon said land, erected a car-house and certain fences thereon, dug up the land and carried gravel thereon, and laid a road-bed and certain wooden sleepers imbedded therein and iron rails attached to the sleepers, for the purpose of permanently operating and running a railroad over and across said land, which car-house, fences, gravel, and most of said rails and sleepers, now remain on the land and attached thereto. The corporation never filed any location of the railroad across, over or through said land, and never furnished the plaintiff any plan thereof, nor paid or offered to pay any land damages, nor gave any security therefor. A plan was made of a considerable tract of land

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larger than and including the land occupied by the railroad, and was used in negotiating for its purchase. The corporation operated its railroad from November 28, 1877, until January 12, 1878.

On January 25, 1878, the corporation was duly adjudged a bankrupt, and the defendants Moulton, Ayer and Moseley were duly appointed its assignees in bankruptcy. On June 6, 1878, after notice given by advertisement, the assignees sold by public auction all the rolling stock of the corporation, and all the rails, sleepers, fences, buildings and other structures on said land, to the defendant Brown, with the agreement that none of the property should be paid for by Brown until delivered. Brown paid at the sale $500 on account of the purchase; and, on July 23, 1879, at the request and by the direction of the assignees, proceeded to take up a portion of the rails, and proposed to take up and remove all the fences, buildings, rails and sleepers, claiming the right thereto.

During all the time that the corporation was entering upon and using the land, the plaintiff was living within a few miles of the premises, in a town through which the railroad ran, and the course and construction of the railroad was matter of common knowledge. Negotiations for the purchase of a tract of land, larger than and including the land occupied by the railroad, were pending between the corporation and the owner of the equity of redemption in possession; and the negotiations were entered into with a view of the corporation to purchase and the owner to sell; and the owner made no objection to the entry of the corporation, and was personally cognizant of the fact that it had entered and had constructed the railroad on the premises.

A decree was entered for the plaintiff; and the defendants appealed to the full court.

S. Hoar, for the plaintiff.

C. Brigham, for Brown.

E. B. Callender, for the assignees, cited *Northern Central Railway* v. *Canton Co.* 30 Md. 347; *Troy & Boston Railroad* v. *Potter*, 42 Vt. 265; *Dietrich* v. *Murdock*, 42 Misso. 279; *Thatcher* v. *Harlan*, 2 Houst. 178; *Hanna* v. *Phelps*, 7 Ind. 21.

AMES, J. "The general rule is, that the owner of property, whether the property be movable or immovable, has the right to

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that which is united to it by accession or adjunction." *Wilde*, J., in *Pierce* v. *Goddard*, 22 Pick. 559. It has been held also that rails laid upon the road-bed, and fastened there, so that engines and cars can pass over them, become annexed to the realty and cease to be personal property, in the absence of any agreement changing the ordinary rule of law. *Hunt* v. *Bay State Iron Co.* 97 Mass. 279. It appears that the railroad company, although it has constructed the track upon the plaintiff's land, has never filed any written location, has presented no plan, and has neither paid nor tendered to the plaintiff any damages for land taken. St. 1874, *c.* 372, §§ 58 *& seq.* It has also ceased to do business, has become bankrupt, and its assignees have undertaken to dispose of all its property, and substantially to abandon the use of its tracks. Not having filed any written location, the corporation has not taken or appropriated the plaintiff's land for its own use in such a sense as to justify its entry upon it, or to give it any legal title or right to use or occupy it. *Hazen* v. *Boston & Maine Railroad*, 2 Gray, 574. It cannot enter upon it, except as a trespasser, even for the purpose of removing the rails which it has placed there, and which, by their annexation to the soil, it has lost the right to remove. The cases cited by the defendants are cases of roads regularly located, or in which the rails were laid with the consent of the owner of the soil, or in which the attempt to remove them was made after an acquiescence on the part of such owner for seven or eight years. In the case at bar, we find no evidence of any such consent; and even if there had been such consent by the owner of the equity, it could not avail against a title derived from the foreclosure of the mortgage. *Perkins* v. *Pitts*, 11 Mass. 125.

Decree affirmed

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WARREN WASS *vs.* HARRIET A. MUGRIDGE.

Middlesex. Jan. 14. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A. conveyed to B. a parcel of land, an undivided half of which was then owned by C., to whom it had been conveyed in trust for D. during his life. The consideration of this deed was paid by D., the purchase was made for his benefit, and he had the control of the premises. Before the conveyance to B., D. agreed to sell this half to A., and a deed of it was drawn, signed and acknowledged by C., but it was not signed by D., and remained in his possession. D., about the same time, accepted the note of A. for the amount of the consideration named in the deed, but this note has never been paid; and D. refused to deliver the deed. *Held*, that a bill in equity would not lie by B. against D. to compel him to deliver this deed to B., to assign and convey to him all D.'s interest in the estate, and secure to him a perfect title, or, if it was not in D.'s power to do so, to make compensation in damages.

BILL IN EQUITY, filed May 14, 1877, to compel the defendant to deliver to the plaintiff a deed of certain real estate in Stoneham, to assign and release to him all her interest in the estate, and secure to him a perfect title therein, or, if it was not in her power to do so, to make compensation in damages. At the hearing, *Gray*, C. J., dismissed the bill, with costs; and the plaintiff appealed to the full court. The facts appear in the opinion.

W. B. Stevens, for the plaintiff.

B. E. Perry & S. W. Creech, Jr., for the defendant.

ENDICOTT, J. The plaintiff took a deed of the land from Andrew J. Leighton and George F. Leighton in 1873. At this time one undivided half thereof was owned by Elizabeth H. Soule, to whom it had been conveyed in 1871, in trust for the defendant during her life, and at her decease to other persons in fee. The consideration of this deed was paid by the defendant, the purchase was made for her benefit, and it is conceded that she had practically the control of the premises thus conveyed. Before the conveyance was made to the plaintiff, the defendant agreed to sell this undivided half for $350 in cash to George F. Leighton; and about the time of the conveyance to the plaintiff, in July 1873, a deed of the undivided half was drawn up, the consideration named therein being $350. It was signed and acknowledged by Elizabeth H. Soule, and was also signed by Sarah W. Soule, who was entitled to a share in the reversion on the

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death of the defendant; but it was never signed by the defendant, and has since remained in her possession. The master has found that the defendant, about the same time, accepted the note of George F. Leighton for $350, as the consideration for the conveyance, which note was afterwards signed by Andrew J. Leighton. This note has never been paid by the Leightons, and the defendant in her answer avers her willingness, upon payment or proper security being given therefor, to execute and deliver the deed.

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It is evident, upon this state of facts, that, whatever might be the rights of the Leightons at law, they would not be entitled in equity to specific performance of their contract with the defendant, except upon payment of the money due upon the note. The plaintiff by his bill seeks to compel the defendant to deliver this deed to him, and to assign and convey to him all her interest in the estate, and to secure to him a perfect title, so far as it is in her power to do so; and failing so to secure him to make compensation in damages. But he has not paid and does not tender payment of the note; and contends that he is entitled to the deed without payment.

The defendant has made no contract with the plaintiff; and assuming that the plaintiff, as grantee of the Leightons, could maintain a bill to enforce such rights as they had under their contract with the defendant for a conveyance, yet it is plain he can have no greater rights than they had, and that he is bound to do all which they would be required in equity and good conscience to perform before obtaining a conveyance. *Love* v. *Sortwell*, 124 Mass. 446. As he does not offer to do this, the decree from which he appeals must stand. *Decree affirmed.*

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MARGARET MURPHY *vs.* CITY OF LOWELL.
PATRICK MURPHY *vs.* SAME.

Middlesex. Jan. 15. — Feb. 27, 1880. COLT & LORD, JJ., absent.

A city, having the legal right to construct sewers in its streets, is not liable in tort for all damages that may be caused by the blasting of rocks, necessary in such construction, but only for such damages as are occasioned by the carelessness or unskilfulness of its agents in doing the work.

TWO ACTIONS OF TORT. The first was for personal injuries occasioned to the plaintiff by a stone thrown against her from a blast exploded in making excavations in the construction of a sewer in Suffolk Street in Lowell. The second was brought by the husband of the plaintiff in the first case, for loss of services of his wife on account of the same injury, and also for injuries to his dwelling-house from similar blasts.

After the former decision, reported 124 Mass. 564, the cases were tried together in the Superior Court, before *Colburn*, J.; the jury returned a verdict for the defendant in each case; and the plaintiffs alleged exceptions, the material parts of which appear in the opinion.

F. T. Greenhalge & W. H. Bent, for the plaintiffs, cited *May* v. *Burdett*, 9 Q. B. 101; *Rylands* v. *Fletcher*, L. R. 3 H. L. 330; *Shipley* v. *Fifty Associates*, 106 Mass. 194; *Jager* v. *Adams*, 123 Mass. 26; *Hay* v. *Cohoes Co.* 2 Comst. 159; *Tremain* v. *Cohoes Co.* 2 Comst. 163.

G. F. Richardson, for the defendant.

AMES, J. Under the law of this State, the mayor and aldermen of the defendant city had authority to lay, make and maintain all such main drains and common sewers as they should adjudge to be necessary for the public convenience or the public health. St. 1869, *c.* 111, § 1. Gen. Sts. *c.* 48. As there is no suggestion of any irregularity in the formal preliminary proceedings of the board of aldermen, it must be inferred that, in the construction of the sewer in question, the defendant was acting under this general authority and responsibility. An authority conferred upon municipal corporations or officers to determine where drains shall be built is in the nature of a judicial power, involving the exercise of a large discretion, and depending upon

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considerations affecting the public health and general convenience. *Emery* v. *Lowell*, 104 Mass. 13, and cases cited. The fact that the course or route selected will require the blasting of rocks, thereby subjecting the owners and occupants of adjoining houses to risk and inconvenience, though proper to be taken into consideration by the board of aldermen, is not sufficient to invalidate their decision. The balance of public convenience may still be in favor of the proposed course; and, at any rate, the decision of the question is within their authority.

It was ruled at the trial, not merely that the actual construction of the drain must be performed with reasonable care and skill, but that the amount of care must be commensurate with the dangerous nature of the work, that great care must be taken, and that no precaution must be omitted which careful men acquainted with the business ought to exercise in relation to the same. We do not understand that the plaintiffs object to these instructions, so far as they relate to the manner in which the work was to be done. Their complaint is that the court refused to instruct the jury, that, "if the defendant or its agents knew that these blasting operations would be dangerous and likely to cause injury to persons or property, notwithstanding all the precautions that could be taken, and injury did result from such blasting operations, then the defendant is liable for all damages resulting from accidents incidental to such operations, provided the parties injured were exercising due care." In other words, as it was pressed upon us in the argument, it was a want of due care at the outset to undertake and enter on such a dangerous work at all, and the defendant became responsible, in this action, for all accidents. This instruction could not properly have been given. If the board of aldermen had a right to say where the sewer should be laid, (as we cannot doubt they had,) and if the city, in its construction, furnished the degree of diligence, care and skill described in the ruling of the presiding judge, no private action of tort can be maintained against it. The cases cited by the plaintiffs are for the keeping of dangerous animals, or for wrongs done by one landholder in improving his own property in such a manner as to injure or destroy that of his neighbor. They furnish no analogy to the cases at bar

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The rulings of the court as to notice of the blasts, and as to the burden of proof, were such as the plaintiffs requested, and were sufficiently favorable to them. The evidence as to the cause of the injury to the dwelling-house, and as to the exercise of due care by the female plaintiff, was conflicting. The verdict of the jury was given upon proper instructions, and has settled both these points in favor of the defendant.

Exceptions overruled.

JOHN DAGGETT *vs.* ELISHA WHITE, trustee.

Norfolk. Jan. 30. — Feb. 9, 1880. MORTON & SOULE, JJ., absent.

If a testator devises property to A. in trust, and also appoints A. his executor, the two offices are distinct; and if A. refuses or neglects to qualify as trustee and give bond, another person may be appointed trustee.

APPEAL from a decree of the Probate Court, appointing Elisha White trustee under the will of Kinsley Wilmarth. The record showed the following facts:

The testator, by his will which was duly proved and allowed on July 7, 1869, contained the following provisions: "After the payment of my just debts and expenses of the settlement of my estate, I dispose of the same as follows: 1. I give, bequeath, and devise to John Daggett of Attleboro', Esquire, all my estate of whatever name or nature, in trust for the sole use and benefit of Elizabeth N. Brayton, daughter of John W. Brayton, and who now resides with me, and to her heirs and assigns forever; provided that, if she should not leave issue by marriage to inherit her estate, I give and devise the residue after her decease to Willard G. Brayton, (son of John W. Brayton,) his heirs and assigns forever. 2. I appoint John Daggett, aforesaid, executor of this will."

In December, 1878, on petition of Elizabeth N. Brayton and Elisha White, praying that White be appointed trustee under the will, the Probate Court passed the following decree: "It appearing by said will that said testator gave certain estate therein

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described in trust for the use and benefit of Elizabeth N. Brayton, and that John Daggett of Attleboro' was named therein as trustee; and it now appearing that said John Daggett has failed to take upon himself said trust and give the bond by law required, and that said petitioners desire that said Elisha White of Attleboro' may be appointed in his place; and notice having been given to all parties interested therein, and no party appearing to object thereto; it is decreed that said Elisha White be appointed trustee, as aforesaid, he first giving bond with sufficient sureties for the due performance of said trust."

The appellant filed in the Probate Court the following reasons of appeal: "1. Because, through some misapprehension, the appellant was prevented from having a hearing on his part at the time of passing said decree. 2. Because due notice was not given to all the parties interested in said decree and in the provisions of said will. 3. Because the Probate Court was not authorized to pass said decree at the time it was made. 4. Because the estate mentioned in said will, and assumed to be given in trust, is properly and legally in the hands and possession of said executor, in accordance with the provisions of the will, and by force and virtue of his appointment as such executor. 5. Because the appointment so made as above named would defeat the objects, provisos and intents of the testator, as contained in his will. 6. Because said appointment under said decree is not in accordance with the true construction of said will."

Morton, J., affirmed the decree of the Probate Court; and the appellant appealed to the full court.

J. Daggett, pro se.

C. A. Mackintosh, for the appellee, was not called upon.

ENDICOTT, J. By the terms of this will, the appellant is appointed executor, and no duties are imposed upon him as executor beyond the duty of paying debts and settling the estate. He is not appointed executor and as such executor required to act as trustee for any person; but, after his duties as executor are performed, the remainder of the estate is bequeathed and devised to him in trust for the use and benefit of certain parties named in the will. It therefore appears from the will that the testator intended to give a distinct and independent character to the trustee thus named, and to impose upon him duties and

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powers in no manner connected with his duties as executor. *Attorney General* v. *Barbour*, 121 Mass. 568, 574, and cases cited. In *Prior* v. *Talbot*, 10 Cush. 1, the same person was appointed executor and trustee, but gave bond only as executor; and it was said that, if he wished to close his account as executor and open a new account as trustee, he must give bond in the capacity of trustee. See also *Dorr* v. *Wainwright*, 13 Pick. 328.

In the case at bar, it is to be presumed that the appellant had given bond as executor; but he has given no bond as trustee, and now contends that he is not required to give such a bond, that the two offices are merged in him, that there was no vacancy, and that the appointment of White as trustee was irregular and void.

We can have no doubt that the judge of probate had the power, and, on a proper and seasonable application, that it was his duty, to appoint a trustee under this will; and this is the only question before us. There is no report of the facts upon which we can determine that the power was not properly exercised in this case; but it sufficiently appears from the record that the will was admitted to probate in 1869, and that in 1878 the appellant had not taken upon himself the trust, or given bond as trustee, according to the provisions of law. Gen. Sts. *c.* 100, §§ 1–4. It is therefore to be assumed that the judge of probate found that the time had arrived for the appointment of a trustee; and that there was a necessity for the appointment of a person other than the appellant, either on the ground that the appellant refused to give bond as trustee, or, by reason of his neglect to give bond, could properly be considered to have declined the trust. § 4. *Decree affirmed.*

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BERNARD FITZSIMMONS *vs.* JOHN CARROLL.

Norfolk. Jan. 23, 1879. — Feb. 25, 1880. AMES & SOULE, JJ., absent.

A manufacturer employed workmen by the piece, and a tag was used to show the kind and value of the work done. From these tags each workman, on completing a piece of work, cut off a slip representing his work and the value thereof, and such slips were sometimes transferred by delivery by the workmen, and were paid on a certain day in each month by the manufacturer to any person presenting them. At the time of the service of a writ upon the manufacturer as trustee of a workman, the workman had in his possession a number of these slips representing the labor performed by him, and worth a certain sum. The Superior Court on these facts charged the trustee. *Held*, on appeal to this court, that no error appeared.

A point which does not appear to have been intended to be raised, on an agreed statement of facts submitted to the Superior Court, will not be considered by this court on appeal.

SCIRE FACIAS upon a judgment recovered by the plaintiff in a trustee process, in which the defendant was summoned as trustee of Martin Flynn. The case was submitted to the Superior Court, and, after judgment for the plaintiff for $56, to this court on appeal, on the following agreed facts:

"The defendant is a manufacturer of boots and shoes, employing a number of persons, among whom was Flynn. No account was kept with the employees, but all work was done by the piece, and tags were used to show the kind and value of the work done. From these tags each employee, at the time he completed each piece of work, cut off that slip which represented his particular work, and the amounts called for by these slips were paid upon their presentment on a certain day of every month, and no payments were made otherwise than upon such slips. There was nothing upon these slips to indicate who had performed the labor, though each slip bore a number corresponding to that upon the tag from which it was clipped, upon which tag was also written the name of the workman. Payment was made to any person who presented these slips; and they were frequently taken at the stores in the town in payment for goods, or otherwise transferred by the employees to other persons, who presented them for payment, and received the money due upon them. At the time of the service of the plaintiff's writ in the original action upon this defendant, Flynn had in his possession

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fifty-five of these slips, though this was not known to this defendant, representing the labor performed by him, and worth in the aggregate fifty-five dollars.

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"Upon the foregoing facts such judgment is to be rendered as law and justice may require."

W. W. Burke, for the plaintiff.

S. H. Tyng, for the defendant, contended that it did not appear that, at the time of the service of the writ in the original action upon the trustee, there was any debt absolutely due Flynn; that the slips were negotiable securities, payable to the bearer at a fixed time, and were not shown to be overdue; that the judgment was excessive, being rendered for a greater sum than was due from the defendant to Flynn; and that, under the Gen. Sts. *c.* 142, § 29, a sum not exceeding twenty dollars was exempt from attachment.

LORD, J. The agreed facts in this case are very loosely and imperfectly drawn.

We suppose it was the intention of the parties to raise the question whether it was competent for the Superior Court, upon the facts stated and the reasonable and proper inferences to be drawn therefrom, to charge the trustee. Whether the facts agreed disclose a possibility that the trustee might not be indebted to the principal defendant in the original suit, it is immaterial to inquire, because the presiding judge would naturally and reasonably, if not necessarily, come to the conclusion that, at the time of the service of the original writ, the defendant in that suit had a legal and valid demand against the trustee for the payment of money which could be immediately enforced by suit. This of itself required the court to charge the trustee. The other questions discussed do not seem to have been raised before, or passed upon by, the court below.

It is quite possible that judgment was entered inadvertently for fifty-six dollars instead of fifty-five, or that the interest upon the amount for which the trustee was properly chargeable from the time when he was charged in the original suit to the time when he was charged upon the *scire facias* will account for the additional dollar which is objected to as erroneous.

As to the other question raised by the defendant, that under the Gen. Sts. *c.* 142, § 29, the sum of twenty dollars should be

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exempt from attachment by trustee process, because the demand was not alleged to be for necessaries, it does not seem to have been raised or intended to be raised in the court below. No facts are agreed in the statement of facts which indicate that this question was in any manner in the minds of the parties.

The section of the statute referred to is in these words: "When the wages for the personal labor and services of a defendant are attached for a debt or demand other than for necessaries furnished him or his family, and when a debt due for the services of the wife or minor children of the defendant is attached, there shall be reserved in the hands of the trustee a sum not exceeding twenty dollars, which shall be exempt from such attachment."

Whether the phrase in the section, "for a debt or demand other than for necessaries," &c., requires that it shall appear affirmatively to be for other than necessaries, we need not inquire, for it is clearly manifest that this agreed statement was prepared without any reference to this section of the statute; that it was not designed to raise, and does not in fact raise, any question either of "wages for personal labor," or whether "for necessaries," or "for the services of the wife or minor children."

If, therefore, it were in the power of this court to revise the inferences of fact drawn by the court below from the facts stated, we should have no occasion to do so, for, as before stated, they are the natural and reasonable, if not the absolutely necessary inferences. *Judgment affirmed.*

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SOLOMON BUBT & another *vs.* OWEN GEARY & another.

Norfolk. Jan. 30. — Feb. 26, 1880. MORTON & SOULE, JJ., absent.

If a poor debtor directs an officer to obtain from a magistrate a notice to the creditor of the desire of the debtor to take the oath for the relief of poor debtors, and to have a time appointed for the hearing not later than a certain day, and the magistrate issues a notice in due form, appointing a later day, which notice is duly served upon the creditor, the debtor may repudiate the notice, and give a new notice immediately, notwithstanding the Gen. Sts. c. 124, § 14.

CONTRACT on a recognizance entered into, under the Gen. Sts. *c.* 124, § 10, by the defendant Geary as principal, and the other as surety, and conditioned that Geary, who had been arrested on July 19, 1878, on an execution in favor of the plaintiffs, should within thirty days from the time of his arrest deliver himself up for examination, before some magistrate authorized to act, giving notice of the time and place thereof in the manner provided by law, and appear at the time fixed for his examination, and from time to time until the same was concluded, and not depart without leave of the magistrate, making no default at any time fixed for his examination, and abide the final order of the magistrate thereon.

The case was submitted to the Superior Court, and, after judgment for the plaintiffs, to this court on appeal, on an agreed statement of facts in substance as follows:

In the evening of August 15, 1878, Geary's attorney at law gave to an officer a notice to the plaintiffs, in the usual form, of Geary's desire to take the oath for the relief of poor debtors, with blank spaces left for the time and place of the examination, and directed him to take it to a master in chancery in Hyde Park, and have him fill in the blanks, and appoint the time for the hearing as early as possible, and not later than August 17, 1878, and then serve it upon the plaintiffs. The master in chancery thereupon issued the notice, appointing August 19, 1878, at three o'clock in the afternoon, as the time for the examination, and the notice was duly served upon the plaintiffs. On August 17, Geary's attorney was informed of the time appointed, and he immediately went before a trial justice

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in Brookline, and had a new notice issued, appointing that day at six o'clock in the afternoon, and the court-room of the police station in Brookline, as the time and place of the examination. This notice was served by an officer upon the plaintiffs, who lived in Brookline, at half-past three o'clock on that day, and the officer a few minutes afterwards read to the plaintiffs the following notice, dated August 17, 1878: "You are hereby notified that the notice of Owen Geary, arrested on execution in your favor, of his desire to take the poor debtor's oath, in which notice the office of H. B. Terry, Esq., at Hyde Park, in said county, is named as the place, and 3 o'clock P. M., on August 19th, 1878, is named as the time, was issued without my authority, and you are hereby requested to disregard the same. Owen Geary, by his attorney, James P. Farley."

At the time and place named in the notice issued by the trial justice, the plaintiffs did not appear; Geary appeared and was discharged. No appearance was made or further action taken on the notice issued by the master in chancery.

If upon these facts there was a breach of the recognizance, judgment was to be entered for the plaintiffs in the sum of $200; otherwise, for the defendants.

J. B. Braman, for the plaintiffs.

J. P. Farley, Jr., for the defendants.

LORD, J. The only question argued or raised is whether the discharge of the poor debtor by the trial justice was authorized by law, or whether the proceedings before him were *coram non judice*, and therefore void.

The policy of the legislation of this Commonwealth has been to relieve a poor debtor from arrest and imprisonment for debt, upon its being made to appear, before a competent tribunal, that he has no property, and that he has committed no fraudulent act which should prevent his discharge. The tendency of the legislation has been to simplify proceedings, so that they shall be as little onerous to the debtor as possible, consistently with the rights of the creditor; and, while the debtor is to be allowed every reasonable facility for procuring his discharge, he is not to be permitted to make use of those facilities to the annoyance of the creditor. The debtor is permitted to give short notices, and to repeat them as often as is necessary to secure a speedy

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discharge. He is not, however, allowed to do this wantonly, nor to the annoyance of his creditor, and therefore it is provided, as a general rule, that notices shall not be issued more frequently than once in seven days. Gen. Sts. *c.* 124, § 14. If this rule were absolute and inexorable, it might operate with great hardship to the debtor. The law has therefore provided that the rule shall have no application to a notice insufficient either in form or service. Such a notice imposes no obligation upon the creditor, and it is therefore no hardship to him that it may be treated as a nullity. Upon these general propositions there is no difference of opinion between the parties in this case.

The difference between them, and the question which we are to decide, underlies all these. It is this: Was a notice in behalf of the debtor issued by the master in chancery returnable on Monday, August 19, 1878, at three o'clock in the afternoon? If so, the trial justice who discharged the debtor had no jurisdiction of the case, and consequently had no authority to discharge him. No question is made of the sufficiency of the notice issued by the master in chancery, either in form or service. The only and exact question is, Was it a notice issued at the request or by the authority of the debtor, or under circumstances which bind him? We think it was not. If the master in chancery, of his own motion, without any communication with the debtor or his attorney, had issued this notice, whatever of irregularity, or even of misconduct, such act might imply on the part of the magistrate, it clearly could not affect the rights of this party. If, instead of acting upon his own motion, the magistrate had acted upon the request of a stranger, whose act was neither previously authorized nor subsequently ratified by the debtor, it is equally clear that the rights of the debtor could not be affected by it. If, in the latter case, the debtor should happen to become possessed of knowledge that such notice had been given in his behalf, and should immediately notify the parties that the proceeding was wholly unauthorized by him, the inequitableness of holding him responsible for the notice would only be more apparent, but not more real.

In this case, the debtor, by his attorney, authorized and requested a third party to do for him a particular act in a particular mode. He was not a general agent, and no discretion was

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left to him to do any act except in the mode prescribed. It is true that the person sent was authorized to give the magistrate a certain discretion, but that discretion was to be exercised within certain prescribed limits, and not otherwise, and the messenger had no authority from the debtor to procure the notice which he did procure. If, after the notice had been issued, and the debtor had knowledge of it, he had simply repudiated it as an act not authorized by him, the question presented would be a different one. Instead of that, as the agreed facts find, he notified the creditor immediately upon the service that the notice which had been served was wholly unauthorized by him, and was to be so treated by the creditor. The fact that, by the terms of his recognizance, he must surrender himself to close confinement before the time when the notice was returnable, is not at all important in this case, because, by the agreed facts, it appears that the messenger appointed to procure the notice had special directions to procure it to be made on an earlier day. If it were a question of fact to be decided by a jury, the circumstance would be of some importance.

The policy of the law is to relieve a poor and honest debtor; the machinery by which this is accomplished is not intended as a snare to entrap one who in good faith, and with no want of proper diligence and care upon his part, is seeking to avail himself of its benefit. We think that this defendant did his whole duty in repudiating, as soon as he knew its existence, the notice by the master in chancery, and in notifying the creditor that the act was unauthorized. *Judgment for the defendants.*

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COMMONWEALTH *vs.* GEORGE F. EGGLESTON.

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Bristol. October 28, 1879; January 28. — February 24, 1880.

An employee of a seller of intoxicating liquors in another state, who there receives an order for such liquors, and, under authority from his employer to receive or reject orders, accepts the order, may be indicted for an unlawful sale in this Commonwealth, if the liquors are, in pursuance of his direction, delivered to the buyer in this Commonwealth.

INDICTMENT for an unlawful sale of intoxicating liquor to Benjamin Stanley at Attleborough.

At the trial in the Superior Court, before *Allen*, J., the government put in evidence tending to show that F. S. Eggleston was engaged in the business of bottling and selling lager beer in Pawtucket, Rhode Island; that he had in his employ, among others, the defendant and one Huntley; that Huntley in the course of his employment went to Attleborough on May 22, 1879, soliciting orders for lager beer, and received there an order from Benjamin Stanley for one dozen bottles of lager beer; that this order, with the money for it, Huntley carried, on the same day, with many similar orders, to the establishment of F. S. Eggleston in Pawtucket; and handed them to the defendant there, who, as clerk or superintendent for the proprietor, figured up the orders, decided which should be accepted, and directed the persons employed there to load the wagon; that the next day Huntley carried the dozen bottles of lager beer ordered by Stanley and delivered them to him in Attleborough, also making similar deliveries to others who had given him orders; and that the defendant paid over the money he received to the proprietor, and had no interest in the sales except as an employee on a salary, and everything he did was done in Rhode Island.

This was all the material evidence in the case; and the defendant asked the judge to rule that it did not show a sale by the defendant in this state, and that he was entitled to an acquittal. The judge declined so to rule; and instructed the jury in sub stance as follows: "The question of where the sale was made depends upon where the beer was delivered. If it was delivered in Attleborough to Stanley by Huntley acting as agent of the owner, it was a sale in Attleborough; but if Huntley received it in Pawtucket as the agent of Stanley, it was a sale in Rhode

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Island. If Huntley delivered it to Stanley in Attleborough as agent of the owner, and the defendant remaining in Rhode Island had authority from the owner as his agent to receive or reject orders, and the power as such to pass upon them, and did so pass upon this order, and direct it to be filled, and the beer to be loaded and carried to Attleborough, it would be evidence of an unlawful sale by him, as charged in the indictment, even though he had no other interest in the transaction than as a paid employee of the owner."

The jury returned a verdict of guilty; and the defendant alleged exceptions.

The case was argued in October 1879, and reargued in January 1880, by *J. Brown*, for the defendant, and *G. Marston*, Attorney General, for the Commonwealth.

LORD, J. There was no error in the instructions of the court. The fact that the sale was made in Massachusetts is established by the verdict of the jury, under proper instructions, and on sufficient evidence. A distinction, however, is attempted to be made between a civil and a criminal act of sale. It is difficult to understand upon what basis; for it is the otherwise innocent and lawful act of sale which the statute makes criminal. It is the transaction itself which is criminal. But being made criminal simply because it is *malum prohibitum*, it can be but a misdemeanor; and every one who participates in the sale is a principal offender. Such participation must be in the sale itself. If a person is merely a messenger, by whom the article is transmitted from seller to buyer, and has no part in the act of sale, he is not responsible. In this case, the defendant was the person who actually received the order for the article sold, received payment for it, determined to make the sale, and gave the orders for the delivery, and so directly participated in the illegal act. Whether he was the owner of the property, or whether he was an agent, or salesman, or clerk of the owner, is wholly immaterial, as has been many times decided in this Commonwealth. *Commonwealth* v. *Hadley*, 11 Met. 66. *Commonwealth* v. *Drew*, 3 Cush. 279. Nor is this principle confined to misdemeanors committed within this state by a person without it, through an innocent agency. *Adams* v. *People*, 1 Comst. 173. 1 Whart. Crim. Law (7th ed.) §§ 278, 604. *Exceptions overruled.*

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COMMONWEALTH *vs.* GEORGE G. HALL & another.

Suffolk. Jan. 28. — Feb. 25, 1880. MORTON & SOULE, JJ., absent.

Under the St. of 1879, *c.* 209, § 1, providing that "whoever in this Commonwealth takes or kills any woodcock," or other specified birds, between certain days of the year, "or within the respective times aforesaid sells, buys, has in possession, or offers for sale, any of said birds, shall upon conviction be punished," a person is not punishable for having in his possession, offering for sale and selling a woodcock lawfully taken or killed in another state.

COMPLAINT on the St. of 1879, *c.* 209, § 1, charging the defendants, on July 15, 1879, at Boston, with having in their possession, offering for sale and selling one dead woodcock.

At the trial in the Superior Court, before *Pitman*, J., it appeared that the defendants had, and at their dining-room served to a guest, a woodcock, for which they received payment; and that the woodcock was not killed, taken or caught in this Commonwealth, but was taken, caught or killed in Pennsylvania, at a season and time when it was lawful, by the laws of that state, to take, catch or kill woodcock, and was dead when brought into this Commonwealth.

Upon these facts, the defendants asked the judge to rule that they had not committed any offence under the laws of this Commonwealth, and to direct a verdict of not guilty. But the judge declined so to rule; ruled that the defendants were liable under the statute; and directed a verdict of guilty. The defendants alleged exceptions.

E. Avery, for the defendants.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the Commonwealth.

GRAY, C. J. This complaint is founded on the St. of 1879, *c.* 209, § 1, by which it is enacted that "whoever in this Commonwealth takes or kills any woodcock, or any ruffed grouse, commonly called partridge, between the first day of January and the first day of September in any year, or any quail between the first day of January and the fifteenth day of October in any year, or within the respective times aforesaid sells, buys, has in possession, or offers for sale, any of said birds, shall upon conviction be punished by a fine of twenty dollars for each and every such bird."

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The clause of this statute, as to having in one's possession within the times mentioned "any of said birds," neither, on the one hand, expressly includes, like the St. of 1855, c. 197, § 1, and the Gen. Sts. c. 82, § 1, "birds taken or killed in this Commonwealth or elsewhere;" nor, on the other hand, is it in terms limited, like the Rev. Sts. c. 53, § 1, and the Sts. of 1870, c. 304, § 1, and 1877, c. 95, § 1, to birds taken or killed within the Commonwealth.

The question presented by the case at bar is whether, in the absence of any such explicit manifestation of the intent of the Legislature, the words "any of said birds" are to be construed in the larger sense, as meaning any woodcock, partridge or quail whatever; or in the more restricted sense, as meaning any woodcock, partridge or quail taken or killed in this Commonwealth within the times before mentioned. By the first alternative, the mere possession, in the first part of every year, of birds which had been lawfully taken or killed in another state, or even in this Commonwealth and at a time when it was lawful to kill them here, would be made a punishable offence; as if, for instance, woodcock killed in the autumn should be preserved in ice after the first of January for subsequent consumption. To adopt such a conclusion, when not imperatively required by the language of the act, would be inconsistent with the ordinary rules of construction of penal statutes.

Some stress was laid by the attorney general on the proviso inserted at the end of § 1 of the St. of 1879, in these words: "Provided, that any person may buy, sell, or have in possession, quail and pinnated grouse, commonly called prairie chicken, during the months of January, February, March and April, provided the same are not taken or killed contrary to the provisions of this act." This proviso, with no other change except in being limited to four months instead of extending throughout the year, is taken from the St. of 1877, c. 95, in which it appears at the end of § 7, corresponding to § 9 of the St. of 1879, and imposing a penalty on "whoever in this Commonwealth at any season of the year takes or kills any pinnated grouse, commonly called prairie chicken, unless upon ground owned by him and grouse placed thereon by the owner." This proviso, relating both to quail and to pinnated grouse, has thus been transferred, from a

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section relating to pinnated grouse and not to quail, to a section relating to quail and not to pinnated grouse. That it is not necessarily inconsistent with a strict construction of the enacting clauses of the statute is shown by the very fact of its having been first introduced in the St. of 1877, which expressly limited the prohibition of having in possession woodcock, partridge or quail to those "taken or killed within this Commonwealth." St. 1877, *c.* 95, § 1.

The true construction of the clause in question is put beyond doubt by § 10, which enacts that "in all prosecutions under the provisions of this act, the possession, except as provided in section one, by any person or corporation, of birds mentioned as protected by this act, during the time within which the taking or the killing of the same is prohibited, shall be *prima facie* evidence to convict under this act." That the words "except as provided in section one" refer to the proviso only, and not to the enacting clauses of that section, may be inferred from the exception's not mentioning the second, third and fourth sections, relating to ducks and teal, plover and sandpiper, doves and terns, which contain no such proviso, but are in all other respects like the first section. And saying that possession shall be *prima facie* evidence necessarily implies that it shall not be conclusive; if the mere possession of birds, during the time within which the taking or killing of them is prohibited, of itself constituted an offence under the previous sections of the statute, to say that such possession should be *prima facie* evidence would be superfluous, if not absurd.

The object of the statute is to protect these birds during the breeding season, and for such a reasonable portion of the year as may prevent them from being exterminated or their numbers diminished in this Commonwealth. The mode in which the statute seeks to attain this object is by punishing the taking or killing of such birds in this Commonwealth during the times specified, or the buying, selling, offering for sale or having in possession in this Commonwealth, during those times, of birds so taken or killed; and by enacting that the possession in this Commonwealth at such times of any birds of the kinds specified shall be *prima facie* evidence to convict; leaving it for the defendant to prove, if he can, that the birds found in his possession

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were not taken or killed in this Commonwealth at a prohibited time. So construed, the statute is reasonably adapted to carry out its object, and is free from all constitutional difficulty. *Commonwealth* v. *Williams*, 6 Gray, 1, 6. *Phelps* v. *Racey*, 60 N. Y. 10. *Railroad Co.* v. *Husen*, 95 U. S. 465.

In the case at bar, it being agreed that the woodcock, which the defendants had in their possession, offered for sale and sold, had been lawfully taken or killed in another state, the defendants were wrongly convicted.

The cases mentioned at the argument are distinguishable from the present case. The St. of 39 & 40 Vict. *c.* 29, § 2, under which it was held in *Whitehead* v. *Smithers*, 2 C. P. D. 553, that a person having in his possession a plover killed abroad might be convicted, differed from the statute before us in explicitly enacting that any one who should at certain seasons "kill, wound or take any wild fowl, or have in his control or possession any wild fowl recently killed, wounded or taken," should be subject to a penalty; and in omitting to reënact the clause of a previous statute, which allowed a defendant to show that the bird had been bought or received before the prohibited time, or from some person residing out of the realm. And the St. of N. Y. of 1871, *c.* 721, under which the defendant was convicted in *Phelps* v. *Racey*, above cited, for having in his possession quail killed in another state, enacted that no person should kill or expose for sale, or have in his possession "after the same has been killed," any quail between the times mentioned; and defined the cases (of which that before the court was not one) in which the defendant might protect himself by proving that the bird had been killed before the prohibited time, or in a state in which the killing was not prohibited.

Exceptions sustained.

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COMMONWEALTH *vs.* ANN MCKIERNAN.

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Middlesex. Jan. 27. — Feb. 7, 1880. MORTON & SOULE, JJ., absent.

A complaint, under the St. of 1875, *c.* 99, averred that the defendant, at a place and on a day named, "that day being the Lord's day, unlawfully did sell intoxicating liquors to a person, whose name is to the complainant unknown, the said defendant not having then and there any license, appointment or authority according to law, to make such sale of intoxicating liquors on the said Lord's day." *Held*, that the complaint was in due form, and was supported by proof of any sale that was unlawful under the statute.

COMPLAINT, under the St. of 1875, *c.* 99, averring that the defendant, at Lowell, on August 31, 1879, "that day being the Lord's day, unlawfully did sell intoxicating liquors to a person, whose name is to your complainant unknown, the said McKiernan not having then and there any license, appointment or authority according to law, to make such sale of intoxicating liquors on the said Lord's day."

At the trial in the Superior Court, before *Gardner*, J., the government introduced evidence tending to show a sale of ale by the defendant to a person unknown, on the day alleged in the complaint; but did not put in evidence to show that the defendant had, at the date of the offence, any license under the above statute.

The defendant asked the judge to rule that the complaint was not sufficient to authorize a conviction without proof that the defendant, at the time of the alleged offence, had some one of the licenses mentioned in said statute. But the judge refused so to rule; and ruled that no proof of any license was necessary to sustain a conviction under the complaint.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

A. G. Lamson, for the defendant.

G. Marston, Attorney General, for the Commonwealth.

BY THE COURT. The complaint was in due form, and was supported by proof of any sale that was unlawful under the statute. St. 1875, *c.* 99, § 1. *Commonwealth* v. *Davis*, 121 Mass. 352. *Commonwealth* v. *Hoyer*, 125 Mass. 209.

Exceptions overruled.

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COMMONWEALTH *vs.* CHARLES H. HARTWELL.

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Norfolk. Jan. 27, 28. — Feb. 27, 1880. MORTON & SOULE, JJ., absent.

An indictment for manslaughter alleged that the defendant was a conductor, in the employ of a certain railroad corporation, in charge of a freight train, which had been run over the outward track of the corporation to a certain place, under his direction; that the corporation had established certain rules in regard to the crossing of the inward track by trains on the outward track, which rules were then in force and known to the defendant; that it was the defendant's duty not to conduct his train from the outward track across the inward track, without first sending forward the proper signal to warn the driver of any approaching train on the inward track that he could not safely pass without stopping; that the defendant, knowing that a train on the inward track was then due and approaching, wilfully, and in a wanton, negligent and improper manner, and while the train on the inward track was then approaching and due, drove his own engine across the inward track to a side track, and attached to it certain cars, and again crossed the inward track to the outward track, leaving the switch out of line so as to disconnect the rails upon the inward track, without first sending forward any signal to warn the driver of the approaching train, in accordance with the rules of the corporation; that, by means of the premises and the felonious neglect and omission of the defendant, the driver of the approaching train did not stop, but continued on his course, and by reason of the misplacement of the switch the train was thrown from the track and a passenger killed. *Held*, that the allegation of the defendant's knowledge of the approach of the train on the inward track was a material allegation, and must be proved as laid.

ENDICOTT, J. This is an indictment for manslaughter, in which the defendant is charged with negligence and omission of duty, as conductor of a freight train, whereby another train was thrown from the track, and a passenger thereon was killed.

The indictment recites that the defendant was a conductor in the employment of the Old Colony Railroad Company, and was, on October 8, 1878, in charge of a freight train, on the road of the company, which had been run over the outward track from Boston to the Wollaston station in Quincy under his direction; that the company had established for the guidance of its servants proper and sufficient rules and regulations, having relation to the crossing of the inward track, over which trains passed on their way to Boston, by locomotive engines and trains using or running upon the outward track, which rules and regulations were in force at the time and well known to the defendant; and that it became and was his duty not to conduct his locomotive engine from the outward track across the inward track, without

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first sending forward the proper signal to warn the driver of any train approaching on the inward track that he could not safely pass without stopping.

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The indictment then charges as follows: "Yet the said Hartwell, well knowing the premises, and well knowing that a certain train, to wit, a train consisting of a certain other locomotive steam-engine, and divers, to wit, twenty cars attached thereto and drawn thereby, was then and there lawfully travelling and being propelled on and along the said inward track of said railroad, and was then due and about to arrive at that part of said railroad in Quincy aforesaid, near the Wollaston station aforesaid, but disregarding his duty in that behalf did" at the same time and place "wilfully and feloniously, and in a wanton, negligent and improper manner, and contrary to his duty in that behalf, and while the last-mentioned train was then and there due and about to arrive as aforesaid, conduct and drive, and suffer, permit and direct to be conducted and driven," his own locomotive engine across the inward track to a side track, and attached to it certain freight cars, and again crossed the inward track to the outward track, "thereby leaving the switch thrown out of line, so as to disconnect the rails upon the inward track, without first sending forward any signal whatever to warn the driver of said approaching train so due as aforesaid," in accordance with the rules and regulations of the company.

The indictment, after again stating that this train of twenty cars was then due, and that the defendant neglected to send forward the required signal, proceeds to charge, in substance, that, by means of the premises and the felonious neglect and omission of the defendant, the driver of the approaching train, then due at the Wollaston station, was induced to believe that the inward track was unbroken and unobstructed, and that he might safely pass; that he did not stop, but continued on his course, and, by reason of the misplacement of the switch, the train was thrown from the track, and a passenger therein named Patrick Reagan was killed.

It appeared in evidence that the train thus thrown from the track was an extra train, and that the defendant had a written notice from the superintendent of the company that it would run on that day. The notice contained the time-table of the

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train, and it was due in Boston soon after five o'clock in the afternoon. The defendant's train left Boston on its regular time, at half-past six, more than an hour after the extra train was due in Boston, and reached the Wollaston station soon after seven. The extra train was then, according to the time-table contained in the notice received by the defendant, more than two hours behind time. The defendant, while at the Wollaston station, in obedience to directions from the freight agent, took the freight cars from the side track, crossing the inward track, as set forth in the indictment, without sending forward the required signal to warn any train approaching on that track. No evidence was introduced by the government that the defendant knew that the extra train was then due and about to arrive at the Wollaston station. On the contrary, it appeared by the evidence that he then understood it was in Boston, and stated to his engineer before he left Boston that it had arrived.

Among other instructions requested, the defendant asked the court to rule, that the averment that Hartwell well knew that a certain train "was then and there lawfully travelling and being propelled on and along the said inward track of said railroad, and was then due and about to arrive at that part of said railroad in Quincy aforesaid near the Wollaston station aforesaid," was a material averment, which must be proved by the Commonwealth, and there was no evidence in the case to support that averment.

The court declined to give this ruling; and it is contended by the government that this averment need not be proved as laid, but can be rejected as surplusage. But we are of opinion that the ruling should have been given, and that the defendant's exceptions on this point must be sustained.

The precise question is whether this averment can be rejected as mere surplusage, or whether it is of such a character as not only to be descriptive of the negligence charged, but, in its connection with the other parts of the indictment, is notice to the defendant of the exact charge which he has to meet.

The defendant is charged with the crime of manslaughter; and the specific nature of the charge is that, by reason of his culpable negligence and omission to perform his duty, Patrick Reagan was killed. His guilt therefore depends solely upon the

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question whether he was negligent, and failed to perform his duty upon a given occasion, and under such circumstances that he may be held criminally responsible for the death. He is entitled, therefore, to have the nature, character and extent of the negligence, which connects him with the death of Reagan, fully and plainly, substantially and formally described to him in the indictment.

This the indictment does or attempts to do, and charges in substance that, well knowing the rules of the road, and his duty in that regard, and what signals should be given when an engine or train from the outward track crosses the inward track, and also well knowing that this particular train was then due and about to arrive upon that track, he neglected to give the required signal, and the death of Reagan was the result. The pleader has made the knowledge of the defendant that the express train was due, as well as his knowledge of the rules and his duty in regard to them, an essential and material portion of the description of the acts and conduct of the defendant which go to constitute the negligence charged; and the negligence charged is not merely that he failed to give the signal required to notify any approaching train, but that he failed to give it when he knew there was an instant and pressing necessity for so doing, because this particular train was then due at that point.

This was not an impertinent averment, or foreign or inapplicable to the charge, because proof of such knowledge would establish the most culpable negligence. The gist of the indictment is the defendant's negligence; and in alleging it this specific act of negligence, to wit, a disregard of his duty to warn this train, which he knew then to be imminent, is made a part of the description of that which is essential to the charge. The general neglect of duty is resolved into this particular manner of neglecting it; and, having charged a general neglect, the indictment notifies the defendant that the neglect of his general duty was in this specific mode. While it is unnecessary to decide whether or not it would be sufficient in this case to allege in general terms a neglect of duty, in not sending out a signal to warn any approaching train, without alleging that the defendant knew that the inward track was liable at any time to be used by an approaching train; it is clear that, when not merely

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general neglect of duty is alleged, but the particular in which it was violated is carefully and with precision set out, the defendant has the right to assume that the specific negligence thus alleged is the mode in which the general duty has been violated.

The government having selected the precise ground upon which to stand, in describing and expressing the nature and extent of the defendant's negligence, it must be confined to the limits which it has prescribed for itself. For it is well settled that an allegation must be proved, which is descriptive of the identity of the charge, or of that which is legally essential to the charge; and when any allegation narrows and limits that which is essential, it is necessarily descriptive. *Commonwealth* v. *Wellington*, 7 Allen, 299, and cases cited. *Commonwealth* v. *Jeffries*, 7 Allen, 548. *Commonwealth* v. *Hughes*, 5 Allen, 499. *Commonwealth* v. *Gavin*, 121 Mass. 54, and cases cited. *United States* v. *Howard*, 3 Sumner, 12. *United States* v. *Porter*, 3 Day, 283. *Churchill* v. *Wilkins*, 1 T. R. 447. *Bristow* v. *Wright*, 2 Doug. 665. 1 Chit. Crim. Law, 294, 557. 1 Greenl. Ev. § 65. The same principle has been recognized in those cases in this Commonwealth, in which it has been held that an averment might be treated as surplusage, when not descriptive of the identity of the charge, or of anything essential to it. *Commonwealth* v. *Pray*, 13 Pick. 359. *Commonwealth* v. *Randall*, 4 Gray, 36. *Lyons* v. *Merrick*, 105 Mass. 71. *McNeil* v. *Collinson*, *ante*, 313.

It is undoubtedly true that, when an indictment alleges the commission of an offence by various means, it is sufficient to prove enough of the means to constitute the offence; as, in the familiar case of obtaining money by false pretences, proof of all the pretences charged is not necessary; it is sufficient if enough are proved to establish the charge. But when the indictment states a pretence in general terms, and then specifies the particulars, it is the particular, and not the general, statement which must be proved; as, for example, if it alleges that a defendant, as a representation of his ability to pay, stated that he owned a large amount of stock in corporations, and then specifies a certain number of shares that he claimed to own in a particular stock, the allegation being thus qualified and limited, the proof must relate to that particular stock. In *Commonwealth* v. *Jeffries*, *ubi supra*, the indictment charged that the defendant

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falsely pretended that he had an order from a certain person in New York, whose name he did not disclose, to purchase goods; the proof was that he falsely pretended that he had an order to purchase them, without stating that it came from a person in New York; and it was held that the variance was fatal, and there was no evidence to support the charge. See *Rex* v. *Plestow*, 1 Camp. 494. And when a person is charged with stealing a white horse, the specific averment of color is not necessary, but, being descriptive of that which is material, it cannot be rejected as surplusage, but must be proved as laid. 3 Stark. Ev. (1st ed.) 1531. See also *State* v. *Noble*, 15 Maine, 476; *Commonwealth* v. *Gavin*, 121 Mass. 54.

In the case at bar, the negligence of the defendant is essential to support the charge of manslaughter. The specific averment that he knew that this particular train was then due bears directly upon that question; and, being set out in that part of the indictment which charges the negligence, it is descriptive of the facts and circumstances which surrounded the defendant at the time, in view of which he acted or failed to act, and of the kind and character of the negligence of which he is alleged to have been guilty. There being no evidence to support it, the conviction cannot be sustained.

In this view of the case, it becomes unnecessary to consider the other questions fully and ably argued at the bar.

Exceptions sustained.

D. S. Richardson & S. Hoar, for the defendant.

G. Marston, Attorney General, & *F. H. Gillett*, Assistant Attorney General, for the Commonwealth.

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COMMONWEALTH *vs.* BENJAMIN D. WASHBURN.

Norfolk. Jan. 27. — Feb. 27, 1880. MORTON & SOULE, JJ., absent.

A complaint, which does not set forth the facts necessary to constitute an offence, except by reference to a statute, the year of which is wrongly given, will not support a conviction; and the objection may be taken for the first time at the trial in the Superior Court on appeal.

COMPLAINT to a trial justice, averring that the defendant, on August 15, 1878, at Needham, "did keep a male dog, contrary to the provisions of the statute passed in the year 1868, being chapter 130 of the Acts of the General Court of said Commonwealth, passed in that year, and entitled 'An Act concerning dogs, and for the protection of sheep and other domestic animals,' in that he, the said Washburn, being on the first day of May, 1878, the owner of a male dog, and keeping the same in said Needham, and having from said first day of May, 1878, to the fifteenth day of August, 1878, owned and kept said dog as aforesaid, did refuse and neglect to cause said dog to be registered, numbered, described and licensed, as prescribed by said statute."

No objection was taken to the complaint before the trial justice, who found the defendant guilty.

At the trial in the Superior Court, on appeal, before *Pitman*, J., it appeared that there was no such statute of the year named as alleged in the complaint. The defendant asked the judge to rule that the complaint set forth no offence, and that the evidence did not support the complaint. The judge declined so to rule; the jury returned a verdict of guilty; and the defendant alleged exceptions.

B. D. Washburn, pro se.

G. Marston, Attorney General, for the Commonwealth.

GRAY, C. J. If the complaint had set forth the facts necessary to constitute an offence under the St. of 1867, *c.* 130, or under any other law of the Commonwealth, the mistake in stating the year of the passage of the statute might have been deemed to be either surplusage, which might be disregarded, or else a formal defect, which, not having been objected to before the trial

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justice, could not be availed of in the Superior Court. 2 Hale P. C. 172. St. 1864, c. 250, § 2. *Commonwealth* v. *Walton*, 11 Allen, 238.

But this complaint in no way avers or shows that the defendant has been guilty of any offence whatever, nor even what acts he has done or omitted to do, except by reference to the provisions of a statute passed in the year 1868, which is referred to, not merely as a law governing the case, (of which, if it existed, the court might be bound to take notice,) but as the only description in fact of the acts or omissions of the defendant. There being no statute of that year upon the subject, the complaint, if not bad in substance, as matter of law, is unsupported by the evidence, as matter of fact. 2 Hawk. c. 25, § 104. Gould Pl. c. 3, § 171. *Commonwealth* v. *Hartwell*, *ante*, 415.

Exceptions sustained.

COMMONWEALTH *vs.* JAMES DUNAN.

Suffolk. March 24, 1880. AMES & LORD, JJ., absent.

The provision made by the St. of 1877, c. 200, for an autopsy by a medical examiner in cases of death by violence, does not, at the trial of an indictment for manslaughter, render inadmissible other competent evidence as to the condition of the deceased.

At the trial of an indictment for manslaughter, the sister of the person killed testified for the government, and, on cross-examination, testified where she and the deceased had lived. *Held*, that the defendant had no ground of exception to the exclusion of evidence tending to show that the witness had falsely stated the residence of the deceased and of herself.

At the trial of an indictment for manslaughter, evidence that the person injured, soon after the alleged injuries were inflicted, said that the defendant was not to blame, and that the injuries were the result of an accident, are not admissible in defence, in the absence of evidence that the statement was made as a dying declaration.

INDICTMENT for the manslaughter of Margaret Fitzgerald, on September 22, 1879, at Boston.

Trial in the Superior Court, before *Pitman*, J., who allowed a bill of exceptions in substance as follows:

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The government offered evidence tending to show that the defendant struck, kicked and threw Fitzgerald upon the ground, as charged in the indictment. George F. King, a physician at the City Hospital, testified for the government as to the condition of Fitzgerald at the time she was brought to the hospital, and after she had received the alleged injuries at the hands of the defendant; and that he was present at the autopsy when it was made by the medical examiner. He was then asked to describe the condition and appearance of Fitzgerald's body at the time of the autopsy. The defendant objected to this question, on the ground that, as the law had provided that autopsies in such cases should be made by the medical examiner for the county, and the latter was then present as a witness, his testimony was all that was competent on that point; and that the testimony of Dr. King was not competent.

The judge overruled the objection; and the witness testified to the places and appearance of various wounds and bruises, on matters material to the government's case, and in some material matters varying from the testimony of the medical examiner, who subsequently testified in the case.

Bridget Walters, a sister of the deceased, and a witness for the government, testified, on cross-examination, that she and her sister had lived in Lowell; had gone to Lowell from Salem; had come to Salem from Ireland some twenty years ago; and that her sister was a woman of temperate habits, and she had never known her to be intoxicated.

The defendant contended, by the cross-examination of witnesses for the government and by the testimony of a medical expert upon the post-mortem appearances of the liver of the deceased, that she was a person who had the habit of drunkenness; that, at the time of the killing, she used coarse and abusive language to the defendant; and that, by reason of intoxication, she fell upon the sidewalk, and thus received the injury which was the cause of her death.

Mary Clark testified for the defence that she had known Bridget Walters six or seven years, and became acquainted with her when said Bridget and her husband lived at No. 79 Lowell Street, Boston, where they had a store, and sold provisions and

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liquors. She was then asked what she knew of the history of Bridget Walters, for the purpose of contradicting the latter, and showing that she was not a credible witness, and that she had not correctly stated her sister's and her own residence, and had falsified as to her residence in Salem. The government objected to this question, and the judge excluded it.

Mary Clark also testified that, on the morning after the deceased was injured, and before she was carried to the hospital, she called to see her, and had a conversation with her. She was then asked to state what the conversation was; to which the government objected. The defendant then stated that he proposed to show by this witness that the deceased then said to the witness that she struck the defendant, that her fall was the result of accident, and that the defendant was not to blame. The judge excluded the evidence.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. P. Brown, for the defendant.

G. Marston, Attorney General, for the Commonwealth, was not called upon.

By the Court. These exceptions cannot be sustained. The provision made by the St. of 1877, *c.* 200, for an autopsy by a medical examiner, does not render other competent evidence inadmissible. The inquiry as to "the history of Bridget Walters" does not appear to have been material. The statement of the deceased was not shown to have been a dying declaration, and was rightly rejected. *Exceptions overruled.*

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COMMONWEALTH *vs.* DANIEL B. GILSON.

Middlesex. March 24, 1880. AMES & LORD, JJ., absent.

No exception lies to a refusal to give instructions which are not shown by the bill of exceptions to be applicable to the case.

COMPLAINT for assault and battery upon the defendant's brother, John F. Gilson, the complainant, at Stoneham, on May 23, 1879.

Trial in the Superior Court, before *Rockwell*, J., who allowed a bill of exceptions in substance as follows:

The defendant claimed the dwelling-house formerly occupied by his mother as a homestead, which he, as administrator of his mother's estate, had conveyed by deed to a woman whom he subsequently married. The complainant, at the time of the alleged assault, was the tenant of the defendant and his wife, occupying the first story of the dwelling-house, and paid rent for its use and occupation. While the defendant was moving his furniture into a tenement in the second story of the dwelling-house, not in the possession of, occupied or hired by the complainant, he was opposed and prevented by the complainant from entering and carrying his furniture into the tenement by said complainant taking hold of the horse attached to the wagon and pushing and drawing him back; and during the time the defendant was endeavoring to lead the horse into the yard for the purpose of carrying his goods into said tenement, and while the complainant was thus preventing him, the assault was alleged to have been committed.

The complainant, as heir of his mother, claimed to have an interest in said dwelling-house, as the validity of the administrator's deed and sale was disputed, and to have acted under advice of counsel in preventing the defendant from entering the tenement which he proposed to occupy. The defendant contended that all proceedings under the sale were legal and valid, but the evidence upon that point was not investigated.

The defendant asked the judge to instruct the jury as follows: "1. If the complainant was the tenant of the defendant, and was not in the possession of the tenement which the defendant

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intended to occupy, either by lease or verbal agreement with the defendant, then the defendant had a right to enter said premises for the purpose of occupying them, and, if he was opposed by the complainant in that purpose, the defendant had a right to use sufficient force to overcome the resistance offered by the complainant. 2. If the defendant had a legal right to enter said premises as owner or otherwise, and was opposed by the complainant, then the defendant had a right to use sufficient force to overcome the resistance offered by the complainant, and is not guilty of assault, unless the jury shall find that the force used by him was excessive."

The judge declined to give the instructions requested, because the question of title, not being involved in the trial, nor made and investigated, except partially, nor requested to be tried by either party, the instructions requested were not applicable to the case; and instructed the jury that, if they were satisfied beyond a reasonable doubt that the defendant assaulted the complainant, such assault not being rendered necessary in self-defence, by any assault on the part of the complainant, they would be justified in rendering a verdict of guilty.

The jury returned a verdict of guilty; and the defendant alleged exceptions.

E. A. Upton, for the defendant.

F. H. Gillett, Assistant Attorney General, (*G. Marston*, Attorney General, with him,) for the Commonwealth.

By the Court. The bill of exceptions does not show that there was any evidence in the case to which the instructions requested were applicable, and therefore cannot be sustained. *Canfield* v. *Canfield*, 112 Mass. 233. *Exceptions overruled.*

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LOUISE P. OWEN vs. MOSES NEVEAU & another.

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Franklin. Sept. 17. — Oct. 19, 1878. ENDICOTT & SOULE, JJ., absent. February 25, 1879. — March 22, 1880.

An officer's return on a sale of the right of a debtor of redeeming mortgaged land, which sets forth that he sent a notice of the time and place of sale, by mail, to the debtor, directed to a certain town in another county, as "I could not find the debtor in my precinct," is a sufficient return that the debtor was not "found within his precinct," within the Gen. Sts. *c.* 103, § 41.

Section 16 of the Gen. Sts. *c.* 103, applies only to a levy on land by extent, and not to a levy, under §§ 39 and 40, on land subject to a mortgage.

The provision in the Gen. Sts. *c.* 103, § 40, that the deed of an officer, of the right of a debtor to redeem mortgaged land, sold on execution, being recorded "within three months after the sale, shall give to the purchaser all the debtor's right of redemption," is intended for the protection of *bona fide* purchasers and attaching creditors, and it is not a prerequisite to the vesting of the title in the purchaser that the deed should be recorded within that time.

Although, under the Gen. Sts. *c.* 123, § 55, a general attachment of real estate, which has been fraudulently conveyed by a debtor to a third person, is not valid against a creditor making a subsequent special attachment, yet, where the land is sold on an execution obtained by the creditor making the general attachment, and the proceeds are applied first in satisfaction of his judgment, and then in satisfaction of the judgment obtained by the creditor making the special attachment, with his consent, and both judgments are fully satisfied, the statute is no defence to a writ of entry brought by the purchaser at such sale to recover possession of the land.

WRIT OF ENTRY, dated February 18, 1876, against Moses Neveau and Phebe L. Neveau, to recover a parcel of land in Montague. Plea, *nul disseisin*. Trial in the Superior Court before *Putnam*, J., who reported the case for the determination of this court, in substance as follows:

On May 16, 1874, Moses Neveau, who was the owner of the land in question, subject to a mortgage made by him, conveyed the land to Charles Moran, who, on the same day, conveyed it to Phebe L. Neveau, wife of Moses. There was evidence tending to show that these conveyances were fraudulent as to the creditors of Moses.

On September 28, 1874, Euclid Owen and others, members of the firm of Owen & Co., creditors of Moses, brought an action of contract against him, and made a general attachment of his real estate. They obtained judgment and execution against him, and on April 17, 1875, the right in equity, which Moses had on September 28, 1874, of redeeming the land from the

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mortgage above referred to, was taken on the execution, and on May 31, 1875, sold by public auction to the demandant, to whom a deed of the equity of redemption was on the same day delivered. This deed was recorded on February 16, 1876; but no other conveyance of the premises was made between the date of the attachment and the date of the record.

The officer's return on the execution set forth that he gave notice to Moses of the time and place of the sale, "by mail, duly directed to the said Moses Neveau at North Adams, Mass., postage prepaid, as I could not find the said Moses in my precinct, he being resident at North Adams in our county of Berkshire."

Moses and his wife were in possession of the premises in question (the wife holding the record title to the same) at the date of the levy and sale, and continued so to be, up to the time of the date of the writ in this case. No evidence other than the officer's return and deed was offered to show any momentary seisin and possession of the premises by the demandant.

The tenants contended that the demandant was not entitled to recover for the following reasons: "1. Because the officer's return does not show that the notice in writing required by the Gen. Sts. *c.* 103, § 41, to be given to the debtor, was properly given. 2. Because there is no evidence that the officer gave to the creditor or his attorney, or the purchaser, the momentary seisin and possession required by the Gen. Sts. *c.* 103, § 16. 3. Because the deed to the demandant was not recorded within three months after the sale, as required by the Gen. Sts. *c.* 103, § 40."

The judge sustained these objections; and ordered a verdict for the tenants. If the ruling was correct, judgment was to be entered upon the verdict; otherwise, a new trial was to be ordered.

D. Aiken & G. L. Barton, for the demandant.

S. O. Lamb, for the tenants.

MORTON, J. None of the tenants' objections to the demandant's title can be sustained.

1. Section 41 of the Gen. Sts. *c.* 103, provides that "the officer shall give notice in writing of the time and place of sale to the debtor, if found within his precinct." The officer's return is a sufficient return that the debtor was not to be found within

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his precinct, and shows an excuse for not giving him the personal notice required by the statute if he is found within the precinct. The language, "I could not find the said Moses in my precinct," imports that the officer made diligent search for the debtor. The statement of the additional fact that the officer sent to the debtor a notice by mail, if unnecessary, does not vitiate the return.

2. The plain answer to the second objection is, that § 16 of the Gen. Sts. *c.* 103, applies only to a case of a levy upon land by extent. In this case the officer proceeded under §§ 39 and 40, and sold the right of redeeming the land, which was subject to a mortgage.

3. In regard to the third objection, the report shows that the deed was recorded before this suit was commenced, and that there was no conveyance of the premises between the date of the sheriff's deed to the demandant and the time it was recorded. The provision of the General Statutes upon which the tenants rely is a reënactment, without change, of the Rev. Sts. *c.* 73, § 38. In *Houghton* v. *Bartholomew*, 10 Met. 138, decided under the Revised Statutes, it was held that the recording of the deed within three months was not a prerequisite to the vesting of the title in the purchaser; that the provision was intended for the protection of *bona fide* purchasers or attaching creditors, and that such deed, though not recorded within three months, gave the purchaser all the right and title of the execution debtor in the premises, even as against a subsequent purchaser or attaching creditor who had actual knowledge of the sale and conveyance by the officer. This is decisive against the ground taken by the tenants in the case at bar. *New trial ordered.*

The case was then tried before *Pitman*, J., who allowed a bill of exceptions, which stated, in addition to the facts already set forth, the following:

After the general attachment by Owen & Co., three other creditors of Moses brought actions against him, and made special attachments of the land in question. Judgments were recovered in all the actions at the same term of court, and executions issued and delivered to the officer, who, after the sale on the execution of Owen & Co., from the proceeds of the sale first satisfied their

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execution, and then the executions in the other actions, in the order of the attachments therein. Each creditor signed a receipt for the amount of his execution, which receipt was written under the return of the officer on each execution. None of the special attachments had been waived or discharged before the seizure on the execution of Owen & Co.

The tenants contended and asked the judge to rule that the general attachment by Owen & Co. was invalid as against the subsequent special attachments; that the proceedings of the officer in the seizure and sale were irregular; and that the demandant acquired no title thereby. The judge declined so to rule, and ruled that this objection was not open to the tenants. The jury returned a verdict for the demandant; and the tenants alleged exceptions.

Lamb, for the tenants.

Barton, for the demandant.

COLT, J. The statute provides that an attachment of real estate, which has been fraudulently conveyed by the debtor to a third person, shall not be valid against a subsequent attaching creditor, or against a person who afterwards purchases the estate for a valuable consideration and in good faith, unless the officer, in addition to his general return, also returns a brief description of the estate attached and the name or names of the person or persons in whom the record or legal title stands. Gen. Sts. c. 123, § 55. It is clear, therefore, that the attachment in favor of Owen & Co., though it was first in order of time, was not valid as against the attachments of the three other attaching creditors, who made special attachments in compliance with the statute above referred to. By the effect of the statute, Owen & Co., as between themselves and the other creditors named, became the fourth attaching creditors in point of right, and the only lien created by their attachment was a lien upon the debtor's equity of redemption, subject to the three prior attachments. All four of the suits proceeded to judgments, and executions were duly issued and placed in the hands of the same officer for service. He proceeded to levy the execution in favor of Owen & Co., by selling all the right of redeeming the premises in suit which Moses Neveau had on September 28, 1874, the day when the same was attached on mesne process. He levied the other

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three executions upon the balance of the proceeds of the sale, treating them as being subsequent in right to the attachment and execution in favor of Owen & Co.

The tenants contend that this sale was prejudicial to the rights of the judgment debtor, and illegal, because the officer attempted to sell the right to redeem which the debtor had on a previous day, while the same was subject to subsequent special attachments; and that no one would bid the actual value of the interest sold, as the purchaser would be liable to have his title defeated by the special attachments.

It does not appear that any wrong was intended in these proceedings, or that there was any fraud on the part of the judgment creditor or the officer, or that the debtor suffered any actual loss. And we are of opinion that the sale was valid as against the tenants. It is true that the statute makes provisions for the case of a subsequent attaching creditor who obtains judgment while prior attachments are pending. He may commence his levy by a seizure, and suspend the further service until the prior attachment is dissolved. If it is dissolved, the estate remains bound by such seizure. If it is set off and sold under the prior attachment, the surplus is applied upon the execution of the subsequent attaching creditor. Gen. Sts. *c.* 133, §§ 41, 50, 51; *c.* 103, § 39. *Capen* v. *Doty*, 13 Allen, 262. But the judgment creditor is not absolutely required to suspend the levy to await a prior attachment; he may take the risk of going on in the belief that it will never be perfected by a judgment or levy of execution. If the attachment is perfected, the title acquired by the previous sale will be wholly defeated, but not otherwise.

It was decided in *Pease* v. *Bancroft*, 5 Met. 90, that a purchaser took nothing under a sale by the second attaching creditor as against the prior attaching creditor; and that, when the sale was made in pursuance of the first attachment, the sale under the second was rendered wholly void. It was not necessary in that case to declare that the sale on the second attachment, pending the first, would not have been good against the debtor, if the first attaching creditor had not obtained judgment, and upon that question the court expressly declined to give an opinion, although it was suggested that, "if it would have been good, it would seem to be injurious to the debtor, by causing

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his property to be sold at a reduced value." The suggestion is not of controlling weight upon the question before us; and we are not prepared to say that a sale on execution of an equity of redemption is invalid as to the judgment debtor, (who has by the Gen. Sts. *c.* 103, § 44, the right within a year to redeem the land from whomever may become the purchaser,) if it appears that at the time of the sale there were attachments which under the Gen. Sts. *c.* 123, § 55, were entitled to priority, but which were never afterwards perfected by a levy.

There is another ground upon which the validity of this sale may be upheld. A prior attaching creditor may, at any time before the completion of the levy, waive or abandon his priority without consulting the debtor. It is a matter of security only, the disposal of which is wholly in his own hands. If he abandons or waives his right, the attachment is dissolved, and there is nothing to prevent a levy by the next attaching creditor. He may, by previous authority or by subsequent ratification, make the officer in whose hands he places the execution for service his agent to do this, either after or before a levy has been made.

In this case, all the executions were in the hands of the officer at the time of the sale, and they were all returned satisfied out of the avails of the sale on the execution of Owen & Co. The creditor's receipt for the amount of each execution was written under the officer's return reciting the sale in each case. There is nothing to control the presumption that the officer proceeded with the approval of all the creditors. The priority of the special attaching creditors was therefore lost by their own act, and there is no ground for the tenants' objection to the validity of this sale. *Exceptions overruled.*

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GEORGE W. JOHNSON, administrator, *vs.* CYNTHIA A. GOSS & others.

Worcester. Jan. 7. — March 2, 1880. COLT & LORD, JJ., absent.

A testator bequeathed to his wife "all my personal property, my household effects, horse and carriages, my life insurance" in a certain company, three mortgages of real estate, and certain bank stock, and to other persons large portions of his productive personal property. *Held*, that the bequest of "all my personal property" was not a residuary bequest, but covered only property of personal use and convenience.

A testator, who at the time he made his will, and at the time of his decease, owned two mortgages of real estate in C. executed by W., and a mortgage executed by the wife of W., in which the latter joined, releasing his right as tenant by the curtesy, bequeathed to his wife "two mortgages on real estate by W. in C." *Held*, that this bequest covered only the two mortgages executed by W. and the debts secured thereby, and not the mortgage executed by the wife of W.

A testator bequeathed to his wife "one mortgage on H. B. of L." He in fact owned two mortgages executed by H. B. *Held*, that the bequest gave to the widow one of the mortgages; and that she might elect which she would take.

A testator bequeathed to his wife "the bank stock I hold in the First National Bank of C." *Held*, that this was a specific bequest; and that the widow was entitled to the stock, exonerated from incumbrances put upon it by the testator.

Under a bequest of personal property by a testator to his widow, "to hold for her own benefit as long as she lives, in a manner that shall be divided equally among the heirs at her decease," the widow is entitled to the management of it, in the absence of evidence of danger that the property will be wasted or secreted by her.

A testator, at the time he made his will, owned one hundred and eighty shares of stock in the C. bank. By his will, he bequeathed to each of his two daughters "sixty shares of bank stock in the C. bank;" and, after the will was made, he sold all his stock in that bank. *Held*, that these bequests were general; and that each daughter was entitled to sixty shares of stock in the bank named, or their equivalent in money.

A testator bequeathed to his son and his son-in-law each "one half of my interest in lands and machinery and effects in the sash and blind factory in C." The testator owned a large number of shares in a corporation in C. for the manufacture of sashes and blinds; and the corporation was indebted to him in a large amount. *Held*, that each legatee was entitled to one half of the number of shares in the corporation owned by the testator at his decease; and that they were not entitled to the debt due from the corporation to the testator.

MORTON, J. This is a bill in equity in which the administrator with the will annexed of the estate of Daniel Goss asks the instructions of the court as to the construction of the will and

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the discharge of his duty under the same. The will is obscure, and was evidently drawn by an illiterate person who was very inaccurate in the use of language. In construing it, we can derive very little aid from previous decisions, and the case can be of but little value as a precedent for future adjudications.

1. After providing for the payment of debts and funeral expenses, the will contains the following clause: "I devise and bequeath to my wife, C. A. Goss, all my personal property, my household effects, horse and carraiges, my life insurance in the Mutual Life Insurance of New York, and two mortgages on real estate by Orison H. Welch in Clinton, and one mortgage on Horatio Bailey of Lancaster, and also the bank stock I hold in the First National Bank of Clinton, to hold for her own benifit as long as she lives (and wave all dowery) in a manner that shall be devided equal among the heirs at her deceased."

The guardian of the widow contends that this is a residuary bequest of all the personal property which may remain after the other bequests in the will are satisfied. But we are of opinion that this was not the intention of the testator. It is clear beyond doubt that he did not intend to use the words "all my personal property" in their ordinary sense, because he proceeds to give to his wife and other legatees large portions of his invested and productive personal property. The language does not purport to bequeath the residuum of his property, and, construing it in connection with the words immediately following, "my household effects, horse and carriages," we think his purpose was to describe property *ejusdem generis*, and that he used the adjective "personal" as descriptive of chattels of personal use and convenience, not intending to include stocks, securities, or other productive property. *Dole* v. *Johnson*, 3 Allen, 364.

2. The testator, at the time he made his will, and at the time of his decease, held two mortgages of real estate in Clinton executed by Orison H. Welch; he also held a mortgage executed by Mary A. Welch, the wife of Orison, to the Lancaster Savings Bank, in which Orison joined, releasing his right as tenant by the curtesy, and which had been assigned to the testator by the bank. It is clear that the bequest to the wife, of "two mortgages on real estate by Orison H. Welch in Clinton," covers only the two mortgages executed by Welch and the debts secured

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thereby, and cannot be extended to include the third mortgage above named, as is contended by the guardian.

3. The testator bequeaths to his wife "one mortgage on Horatio Bailey of Lancaster." This language, strictly construed, is meaningless; but there is no doubt that he intended to give her the debt secured by a mortgage given by Bailey. He in fact owned and held two mortgages executed by Bailey. As he has not specified which of the two mortgages she is to take, we think that by implication he gives her the right of selection, and that her guardian may elect which of the two shall be transferred to her use by the administrator.

4. The bequest of "the bank stock I hold in the First National Bank of Clinton" is a gift of particular property specified and distinguished from all other property of the testator, and is therefore a specific legacy. *Towle* v. *Swasey*, 106 Mass. 100. *Foote, appellant*, 22 Pick. 299. *White* v. *Winchester*, 6 Pick. 48. *Metcalf* v. *Framingham Parish*, *ante*, 370.

As to property specifically devised or bequeathed, the general rule is that, in the absence of any expressed intention to the contrary, such property is to be exonerated and relieved from all incumbrances placed upon it by the testator. *Richardson* v. *Hall*, 124 Mass. 228. This rule should be applied to this bequest, and the administrator should pay the debt for which this bank stock is pledged, and transfer to the widow's guardian the stock free from incumbrance.

5. The remaining question under this clause of the will is whether the administrator should transfer to the guardian the property given to the widow. If we assume that the bequest was intended to be for the life of the widow, and that at her decease the property is to be divided equally among the heirs of the testator, yet we think his intention was that she should hold and manage it. He makes no provision for trustees, but gives it to her "to hold for her own benefit as long as she lives." There being no suggestion of danger that the property will be wasted or secreted by the life tenant, we are of opinion that she is entitled to the management of it, and that the administrator should transfer it to the guardian. *Gibbins* v. *Shepard*, 125 Mass. 541.

6. The next clause of the will is as follows: "I bequeath to my daughter Marion a trust deed on a saw-mill in the State

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of Michigan, the town of Muskgeon, and a trust deed on A. D Hyde house and lot in Chicago, and also sixty shares of bank stock in the First National Bank of Chicago, to hold for her benefit aside from her husband." The only question properly before us under this clause is in regard to the legacy of sixty shares of bank stock. The question whether it is good as a devise of lands in Michigan and Illinois is one in which the administrator has no interest, and as to which, upon his bill, we are not called upon to express an opinion. At the time the testator made his will, he owned one hundred and eighty shares in the First National Bank of Chicago. He bequeathed, as above stated, sixty shares to his daughter Marion, and, by a subsequent clause of his will, in the same language, sixty shares to his daughter Ellen. After the will was made, he sold all this bank stock. The question whether this was an ademption of the two legacies depends upon the question whether the legacies were intended by the testator to be specific or general legacies. It is not, as in the gift to his wife, a bequest of certain specific bank shares held by him; he did not give to either or to both of his daughters the exact amount of the stock held by him in the Chicago bank; the will manifests a clear intention to make a substantial provision for each of his daughters, and an important part of this provision consists in this gift of bank stock. Under the circumstances of this case, we are of opinion that the subsequent sale of the stock in the Chicago bank held by him was not intended by the testator as a revocation of the bequests to his daughters, but that such bequests must be regarded as intended to be general pecuniary bequests. It follows that it is the duty of the administrators to procure and transfer to each daughter sixty shares of the bank stock, or to pay their equivalent in money.

7. The remaining clauses of the will which give rise to any question in this case are as follows: "I devise and bequeath to my son F. W. Goss one half of my interest in the property in the lands and machinery and effects in sash and blind factory in Chicago, State of Illinois," and "I devise and bequeath to my son-in-law W. B. Phillips one half of my interest in lands and machinery and effects in the sash and blind factory in Chicago, Illinois." The testator owned 727 shares in a corporation in

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Chicago for the manufacture of sashes and blinds. The corporation was indebted to him in a large amount. The legatees Goss and Phillips contend that they are entitled, not only to the testator's shares in said company, but also to all the debts due the testator at his decease from the corporation. This claim cannot be sustained. The testator's "interest in the property in lands and machinery and effects in sash and blind factory in Chicago" is represented by his stock. The language used covers nothing more, and we cannot see any evidence of intention on his part that it should include the debt which the corporation owed to him. We are of opinion that, under this clause, each legatee is entitled only to one half of the 727 shares of the capital stock of the corporation held by the testator at his decease.

We have thus considered all the questions presented by the administrator. A decree may be drawn in accordance with these views, the form of which may be settled before a single justice.

Decree accordingly.

G. Swan, for the widow.
C. G. Stevens, for the son.
W. S. B. Hopkins, for the daughters.

JOHN DOLAN *vs.* COURT GOOD SAMARITAN, No. 5910, ANCIENT ORDER OF FORESTERS.

Bristol. Oct. 29, 1879. — March 30, 1880. COLT & AMES, JJ., absent.

If an incorporated benevolent society, whose by-laws provide for the payment of a weekly allowance to a sick member, upon the performance of certain conditions by him, refuses to fulfil its contract, the member injured thereby may maintain an action at law against it, if the by-laws of the society make no provision for a tribunal to decide questions arising between the society and its members.

The by-laws of an incorporated benevolent society provided that a sick member, upon sending to the society "every week during his sickness" a certificate signed by a qualified surgeon, stating his illness, "shall be entitled to a weekly allowance of five dollars." A member of the society was taken ill, in another state, and sent to the society a certificate, stating his illness and signed by a person who was in fact a surgeon in attendance upon him, but who did not describe himself in the certificate as such. Accompanying the certificate was

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a letter from the member, in which he spoke of it as the doctor's certificate. No other certificate was furnished until after his return to this state about three months later, when he furnished a certificate that he had been ill since the date named in his first certificate. *Held*, that the first certificate was a substantial compliance with the by-law, and entitled the member to receive an allowance for one week; and that he was not entitled to any further allowance.

CONTRACT by a member of the defendant society, a corporation duly established by law, to recover $63, alleged to be due the plaintiff according to the by-laws of the society. Trial in the Superior Court, without a jury, before *Brigham*, C. J., who ruled that the plaintiff could not recover; and found for the defendant. The plaintiff alleged exceptions, which appear in the opinion.

J. W. Cummings, for the plaintiff.

M. Reed, for the defendant.

MORTON, J. The sixteenth article of the defendant's by-laws provides that "any member who may be sick, lame or infirm, and incapable of following his usual trade, occupation or employment, provided such sickness does not arise from intemperance or sexual indiscretion, in which case he will receive no benefits from the funds or court doctor, (notwithstanding he may continue to carry on or conduct the business by his wife, servant or children,) shall be entitled to a weekly allowance of five dollars, which shall be paid to him, if clear on the books, for 26 weeks." The seventeenth article provides that "no sick money shall be paid to any member until the chief ranger or secretary receive a certificate, signed by the surgeon of the court, or by a qualified surgeon, stating his illness, provided the member reside within two miles from the City Hall; if a sick member reside beyond such distance he will send a certificate from the surgeon who attends him, and send one every week during his sickness, disability or affliction to the secretary or chief ranger."

Without doubt the duties required of the sick member by the seventeenth article were intended and understood as conditions precedent to his right to claim the weekly allowance. But, upon the performance of these conditions, the sixteenth article declares that "he shall be entitled to" such allowance.

So far as the bill of exceptions shows, there is no discretion in the officers, or in any tribunal provided by the by-laws. The member is absolutely entitled to the allowance; there exists a

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simple duty on the part of the defendant to pay it to him, and there is an implied contract to do so founded upon the consideration of the payment by the member of his dues. The corporation is not a mere charitable society, but is rather in the nature of an association for the mutual insurance of its members against sickness or accident. If it refuses to perform its contract contained in the by-laws, the member who is injured may have recourse to the proper courts to enforce the contract.

The cases upon which the defendant relies are distinguishable from the case at bar. In each of those cases, the by-laws or articles of association of the society contained provisions for some body or tribunal who were to pass upon the question of the liability of the society, and each case was decided upon the ground that the parties, having selected a tribunal, were concluded by the decision of the forum of their choice. *Black & White Smiths' Society* v. *Vandyke*, 2 Whart. 309. *Toram* v. *Howard Association*, 4 Penn. St. 519. *Anacosta Tribe of Red Men* v. *Murbach*, 13 Md. 91. But in the present case there does not appear to be any by-law, providing that the officers or any other tribunal may decide questions arising between the members and the corporation, by which the plaintiff has selected or agreed to any special tribunal to decide his rights, and is precluded from having recourse to the courts of law to enforce them.

The next inquiry is whether the plaintiff has proved a compliance on his part with the conditions of the by-laws, so as to entitle him to recover the whole, or any part, of the allowances for which this suit is brought. It is admitted that he was a member in good standing, had paid all his fees and dues, and was "clear on the books."

On June 13, 1878, he was taken sick in the State of Colorado, and his sickness did not arise from intemperance or sexual indiscretion. He sent to the defendant's secretary a certificate stating his sickness, which was received on June 19, 1878. The only objection made to this certificate is that the person who signed it did not describe himself as a surgeon or physician. But the signer was in fact the surgeon in attendance upon the plaintiff, and a letter from the plaintiff accompanied the certificate, in which he spoke of it as the "doctor's note to certify that I have been sick and I am sick." The defendant thus

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had a surgeon's certificate and notice that the person signing it was a surgeon, as fully as if the signer had added "Surgeon" or "M. D." to his signature. We think this was a substantial compliance with the by-law, and entitled the plaintiff to receive an allowance of five dollars for one week; and that the right to this allowance vested in him and was not forfeited or lost by his failure to send the future certificates required to entitle him to further weekly allowances.

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But, upon the facts now presented to us, we are unable to see how he can recover anything more than one weekly allowance. The by-laws require that he shall send a certificate "every week during his sickness." By the fair interpretation of the by-laws, the sending of such certificate by a sick member is a condition precedent to his right to demand the weekly allowance, and he can claim only the allowance for each week for which he has furnished the certificate. The plaintiff, after he sent the first certificate in June 1878, did not furnish any other certificate during his sickness until after his return to Fall River in September 1878. He then furnished a certificate that he had been sick since June 13, 1878. But this was not a substantial compliance with the seventeenth article of the by-laws. No excuse is given for his failure to comply with the requirements of the by-laws; and we therefore need not consider what might be the effect upon the rights of the parties if he had been prevented by an act of God which rendered him incapable of sending the required certificates. Having chosen to stipulate as one of the conditions of his right to a weekly allowance that he would furnish a weekly certificate, he is bound by his contract, and cannot claim the allowance for those weeks when he neglected to send the certificate.

It follows that, upon the facts appearing in this case, the Superior Court should have rendered judgment for the plaintiff for five dollars, with interest. *Exceptions sustained.*

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WILLIAM CLAFLIN & others, trustees, *vs.* KATE ASHTON & others.

Suffolk. July 24, 1879. — March 2, 1880. ENDICOTT & SOULE, JJ., absent.

A testator bequeathed the residue and remainder of his property, at the death of his widow, to trustees, who, after the payment of certain legacies, were to divide the net rents and profits of the remainder, in equal shares, among his then surviving children during their lives, and to pay "the whole of each child's share of said rents and profits" to such child on its arriving at the age of twenty-one years; and "at the decease of any of my children, to transfer and convey to the heirs at law of such child the same aliquot part of the said residue and remainder of my estate, to which such child was entitled at the time of his or her decease, in the rents and profits thereof," in equal shares, free from the trusts. By a subsequent provision of the will, the testator directed that "in case of the death of my children, before the age of twenty-one years or without lawful issue," then the trustees, "all the above-named legacies being paid," should pay certain other legacies, and should also pay the residue and remainder of his property to a legatee named. The testator left a son and a daughter, both of whom survived their mother, and also left grandchildren, children of other daughters who died before him. The son, after the daughter became of age, died under age and unmarried. *Held*, that the legatees named in the subsequent clause were entitled to one half of the estate of the testator, including the income which had accumulated thereon since the death of the son.

BILL IN EQUITY, by the trustees under the will of John Ashton, to obtain the instructions of the court. Hearing before *Morton*, J., who reserved the case for the consideration of the full court. The facts appear in the opinion.

E. D. Sohier & C. A. Welch, for Kate Ashton.

A. Hemenway, executor of the will of a grandchild, *pro se*.

C. F. Walcott & E. C. Perkins, for the Massachusetts General Hospital.

MORTON, J. The will of John Ashton gives the residue and remainder of his property, at the death of his widow, to trustees, who by the fourth article are to pay certain legacies to his grandchildren George A. Lunt and Mary U. Goodrich. The fifth article provides that, the above-named legacies being paid, the trustees shall receive the rents and profits of the residue, and, after paying necessary charges and expenses, shall "divide the residue of such rents and profits, in equal shares, among my then surviving children, during their lives, so much of the share of any minor child, as in the judgment of the said

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trustees may be needed for the maintenance and education of such child, to be paid to the legal guardian or guardians of such child, for that purpose, and the balance of such share, if any remain, to be reinvested by the trustees, for the general benefit of my estate; but the whole of each child's share of said rents and profits to be paid to such child from and after his or her arriving at the age of twenty-one years. 2d. At the decease of any of my children, to transfer and convey to the heirs at law of such child the same aliquot part of the said residue and remainder of my estate to which such child was entitled, at the time of his or her decease, in the rents and profits thereof; to have and to hold the same in equal shares to the said heirs at law, their heirs and assigns, in fee simple forever, free and discharged from the trusts hereby created."

The testator left a son, John Ashton, Jr., and a daughter, Kate Ashton, the children of his widow, Sophia G. Ashton. He also left the two grandchildren above mentioned, who were the children of his daughters by a former wife. Those two daughters died before the date of the will. Kate Ashton is living unmarried. John Ashton, Jr. died under age and unmarried, after the death of the testator's widow.

It seems to us clear that, under the fifth article, unless it had been controlled by other parts of the will, it would have been the duty of the trustees, at the decease of John Ashton, Jr., to transfer and convey to his heirs at law one half of the principal of the trust fund in their hands. They are directed, "at the decease of any of my children, to transfer and convey to the heirs at law of such child the same aliquot part of the said residue and remainder of my estate to which such child was entitled, at the time of his or her decease, in the rents and profits thereof." Although the trustees had a discretion as to the amount of the income of the share of each child which should be paid to his or her guardian, yet each child was entitled to the whole of the income if necessary for his maintenance and education. Throughout the article the testator uses the expression, "the share" of each child, clearly intending to designate the whole of the income of that part of the trust estate set apart for the benefit of such child. When he directs the trustees to transfer and convey to the heirs at law of a deceased child the same part of the

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estate to which such child was entitled "in the rents and profits thereof," we have no doubt that he intended to designate that share of the estate set apart for the benefit of such child, and of which he might receive the rents and profits.

But the difficulty in the construction of this will arises from the ninth article, which provides that, "in case of the death of my children by my wife, S. G. Ashton, before the age of twenty one or without lawful issue, then the following division and disposition of my said property shall be made by my said trustees. All the above-named legacies and debts being paid, they shall further proceed to pay" certain legacies to his said two grandchildren and to other persons, which need not be mentioned in detail, and "all the residue and remainder of my property shall be given to the Massachusetts Hospital, for diseased and wounded soldiers;" with a further provision that, if the property bequeathed shall be insufficient to pay all said legacies, they shall be paid in full in the order in which they are named in the article.

The two articles, considered separately, are inconsistent and repugnant. They plainly refer to the same property, and, if construed literally and independently, each directs a disposition of it inconsistent with the other. But if the two are brought together and considered as parts of one scheme of disposition of the property, the result will be the same as if they both formed parts of one article of the will, and the repugnancy and difficulty of construction will not appear to be so great. The will may thus fairly be construed to read that the trustees are, at the decease of either of the children, to transfer and convey to the heirs at law of such child the share of the fund of which such child was entitled to receive the income, provided however that, in case such child shall die under age or without lawful issue, then the trustees shall pay the legacies named in the ninth article. Read in this form, the latter clause restricts and qualifies the prior devise to the heirs at law of a child, so that it operates only in case such child should die leaving issue.

We are of the opinion that this transposition and construction express and effectuate the intention of the testator. His scheme, to be inferred from the whole tenor of the will, seems to have been to provide a fund of which each of his children was to have one half of the income during his or her life; if either

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child died leaving issue, his or her share of the principal was to be transferred to such child's heirs at law, who would be such issue; but if either child died under age or without issue, the share of such child was to be divided among the legatees specified by the testator as the objects of his bounty. It is to be presumed that the testator intended that all the clauses of his will should have some operation and effect. It is not to be supposed that the purpose of the ninth article was to entirely revoke and annul the devise to the heirs at law of his children in the fifth article. Such a purpose, if entertained, would naturally have been expressed in direct language.

We think, as we have before intimated, that the purpose of the ninth article was to restrict and qualify the prior devise in the fifth article. Upon any other construction, we should be obliged to treat one or the other of the provisions as entirely inoperative. If the two provisions were to be regarded as incurably repugnant, perhaps the rule would apply that the clause in the will which is posterior in position should prevail; in which case, in the contingency which has happened, the result would be the same as it is upon the construction we have adopted. But, in construing this will, we must take our stand at the death of the testator, and look forward to all possible contingencies which might arise in the future. If John Ashton, Jr. had died after he became of age, leaving children, it would be impossible to reconcile with the intentions and purposes of the testator a construction of the ninth article which held that it wholly defeated and frustrated the prior devise, and thus left the children of John Ashton, Jr., the grandchildren of the testator, entirely unprovided for.

The result is that, in the contingency which has happened, namely, the death of John Ashton, Jr., under age and without issue, it was the duty of the trustees at his death to divide one half of the trust estate among the legatees named in the ninth article, paying them in the order of priority, as directed by the testator. As they were respectively entitled to their legacies at the death of John Ashton, Jr., it follows that the income which has since accumulated belongs to them, and should be divided among them in proportion to their legacies.

Decree accordingly.

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BOSTON & ALBANY RAILROAD *vs.* JOHN H. PEARSON & others.

Suffolk. Nov. 13, 1879. — March 2, 1880. COLT, J., did not sit. SOULE, J., absent.

A joint-stock company formed under the N. Y. Sts. of 1849, *c.* 258, 1851, *c.* 455, and 1853, *c.* 153, is not a corporation, and members of it may be sued here as partners.

Under the laws of New York, certain persons met, and resolved that "we organize ourselves and such others as shall join hereafter into a joint-stock association, and that we adopt" certain articles of association. They then signed the articles of association and adopted a form of subscription, which stated the name of the association and the names of the officers, and that the capital stock was $2,500,000, and by which the signers purported to subscribe for the number of shares set opposite their names in the capital stock of the association, agreed to pay a certain percentage on every share within ten days, and to pay such further calls as might be made by the company in pursuance of its articles of association, whereupon the company was to issue its stock for the amount so subscribed, and authorized the secretary of the company to sign their names to the articles of association. The prospectus stated that the company "is organized with a capital stock of $2,500,000;" that "a relatively small cash capital, and a percentage only of the subscriptions, will be required to put the company in working order;" and that subsequent calls will be made as the business of the company requires. Subscriptions were obtained to the amount of $450,000. *Held*, that the subscription paper contained an absolute contract to take stock in an association already formed; that a person signing it, and paying the percentage required, became a partner in the enterprise, and was liable as such for a debt of the company, although he did not sign the articles of association, and never attended any meeting of the association, had no knowledge of the amount of the subscriptions or of the business of the association, and was not known to the creditor to be a partner when the debt was incurred: and although no certificates of stock were issued to any one. *Held, also*, that if it was necessary to prove that a subscriber's percentage had been paid to the association, in order to hold him as a partner, evidence that he paid it to the executive committee of the association was sufficient; and that the admission in evidence of an entry in the cash-book of the association, put in to show that the treasurer had received the money, was immaterial.

A formal defect in a declaration, which might have been cured by an amendment, is waived, if not objected to until after a trial upon the merits before an auditor.

CONTRACT upon an account annexed against the defendants, as "copartners under the firm and style of the New England Express Company," for work done by the plaintiff for said company in 1868. Writ dated April 1, 1872. Pearson alone defended, and filed an answer containing a general denial.

At the trial in the Superior Court, before *Colburn*, J., without a jury, the defendant contended that the New England Express

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Company was a corporation organized in 1867, under the laws of the State of New York, and, as evidence of the laws of that state, put in the N. Y. Sts. of 1849, *c.* 258; 1851, *c.* 455; 1853, *c.* 153;* and the case of *Westcott* v. *Fargo*, 61 N. Y. 542. The plaintiff put in evidence, on this point, the N. Y. St. of 1854, *c.* 245.†

The defendant also contended that, if the New England Express Company was a partnership, and not a corporation, Pearson was not a member of it, and objected to evidence admitted to prove that he was a member; and also objected to the allowance of certain items of the account annexed.

The judge found for the plaintiff; and reported the case for the determination of this court. The facts appear in the opinion.

E. Avery & H. G. Parker, (*G. W. Estabrook* with them,) for the defendant.

G. S. Hale & S. C. Darling, for the plaintiff.

MORTON, J. The question whether the New England Express Company, organized under the laws of the State of New York, was a corporation or a copartnership, has been before the courts of this and other states in several cases; and it has been uniformly held that it was a copartnership, and not a corporation. *Taft* v. *Ward*, 106 Mass. 518, and 111 Mass. 518. *Bodwell* v. *Eastman*, 106 Mass. 525. *Frost* v. *Walker*, 60 Maine, 468. See also *Westcott* v. *Fargo*, 61 N. Y. 542; *Witherhead* v. *Allen*, 3 Keyes, 562. The provisions of the statutes of New York in relation to such copartnership, that suits shall be prosecuted in the first instance against the officers of that association, are

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* The provisions of these statutes are stated in the margin of 106 Mass. 522, 523.

† Section 1 of this act provides that such associations may provide that the death of any stockholder or the assignment of his stock shall not work a dissolution of the association; and that such company shall not be dissolved except by a judgment of a court for fraud in its management, or other good cause shown, or in pursuance of its articles of association.

Section 2 gives the association power to provide by its articles that the shareholders may devolve upon any three or more of the partners the sole management of their business.

Section 3 is as follows: "This act shall in no court be construed to give said associations any rights and privileges as corporations."

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provisions respecting the remedy; of local operation, not binding here; and the liability of the individual partners may be here enforced according to the laws of this Commonwealth. *Taft* v. *Ward*, 106 Mass. 518. *Gott* v. *Dinsmore*, 111 Mass. 45. It follows that the defendant Pearson is liable in this action, if he was a member of said copartnership at the time the plaintiff's bill was contracted.

Upon this point, the following evidence was introduced at the trial. In October 1867, a meeting of the persons whose names are subscribed to the articles of association was held in New York, at which it was "resolved, that we organize ourselves, and such others as shall join hereafter, into a joint-stock association, to be known and designated as the New England Express Company, under the laws of the State of New York, and that we adopt and sign the articles of association as submitted and read by the secretary and hereafter subscribed." The articles of association were signed at said meeting, and it was also resolved "that the subscription list to the capital stock of the said company be opened at once," and a form of subscription was adopted, which, after giving the name of the company, and the names of officers, stated the capital stock at $2,500,000, and proceeded as follows: "We hereby severally subscribe for the number of shares of the capital stock of the New England Express Company, set opposite our respective names, and agree to pay to the treasurer of the said company five per cent on every share of one hundred dollars so subscribed for, within ten days from the time of making such subscription; and to pay such further calls, at such time and in such amounts as may be made by the company, in pursuance of its articles of association; and thereupon, and in consideration thereof, the said company is to issue to us, severally, its stock for the amount so subscribed. And we hereby severally authorize and direct the secretary of said company to sign our names to the articles of association of said company." Copies of this subscription paper, together with a prospectus, were circulated, and subscriptions from a large number of persons, amounting to forty-five hundred shares of the par value of one hundred dollars each, were obtained. Among other persons, the defendant Pearson, in the fall of 1867, subscribed for fifteen shares, and, in the summer of 1868, he paid

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the five per cent mentioned in said subscription paper. In the summer of 1868, the said company, through its executive committee, commenced and entered upon the express business, and, in the course of that business, made the contract with the plaintiff upon which this suit is brought.

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Upon this evidence, it was competent for the presiding justice of the Superior Court to find that the defendant was a member of the copartnership, and as such liable in this action.

The paper signed by the defendant was an absolute subscription for fifteen shares of the capital stock of the New England Express Company. It contained no provision that it was not to take effect until the whole of the contemplated capital of two million five hundred thousand dollars was subscribed, or the performance of any other condition. It cannot be construed, as contended by the defendant, to be a mere promise to take stock in a company thereafterwards to be formed. The company was already formed and organized under the laws of New York. Upon examining the articles of association and prospectus, it is clear that it was not contemplated that the formation of the company, or its entry upon active business, was to be delayed until the whole of the capital was taken. The ninth clause of the prospectus declares that the company "is organized with a capital stock of two million five hundred thousand dollars, in order to meet the wants of its business as it extends, and as far as possible to distribute the capital among business men." In the tenth clause, it is said: "It will be seen that a relatively small cash capital, and consequently a percentage only of the subscriptions, will be required to put the company in working order. The receipts thereafter will maintain and extend it." So the eleventh clause says that "five per cent of the stock subscribed will be required at the time of subscription, and subsequent calls not exceeding five per cent at any one time will be made at convenient intervals, as the business of the company requires." The articles of association purport to be the present organization of a joint-stock association under the laws of New York; the subscription paper purports to be an unconditional subscription to stock in an association already existing; and the terms of the prospectus, issued in connection with the subscription papers, show that it was the understanding and purpose of

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all parties, that the business of the company was to be entered upon before the whole capital was subscribed, and before all the assessments upon the stock subscribed were paid in.

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There is no ground for the claim of the defendant that his subscription was conditional, or that it was a promise to take stock in a company to be organized in the future. By the law of partnership, one becomes a member of a firm when he contributes to the capital stock and is admitted to a community of interest with the other partners in the property, business and profits of the partnership. The defendant's subscription to stock and payment of the assessment of five per cent, upon the call of the company, admitted him into such community of interest; it entitled him to a share of the profits, if any were thereafter made; and it is immaterial that he did not formally sign the articles of association, either personally or by his agent authorized to do so by the terms of his subscription. *Tyrrell* v. *Washburn*, 6 Allen, 466. *Frost* v. *Walker*, 60 Maine, 468. Being a partner, he is responsible to the creditors of the firm; and it cannot be contended that the facts, if proved, that he never attended meetings of the association, and that he had no knowledge of the amount of the subscription for stock or of the business of the firm, would shield him from this responsibility. So the fact that the plaintiff did not know, when its debt accrued, that the defendant was a partner, is immaterial. It has a right to claim against all who were in fact partners at that time, whether known to it or not. So also the fact that the association never issued certificates of stock is immaterial. Such certificates were not to be issued until all the assessments were paid, and were not conditions precedent to the formation of the partnership. The relations of the partners to each other and to creditors would be the same whether they were issued or not. *Hawes* v. *Anglo-Saxon Petroleum Co.* 101 Mass. 385.

At the trial, the defendant excepted to the admission in evidence of an entry upon the cash-book of the New England Express Company, introduced solely for the purpose of showing that the seventy-five dollars paid by the defendant was received by the treasurer of the company. It was established by other evidence, not objected to, that the defendant paid this amount to Eastman, one of the executive committee of the company.

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If it was necessary to prove that the amount paid was received by the company, the evidence that it was paid in good faith to one of the executive committee, which had the management and control of all the affairs of the company, was sufficient to prove that fact. The further evidence to show that Eastman handed it to the treasurer was unnecessary. If, therefore, the entry upon the cash-book was erroneously admitted, it was immaterial, and did not prejudice the defendant.

The case at an early stage was referred to an auditor, who, after a full hearing of the parties, made his report to the court. At the trial in the Superior Court, the defendant for the first time objected to the allowance of items numbered 5, 6, 10 and 11 in the account annexed to the declaration, "upon the ground of the form in which they were charged." The fifth item is "to transportation of cubic feet of extra freight between Worcester and Norwich, in October, $227.09." The others are like it. This mode of declaring is objectionable, and, if the defendant had moved in season, he would have been entitled to an amendment specifying the particulars of this general charge. But we are of opinion that the objection was taken too late. By going to a trial upon the merits before the auditor, without making any objection, he must be deemed to have waived objections merely of form, which, if made known, could have been cured without loss of time or expense by an amendment.

Upon the whole case, therefore, we are of opinion that the finding of the Superior Court was correct; and that the plaintiff is entitled to judgment thereon.

Judgment for the plaintiff.

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ASA P. MORSE *vs.* GOODRICH M. DAYTON.

Suffolk. March 2. — 3, 1880. ENDICOTT & SOULE, JJ., absent.

The omission of a debtor, at the trial of an appeal by him from the judgment of a magistrate upon charges of fraud under the Gen. Sts. c. 124, to file in court copies of the charges and the plea thereto, and of his examination before the magistrate, does not entitle the creditor, after proceeding to trial without raising any objection on this ground, to have the debtor defaulted.

APPEAL by a debtor from the findings and sentence of a master in chancery upon charges of fraud filed against him by a judgment creditor, under the Gen. Sts. c. 124, upon his application to take the oath for the relief of poor debtors.

The appeal was entered, and the master's certificate of the proceedings before him, as well as the original charges of fraud and the plea thereto, were filed, in the Superior Court at October term 1876. At the first trial, at April term 1877, the creditor proposed to offer evidence upon all the specifications in the charges; but the judge limited the evidence to the single charge upon which the debtor had been found guilty by the magistrate; and, it being pleaded and admitted that the debtor had been adjudged a bankrupt, and that the creditor's debt had been proved against his estate in bankruptcy, directed a verdict for the debtor, and reported the case to this court, which held both rulings to be erroneous, and ordered a new trial. 125 Mass. 47.

At the second trial, at January term 1879, before *Aldrich*, J., the creditor read the master's certificate of the proceedings before him, and moved to have the debtor defaulted, because he had failed to produce in the Superior Court copies of the charges of fraud and of the plea thereto, but instead thereof had produced the originals. This objection not having been previously taken, the judge overruled the motion.

In the course of the trial, it appeared that the debtor had been examined on oath by the creditor's attorney before the master, and his examination taken in writing, his answers read to him for correction, and no correction made; but that the examination was not afterwards sworn to nor signed by him. The creditor thereupon moved that the debtor be defaulted, because he had failed to produce in the Superior Court a copy of

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the examination so taken before the master. The judge overruled this motion also; but, at the request of the creditor, permitted the original examination, having been produced by the debtor, to be read by the creditor to the jury as evidence, by reason of admissions therein contained, upon the charges of fraud.

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The jury returned a verdict of not guilty upon all the charges; and the creditor alleged exceptions to the refusals to grant his motions.

D. B. Gove, for the creditor.

R. D. Smith & M. M. Weston, for the debtor, were not called upon.

By the Court. The omission of the debtor to file in the Superior Court copies of the charges of fraud and the plea thereto, and of his examination before the magistrate, did not entitle the creditor, after proceeding to trial without raising any objection on this ground, to have the debtor defaulted. Whether a postponement or suspension of the trial should have been granted, if moved for, until such copies were furnished, is not before us *Exceptions overruled*

John S. Lyons *vs.* Enos Ricker.

Suffolk. March 3.—4, 1880. Endicott & Soule, JJ., absent.

In an action for stone sold and delivered, the report of an auditor stated that the defendant, who had a contract with A. to furnish stone, asked the plaintiff to furnish a part, which he did, relying on the defendant for his pay; that nothing was said at the time as to who was to pay the plaintiff, and the plaintiff did not present a bill to the defendant until after the failure of A.; and found for the plaintiff, subject to the opinion of the court on the facts stated. The judge ruled that the report was *prima facie* evidence of the facts found, and that, on these facts, in the absence of other evidence, the plaintiff was entitled to recover. *Held*, that the rulings were correct.

In an action for goods sold and delivered, the defendant contended that the goods were furnished to A., and put in evidence a proof of debt by the plaintiff against the estate of A. in bankruptcy, which he contended included the claim in question. Annexed to the proof were certain promissory notes. The plaintiff testified that there was a mistake in the amount of his debt against A., and

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that these notes were a percentage of the amount due from A. according to a resolution of composition in bankruptcy; and put in the composition. A. was asked by the defendant if he knew what the amount of the debt due from him to the plaintiff was, but the judge ruled that this was immaterial. *Held*, that the resolution in bankruptcy was admissible; that it was not open to the defendant to contend, for the first time in this court, that it had not been recorded; and that the question to A. was immaterial.

If a bill of exceptions states that the excepting party offered certain evidence, and does not state that the judge excluded it, no ground of exception is shown.

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CONTRACT on an account annexed, for stone sold and delivered to the defendant, containing seven items. Item 1 related to stone used for a school-house in Newbury Street in Boston. Items 2–5 related to stone furnished for a school-house in King Street in Boston. Item 6 was for extra work on the last-named building, $92. Items 7 and 8 were credits.

The case was referred to an auditor, whose report stated, in regard to item 1, that the firm of S. J. & G. Tuttle made a contract with the city of Boston to furnish materials and do the mason-work on a school-house in Newbury Street; that the defendant made a contract with the Tuttles to furnish the foundation stone for this building, and, after this, asked the plaintiff to furnish a portion of the stone, which the plaintiff agreed to do, and did to the amount stated in item 1; that no question was made about the price charged; that, at the time the defendant requested the plaintiff to furnish the stone, nothing was said as to who was to pay the plaintiff, or how he was to be paid; that the plaintiff did not make out any bill for the stone to the Tuttles, or ask them to pay for it; that the plaintiff, in furnishing the stone, relied on the defendant for his pay, although he did not present a bill to him, or ask him for payment, until after the failure of the Tuttles; that the defendant was liable for the amount charged in item 1, unless, upon the facts reported, the court should be of opinion that the defendant was not liable.

The auditor's report also stated a finding for the plaintiff on items 2–5; that item 6 was not disputed; that items 7 and 8 were correct; and stated the account, showing a balance due the plaintiff.

At the trial in the Superior Court, before *Bacon*, J., the plaintiff was allowed, against the defendant's objection, to read the auditor's report to the jury.

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For the purpose of contradicting the testimony of the plaintiff, that he charged no part of the price of the stone to the Tuttles, the defendant produced from the files of the bankruptcy court a proof of debt, made and sworn to by the plaintiff against the Tuttles, annexed to which, as evidence of the debt proved, was a note of $1000 and a balance of an open account for hammered granite for $1203.95. There were also annexed to this proof three promissory notes, of the following amounts respectively, $122.81, $125.22, $128.83. The plaintiff, in reply to this claim that he had proved against the estate of the Tuttles more than was due him unless the debt sued for was due to the plaintiff from the Tuttles, testified that a mistake had been made in regard to the amount of his debt against the Tuttles, and was proceeding to explain the mistake by stating what the three notes above mentioned were, when the defendant objected. The judge ruled that the plaintiff might explain how the mistake occurred; and the defendant excepted. The plaintiff then testified that the three notes were thirty per cent of the amount due him from the Tuttles at the time of their failure, and was proceeding to state what per cent was named in the resolution of composition, when the defendant objected, on the ground that it was a matter of record. The plaintiff was then permitted, against the defendant's exception, to offer in evidence the resolution of composition.

Samuel J. Tuttle, a witness for the plaintiff, testified, on cross-examination, that he knew how much the plaintiff proved against his estate. The judge ruled, against the defendant's exception, that it was immaterial for the witness to state the amount so proved.

In regard to item 6, there was evidence that a certain firm had contracted with the city to build a school-house in King Street; that they had sub-contracted with the defendant to do the granite work, and that he had sub-contracted with the plaintiff to do a part of it; that, in the part which the plaintiff undertook to do, certain changes were made by the direction of the city, for which the plaintiff charged $92; and that this sum had been paid to the defendant by the city. The defendant contended that he was entitled to retain a portion of the profit on this sum; and, in support of this claim, offered to prove

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the following custom, namely, that, when extra work is done outside of a contract, the existing market rates shall be charged the person who has that work done, and when the two persons who are doing the contract come to figure up, that amount is included; and the person who does the extra work is allowed the same price for his work as though it had been included in the contract, and then the amount above that, received for their extra work, is ratably divided.

The judge instructed the jury that, upon the facts reported by the auditor in regard to the first item of the plaintiff's account, the defendant was liable; that the auditor's report was *prima facie* evidence; and that, if there was no other evidence affecting the defendant's liability, the jury would be required to find on this item for the plaintiff.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

E. Avery & J. T. Wilson, for the defendant.

A. A. Ranney & D. C. Linscott, for the plaintiff, were not called upon.

GRAY, C. J. 1. The auditor, by his report, found that the stone mentioned in the first item of the plaintiff's account was furnished by the plaintiff at the request and upon the sole credit of the defendant, and that the defendant was liable for the amount charged therefor, unless the court should be of opinion that, upon the facts reported by him, the defendant was not liable as matter of law. As upon those facts the defendant clearly was liable, the judge properly allowed the auditor's report to be read to the jury, and rightly instructed them that it was *prima facie* evidence, the effect of which was, that, if there was no other evidence affecting the question, the jury would be required to find on this item for the plaintiff.

2. The resolution of composition in bankruptcy was admissible in evidence, in connection with the plaintiff's testimony, to explain what the debt was which appeared by the defendant's evidence to have been proved by the plaintiff against the estate of Tuttle. The objection made by the defendant at the argument, that the resolution was not shown to have been recorded, does not appear to have been taken at the trial, and is not open to him upon the bill of exceptions.

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3. The amount of the debt proved by the plaintiff against the estate of Tuttle having been shown by the proof of debt from the files of the court in bankruptcy, and Tuttle having testified that he knew how much the plaintiff proved against his estate, the ruling which precluded him from stating the amount so proved was wholly immaterial.

4. The bill of exceptions does not show that the evidence of custom offered by the defendant was excluded.

Exceptions overruled.

CATHERINE KELLEY, administratrix, *vs.* BOSTON LEAD COMPANY.

Suffolk. March 4. — 5, 1880. ENDICOTT & SOULE, JJ., absent.

A master is not liable to a servant for an injury sustained by him from the fall of an elevator caused by the negligence of a fellow-servant.

TORT for a personal injury occasioned to the plaintiff's intestate by the alleged negligence of the defendant corporation. Trial in the Superior Court, before *Wilkinson*, J., who ordered a verdict for the defendant, and reported the case for the determination of this court, in substance as follows:

The defendant used in its business a building one story and a half in height, through which ran a driveway; on each side of the driveway were bins, into which the workmen were obliged to go to place the materials used in making white lead. Opposite to each bin was a platform elevator, projecting into the driveway, which was raised up and down by a rope running from the top of the elevator and fastened to and coiled around a revolving drum near the top of the building. There were grooves in the side timbers of the openings of each bin, into which each elevator fitted, and there were cleats to keep the elevator in place; but there were no appliances to keep the elevator from falling in case the rope which suspended it should break, or any other accident happen. The machinery which caused the drum to revolve was brought into gearing with a

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main shaft, and set in motion by pulling a wire rope which passed by the side of the elevator to the driveway. By pulling another rope, the elevator could be stopped.

These elevators were constructed and used for the purpose of taking the materials used in making white lead to the bins, and there was no evidence that they were constructed or used for any other purpose, although there was evidence that the workmen sometimes went up and down on them.

On the morning of the accident, the plaintiff's intestate, who had been in the employ of the defendant for about five weeks, was on his way to his work in one of the bins, when he was injured by one of the elevators falling from above. There was no evidence whether the elevator had been used before on that day or not, or that the rope was broken when the elevator came down, or that it was unfastened from the drum, or that the platform came out of place in coming down, or that there was anything out of order in any part of the machinery. The only evidence given in explanation of the sudden descent of the elevator was that the rope was loose or uncoiled from the drum, when a workman, who had gone into the second story for some vinegar to place in the bins, got upon the elevator with the vinegar, and the elevator immediately fell before he could touch either of the ropes used to set the elevator in motion and to stop it. This workman was in the habit of getting the vinegar used in the bins, and he would sometimes place the vinegar on the elevator and lower it, and sometimes he would go down on the elevator with the vinegar. He testified that in this instance he stepped upon the elevator without looking at the rope, or the drum, or at anything connected with the elevator; that, if the rope was loose or uncoiled over the drum, there was nothing to prevent his seeing it if he had looked.

Except the evidence hereinbefore stated, and any inference which a jury might legally draw from it, there was no evidence that the hoisting platform or its machinery was, in any respect, unsafe, out of repair, dangerous, or unsuitable for the purpose for which it was designed, or of any want of proper care or caution on the part of the defendant corporation, or its officers, or of the use of due care or caution on the part of the plaintiff's intestate.

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B. E. Perry, (*C. P. Gorely* with him,) for the plaintiff.

W. Gaston & L. S. Dabney, for the defendant, were not called upon.

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By the Court. There is no evidence that the defendant was negligent, or that the injury to the plaintiff's intestate happened from any other cause than the act or the negligence of a fellow-servant, either in leaving the elevator suspended at the second floor, or in leaving the rope out of gear, or in coming down on the elevator while the rope was out of gear. *Felch* v. *Allen*, 98 Mass. 572. *Wood* v. *New Bedford Coal Co.* 121 Mass. 252. *Smith* v. *Lowell Manuf. Co.* 124 Mass. 114. *Walker* v. *Boston & Maine Railroad*, *ante*, 8.

Judgment on the verdict.

Provident Institution for Savings *vs.* Louis W. Burnham.

Suffolk. March 4. — 5, 1880. Endicott & Soule, JJ., absent.

Under the St. of 1873, c. 44, providing that "no person shall serve as a traverse juror in the county of Suffolk more than thirty days at any term of court," it is no ground for a challenge to the array that, at the time it was made, more than thirty days had elapsed since the jurors had begun to serve, if during that time the court had been in session less than thirty days.

If a challenge to the array is made without legal ground, the fact that it is overruled without a replication thereto being filed affords no ground of exception.

At the trial of a writ of entry brought by a corporation, a witness testified that he was clerk of the demandant, and that two books which he produced were the records of the corporation kept by him, but these books were not otherwise offered in evidence. The demandant also put in evidence a mortgage deed of the demanded premises from a third person to itself, in which it was described as a corporation, and a subsequent deed executed by the tenant, which recited that the demandant was the holder of that mortgage, and in which he agreed to pay the mortgage debt to "said corporation." *Held*, that there was evidence of the corporate existence of the demandant.

Easements and restrictions cannot be recovered or enforced in a writ of entry, and need not be set forth therein.

By the Gen. Sts. c. 129, § 28, and c. 134, § 8, a real action is at issue when the plea is filed, and no formal joinder of issue by the demandant is necessary.

At the trial of a writ of entry, the judge instructed the jury, "that, as the tenant had shown no title other than naked possession, the demandant must show

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that his title is better than the naked possession of the tenant, and need show nothing more than such better title to entitle him to recover the possession." *Held*, that the tenant had no ground of exception.

Under the Gen. Sts. *c.* 134, §§ 13, 14, the demandant in a writ of entry is entitled to recover rents and profits, although not specifically demanded in the writ.

On a writ of entry to foreclose a mortgage, if neither party moves for conditional judgment, judgment is to be entered in the common form, under the Gen. Sts. *c.* 140, § 4, and the demandant cannot recover money paid for insurance.

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WRIT OF ENTRY, dated December 10, 1878, to recover a parcel of land in Boston, with an *ad damnum* of $12,000. The demandant, in its declaration, alleged that, "being seised of said premises in fee within twenty years now last past, it ought to be in quiet possession thereof, but the said tenant hath since unlawfully entered and holds the demandant out." Plea, *nul disseisin*. No replication or joinder of issue was filed.

The Superior Court, at April term 1879, came in on April 1, and on May 9, when this case was called for trial, had actually been in session twenty-eight days, and the same persons had been serving as jurors during all this time. The tenant interposed the following challenge to the array: "And now comes the said Louis W. Burnham, in his proper person, when the jury is about to be empanelled to try the issue in the above-entitled cause, and says that the said jury is an illegal jury, and each juror drawn is not a legal juryman, and not competent to serve otherwise, because more than thirty days have elapsed since said jury was first empanelled to try causes at this present term, and more than thirty consecutive days have elapsed since each and every juryman upon said panel entered upon the first day of his service at this term, and that each and every of said jurors has served more than thirty days this term, if the time of service is legally computed." No replication to this challenge was filed, nor was any suggestion made that issue had not been joined on the challenge, but it was immediately overruled by *Bacon*, J., upon its being read.

At the trial, one Brown testified that he was clerk of the plaintiff corporation, and that two books which he produced were the records of the corporation kept by him. These books were not otherwise offered in evidence; but no objection was made to them as not being in evidence until the motion for a nonsuit, as hereinafter mentioned; and they remained on the

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witness stand during the trial, and were taken into the jury-room without the knowledge of the tenant.

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The demandant put in evidence the following deeds: 1st. A mortgage deed dated July 8, 1871, with condition for the payment of $10,000 in five years, with interest, from Joseph Swallow to "the Provident Institution for Savings in the town of Boston, a corporation established by authority of the Commonwealth of Massachusetts," of the parcel of land described in the writ, "with all rights, easements, privileges and appurtenances to the same belonging, and subject to the restrictions set forth in the original deed from the Boston Water Power Company, recorded with Suffolk deeds, lib. 843, fol. 98." 2d. A deed from the tenant, dated April 2, 1877, reciting that "the Provident Institution for Savings in the town of Boston" is the holder of that mortgage (describing it), and that the tenant, being the owner of the equity of redemption, "has requested the said corporation" to grant further time for the payment of the mortgage debt; and that the "said corporation" has agreed to extend the time; and by which the tenant covenanted with the "said corporation" to pay the mortgage debt at the expiration of the extended term, together with accrued interest and any moneys paid by the "said corporation for taxes, insurance and other necessary charges on the mortgaged premises."

There was no other evidence that the demandant was a corporation, and no evidence as to the rights, easements, privileges, appurtenances and restrictions mentioned in the mortgage.

The tenant introduced no testimony, but rested his case upon the demandant's evidence, and asked the judge to direct a nonsuit for the following reasons: "The demandant has not proved a better title in itself. First. Because it has not shown or attempted to prove its own corporate existence. Second. Because the two books (about which the witness Brown was interrogated) were not themselves offered in evidence. Third. Because there is a fatal variance between the writ and declaration and the Swallow mortgage in the description of the property which is the subject of the action. Fourth. Because at the time the demandant closed its evidence and rested its case, it had not joined issue with the tenant." The judge overruled the motion for a nonsuit.

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The tenant requested the following instruction to the jury: "The demandant is not entitled in this case to recover for the rent of said premises of the tenant, nor for any taxes or insurance paid by the demandant, if any, because there are no allegations in the demandant's writ and declaration to base any such claim upon." The judge declined to give this instruction; "but gave one of an opposite character; and told the jury not to include any taxes, because they were paid before entry for foreclosure; and further instructed them that, as the tenant had shown no title other than naked possession, the demandant must show that his title is better than the naked possession of the tenant, and need show nothing more than such better title to entitle him to recover the possession."

The jury returned a verdict for the demandant, and assessed damages in the sum of $360.82; and "to all the rulings and action of the court as to the challenge to the array, to the motion for nonsuit, to the instruction prayed for, to the instructions actually given, and to the action as to the two books aforesaid," the tenant alleged exceptions.

P. H. Hutchinson, for the tenant.

F. C. Welch, for the demandant, was heard on the question of damages only.

GRAY, C. J. 1. By the St. of 1873, *c.* 44, it is enacted that "no person shall serve as a traverse juror in the county of Suffolk more than thirty days at any one term of court, unless for the purpose of finishing a case commenced within that time." The "thirty days" here intended are manifestly days on which the court is in session, and on which jurors may be called upon to serve. Upon the facts stated in the bill of exceptions, therefore, the challenge to the array set forth no legal ground of objection to the jury, and the tenant suffered no prejudice by the summary and informal manner in which it was overruled.

2. There was evidence of the corporate existence of the demandant; 1st. In the books of records produced by its clerk and proved by his testimony; and 2d. In the description of the demandant as a corporation in the mortgage referred to and affirmed in the deed executed by the tenant himself. *Worcester Medical Institution* v. *Harding*, 11 Cush. 285. *Williamsburg Ins. Co.* v. *Frothingham*, 122 Mass. 391.

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3. There was no variance in the description of the property demanded. Easements and restrictions cannot be recovered or enforced, and need not be set forth, in a writ of entry. Stearns on Real Actions, 150. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 104 Mass. 1. The objection made at the argument, that the demandant had not alleged his seisin to be in mortgage, was not taken at the trial, when it might have been cured by amendment, if necessary.

4. By the practice act, the case was at issue when the plea was filed, and no formal joinder of issue by the demandant was needed. Gen. Sts. *c.* 129, § 28; *c.* 134, § 8.

5. The instruction as to the proof of title was all that the case required. Gen. Sts. *c.* 134, § 7. There does not appear to have been any evidence or pretence of title in the tenant.

6. The instruction as to rent was correct. Under the statutes of the Commonwealth, the demandant in a writ of entry is entitled to recover rents and profits, although not specifically demanded in the writ. Gen. Sts. *c.* 134, §§ 13, 14. *Raymond* v. *Andrews*, 6 Cush. 265, 268.

7. But neither party having moved for conditional judgment, judgment was to be entered in the common form, and the demandant could not recover for insurance. Gen. Sts. *c.* 140, § 4. As the instructions given allowed the demandant to recover for insurance, the tenant's exceptions must be sustained and a new trial granted as to damages only, unless the demandant (as was intimated at the argument) elects to remit all damages and take judgment for possession of the land, in which case the entry will be *Exceptions overruled.*

Upon the delivery of this opinion, the demandant elected to remit all damages, and judgment was entered accordingly.

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HENRY B. NEWHALL *vs.* JOHN HAMILTON & another.

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Suffolk. March 8. — 9, 1880. ENDICOTT & SOULE, JJ., absent.

In an action for goods sold and delivered, the plaintiff's evidence tended to show that his agent offered to sell to the defendant goods to be used in rigging his vessel; that the defendant agreed to take the goods, if a third person, who was doing the work on the vessel, approved of the order; that he did approve; that the agent thereupon wrote the name of the third person on the order; and the goods were delivered and used on the vessel. *Held*, that the agent might be asked whether he wrote the name of the third person on the order at his request and direction.

CONTRACT on an account annexed, against the owners of the schooner Belle A. Keyes, for goods sold and delivered. Trial in the Superior Court, before *Allen*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff, who did business in New York, put in evidence tending to show that a salesman of his agent in Boston applied to the defendant Hamilton for an order for some blocks to be used in rigging the defendants' schooner, and was referred by him to the other defendant for the sizes required; that he afterwards brought Hamilton a list of the blocks, with the price, and Hamilton told him he might have the order if John H. Keyes approved it; that Keyes did approve it, and the salesman wrote over the list, in pencil, the words "Belle A. Keyes and owners. John H. Keyes," and handed it to the plaintiff's agent, who forwarded it to the plaintiff, who thereupon sent on the blocks in two barrels marked "John H. Keyes;" that Keyes received the blocks, the defendants giving him the money to pay freight on them, and afterwards took them to the schooner. There was no evidence that the defendants had seen the words written in pencil on the list. The plaintiff asked the salesman if he did not write the words in pencil at the request and by the direction of Keyes. The judge, against the defendants' objection, allowed the question to be put; and the witness answered that he did.

The defendants denied making any agreement with the salesman; and put in evidence tending to show that, before the sale of the blocks, they had made an agreement with Keyes by which they were to sell him one quarter part of the schooner, he to pay for the same by performing labor and furnishing the blocks

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required in rigging the vessel, and other materials; that, a month or more after the sale of the blocks, one quarter part of the vessel was registered in the name of the wife of Keyes, and she gave the defendants a mortgage on her quarter part of the vessel; that, in estimating the amount of the mortgage, Keyes was allowed by the defendants for the blocks as purchased by him; (but Keyes testified that he had no knowledge of this circumstance;) that, on referring the salesman to Keyes, they told him that Keyes was to furnish the blocks, and that they would not be responsible. There was no evidence that Keyes was authorized to contract on behalf of the defendants.

J. D. Thomson, for the defendants.

W. W. Dodge, for the plaintiff.

By the Court. The evidence that the names of the vessel and of Keyes were written upon the list of goods by the salesman at the request and by the direction of Keyes was competent as part of the transaction, and to show the approval of Keyes in accordance with the agreement between the parties which the other evidence for the plaintiff tended to prove.

Exceptions overruled.

Amelia Freison *vs.* President and Trustees of Bates College.

Suffolk. March 8. — 9, 1880. Endicott & Soule, JJ., absent.

A married woman, against whom a conditional judgment has been rendered, after she has appeared and pleaded since the St. of 1874, *c.* 184, § 3, on a writ of entry to foreclose a mortgage made by her under the Gen. Sts. *c.* 108, § 8, is estopped, on a writ of entry by her against the mortgagee or his grantee, to show that her deed was void for want of her husband's assent or a judge's approval.

Writ of entry, dated October 14, 1878, to recover a parcel of land in Boston. Plea, *nul disseisin*. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

On May 1, 1869, Joshua Benson conveyed the demanded premises to the demandant by warranty deed, and on the same day

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she mortgaged the premises back to him for $600. After the death of Benson, his executors brought a writ of entry against her to foreclose the mortgage, dated November 25, 1874, and she appeared at the January term 1875 of this court, and pleaded the general issue. On December 29, 1875, conditional judgment was entered in that suit, "that if the defendant shall, within two months, pay to the plaintiffs the sum due on the mortgage, viz., $698.32, with interest and costs of suit, the mortgage shall be void. and the defendant shall hold the premises discharged thereof, otherwise the plaintiff shall have his execution for possession and for the costs of suit." On March 2, 1876, execution for possession of said premises was issued, and the plaintiffs were given possession of the same by the officer. On June 9, 1876, the executors of Benson conveyed all their right, title and interest in and to said premises to the president and trustees of Bates College, the residuary legatee and devisee under the will of Benson, and the tenant in this action, and by virtue thereof the college still holds possession. The mortgage has not been paid. The demandant offered to prove that, at the time the mortgage was given, she was a married woman, having a husband alive who did not join in said deed nor assent in writing thereto, and that she did not obtain the consent of a judge of the Supreme Judicial, Superior, or Probate Court to said deed. The tenant requested the judge to rule that the demandant was precluded from maintaining this action by the judgment recovered against her on December 29, 1875. The judge so ruled, and directed a verdict for the tenant; and the demandant alleged exceptions.

J. W. Keith, for the demandant.

G. E. Smith, for the tenant, was not called upon.

GRAY, C. J. The demandant contends that the mortgage deed executed in 1869 by her alone, without her husband's concurrence or assent, or a judge's approval, was void, under the statute then in force and the decisions of this court. Gen. Sts. *c.* 108, § 3. *Concord Bank* v. *Bellis*, 10 Cush. 276. *Weed Sewing Machine Co.* v. *Emerson*, 115 Mass. 554. But the decisive answer to this position is that the conditional judgment rendered against her, after she had appeared and pleaded (as she was competent to do; St. 1874, *c.* 184, § 3;) in the former writ of entry brought

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to foreclose the mortgage, conclusively establishes the validity of the mortgage, the amount due thereon, and the right of the then demandants to hold the land on non-payment of that amount, and estops her to litigate any of those matters anew against the same parties or their assigns. Gen. Sts. *c.* 140, §§ 3–5. *Adams* v. *Barnes*, 17 Mass. 365. *Burke* v. *Miller*, 4 Gray, 114. *Sparhawk* v. *Wills*, 5 Gray, 423. *Stevens* v. *Miner*, 5 Gray, 429 note, and 110 Mass. 57. *Exceptions overruled.*

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HEPSEBETH FENTON *vs.* THOMAS LORD & others.

Suffolk. March 5. — 10, 1880. ENDICOTT & SOULE, JJ., absent.

A deed conveyed land to A., B. and C. in the following proportions, namely, one half to A. and the other half to B. and C., and the habendum was in the same form. The deed also stated that the land was subject to a mortgage which "the said grantees are to assume and pay." *Held*, that the grantees were tenants in common, and were jointly liable for breach of this agreement.

If A. conveys to B. land which is subject to a mortgage to C., which B. agrees to assume and pay, and the land is sold, under a power contained in the mortgage, for breach of condition, and A. becomes the purchaser for a sum less than the amount of the mortgage debt, this does not satisfy or extinguish the whole of that debt; and, if A. refuses to complete his purchase, B. is still liable to him upon the promise to pay the mortgage, at least for the surplus remaining after deducting the amount which A. agreed to pay at the sale.

If a deed of land, subject to a mortgage which the grantee assumes and agrees to pay, is executed by a husband and wife as grantors, the promise implied by law from the acceptance of the deed is to both, and an action for breach of the promise should be brought in the name of both, although the wife alone signed the mortgage note, and the husband joined "to give validity" thereto. But if, in an action by the wife alone, the merits of the case have been fully tried, she will be allowed to amend, after verdict in her favor, by joining her husband, taking no costs since the trial.

CONTRACT against Thomas Lord, Horace L. Cilley, and Martin W. Stimson. Writ dated July 23, 1878, returnable to the Superior Court.

The plaintiff in her declaration alleged that, on July 7, 1873, she executed and delivered to the defendants a deed, for the consideration as therein expressed of $25,000, of certain land in Boston, (being the same which had been conveyed to her on

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May 17, 1873, by George W. Torrey,) in which deed it was stipulated that "this conveyance is made subject to a mortgage for $16,400 given by said Hepsebeth to said Torrey, dated May 17, 1873, and recorded with Suffolk deeds, lib. 1159, fol. 213, which mortgage the said grantees are to assume and pay, the said mortgage forming part of the above-named consideration;" that the defendants accepted this deed, and entered into possession of the land under the same, and thereby became bound and promised to pay the mortgage debt, but had not done so, although the same has long since become due and payable, and they had been requested to pay it; and that the defendants owed the plaintiff the sum of $16,400 and interest.

The defendant Lord demurred to the declaration as insufficient in law to support the action. The Superior Court overruled the demurrer, and gave judgment thereon against the defendant Lord for $5775.80; and he appealed to this court.

The other defendants answered, denying all the allegations in the declaration, and setting up that, on February 15, 1879, the land was sold by public auction pursuant to a power contained in the mortgage to Torrey, and that at such sale the plaintiff became the purchaser for the sum of $11,600 and the additional sum of $196.12 for outstanding taxes, and signed and delivered to the auctioneer a contract to purchase the land at that price, and to pay $500 thereof immediately and the balance within ten days afterwards, but had paid only $375, and had refused to complete the purchase and fulfil her contract; and that the defendants, if previously liable, were thereupon released from the liability charged against them in the declaration.

At the trial upon this answer, before *Aldrich*, J., without a jury, it appeared that the deed to the defendants was executed by the plaintiff and her husband; began as follows: "Know all men by these presents that we, Thomas W. Fenton and Hepsebeth Fenton his wife in her right, of Medford in the county of Middlesex and Commonwealth of Massachusetts, in consideration of twenty-five thousand dollars to said Hepsebeth paid by Thomas Lord, Horace L. Cilley and Martin W. Stimson, all of Boston in the county of Suffolk and said Commonwealth, the receipt whereof is hereby acknowledged, do hereby give, grant, bargain, sell and convey unto the said Thomas Lord, Horace L.

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Cilley and Martin W. Stimson, in the proportions following, to wit, to the said Thomas Lord and his heirs and assigns one undivided half part, and to the said Horace L. Cilley and Martin W. Stimson and their heirs and assigns one undivided half part of a certain parcel of land;" contained a description of the land; the stipulations set forth in the declaration; an habendum one undivided half part to Lord, his heirs and assigns, and the other undivided half part to Cilley and Stimson, their heirs and assigns; and covenants of both grantors that the plaintiff was seised in fee, that the premises were free from incumbrances, that the grantors had good right to convey, and of general warranty except against the mortgage aforesaid; and concluded as follows: "In witness whereof we the said Thomas W. Fenton and Hepsebeth Fenton hereunto set our hands and seals this seventh day of July in the year one thousand eight hundred and seventy-three."

It also appeared that the mortgage was from the plaintiff only as grantor, her husband merely joining therein to give validity to the same; that the mortgage note was signed by her alone, and for her own debt of $16,400 to the mortgagee; and that the facts as to the sale under the power, and the purchase and contract of the plaintiff, were as set up in the answer.

The defendants Cilley and Stimson asked the judge to rule. "First, that the plaintiff should not have sued alone, but together with Thomas W. Fenton. Second, that the plaintiff had failed to prove the promise as alleged in the writ and declaration, the deed showing the promise to have been made to the plaintiff together with Thomas W. Fenton. Third, that the defendants were wrongly joined in the action with Lord, their promise to pay, if any there was, being not joint with him, but several. Fourth, that in no form of action could the defendants Cilley and Stimson be held for more than one half of the liabilities of the grantees in said deed. Fifth, that the acts of the plaintiff in bidding off and agreeing to buy the property, and breaking that contract, relieved the defendants Cilley and Stimson from all further liability whatsoever under said deed;" and to find for the defendants.

The judge refused to rule or find as requested, and found for the plaintiff against all the defendants for $6131.39, being the amount of the mortgage and interest, less the amount bid by

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the plaintiff at said sale; and the defendants Cilley and Stimson alleged exceptions.

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J. P. Treadwell, for Cilley and Stimson.

A. B. Wentworth, for Lord.

S. J. Thomas, for the plaintiff.

GRAY, C. J. The single point argued in support of the demurrer is that the declaration seeks to charge the defendants jointly instead of severally. But the deed which they have accepted is to them as tenants in common, and the description of the proportions in which they are to take does not affect their joint liability upon their promise therein stated. The demurrer of the defendant Lord was therefore rightly overruled, and for the same reason the third and fourth rulings requested by the other defendants were rightly refused.

The sale of the land to the plaintiff, under the power contained in the mortgage, for less than the amount of the mortgage debt, did not satisfy or extinguish the whole of that debt. The plaintiff having been held to account for the sum bid by her at that sale, and having been allowed to recover this surplus only, the defendants have not been prejudiced by her neglect to complete the purchase, or by the refusal to give the fifth ruling requested. *Hood* v. *Adams*, 124 Mass. 481, and *ante*, 207.

The only other objection argued is that stated in the first and second rulings requested, namely, that this action is brought by the plaintiff alone, without joining her husband. It is true that the deed to the defendants, having been executed by both husband and wife as grantors, conveying his right by the curtesy, as well as her title, the promise implied by law from the acceptance of the deed was to both, and this action should have been brought in the names of both, and not in that of the wife alone. *Mellen* v. *Whipple*, 1 Gray, 317. *Prentice* v. *Brimhall*, 123 Mass. 291. But as the merits of the case appear to have been fully tried, the plaintiff should be allowed to amend by joining her husband, taking no costs since the trial. Gen. Sts. *c.* 129, § 41. *Whitney* v. *Houghton*, 127 Mass. 527, and cases cited.

The proper entry therefore is that, upon such amendment being made in the Superior Court, the demurrer and the exceptions be overruled, and there be

Judgment for the plaintiffs.

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BENJAMIN F. COLCORD *vs.* ISAAC W. McDONALD.

Suffolk. March 9.—10, 1880. ENDICOTT & SOULE, JJ., absent.

Where the owner of a chattel, who has transferred the possession thereof to another person, with the agreement that it should become his property on the payment of a certain sum in weekly instalments, brings an action against a third person for a conversion of the chattel after payment of some of the instalments and a failure to pay the remainder, the measure of damages is the whole value of the property, with interest from the time of the conversion.

TORT for conversion. The case was submitted to the Superior Court, and, after judgment for the plaintiff for $35 and costs, to this court on appeal, on an agreed statement of facts in substance as follows:

The property in question was sold by the plaintiff to one Harrigan, upon a written lease or agreement signed by him, stipulating that he should pay $5 a week until the purchase price, $45, was paid, and that the property should remain in the plaintiff until paid for. Harrigan was in arrears upon all the payments, but the plaintiff accepted from time to time various sums, until all but $13 of the agreed price was paid. Harrigan mortgaged the property, and the mortgagee brought a writ of replevin against Harrigan, and the defendant, as a constable, served the writ and took and removed the property. After the taking, and while removing the same, the plaintiff made due demand upon the defendant for the property, which was then worth $35.

If, upon these facts, the plaintiff could recover the full value of the property, judgment was to be entered for him for $35 and costs; otherwise, for $13 and costs.

N. B. Bryant, for the defendant.

G. S. Littlefield, for the plaintiff.

BY THE COURT. The case is governed by former decisions. *Angier* v. *Taunton Paper Co.* 1 Gray, 621. *Carter* v. *Kingman*, 103 Mass. 517. *Judgment affirmed.*

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L. C. SEAVEY & another *vs.* DANIEL W. BECKLER.

Suffolk. March 8. — 16, 1880. ENDICOTT & SOULE, JJ., absent.

The provisions of the U. S. Rev. Sts. § 5106, for staying, upon the application of a bankrupt, and to await the determination of the question of his discharge, suits upon claims provable in bankruptcy, are applicable to a suit pending before a referee, to whom it has been referred by consent of parties and rule of court.

CONTRACT for work done and materials furnished. In the Superior Court, the case was referred by consent of parties and rule of court.

Before proceeding with the hearing before the referee, the defendant filed a suggestion in writing, that he had been adjudged a bankrupt under the bankrupt law of the United States, that the proceedings in bankruptcy were still pending in the United States District Court, and that six months had not yet elapsed since the commencement of those proceedings; and also filed a motion that the case be therefore continued to await such proceedings in bankruptcy, and especially the event of the defendant's discharge.

The referee returned his award in favor of the plaintiff, subject to the opinion of the court upon this question of law: At the hearing before the referee, the defendant objected to further proceedings, upon the ground, stated in the suggestion filed by him and which was annexed to the award, that he had been adjudged a bankrupt; and it appeared that the attachment upon the original writ had existed more than four months before the filing of the defendant's petition in bankruptcy. The referee overruled the objection, and ordered the defendant to proceed in the hearing.

The plaintiffs moved for a special judgment to enable them to proceed against the sureties upon the bond given to dissolve the attachment. The defendant objected to the acceptance of the award, upon the ground that the referee erred in refusing his application to stay proceedings. *Brigham*, C. J., ordered the award to be accepted, and special judgment entered as prayed for by the plaintiffs. The defendant appealed to this court.

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W. S. Stearns, for the plaintiffs, cited U. S. Rev. Sts. § 5106; St. 1875, *c.* 68; *Dunbar* v. *Baker*, 104 Mass. 211; *Bradford* v. *Rice*, 102 Mass. 472; *Bosworth* v. *Pomeroy*, 112 Mass. 293; *Ray* v. *Wight*, 119 Mass. 426, and cases cited; *Barnstable Savings Bank* v. *Higgins*, 124 Mass. 115.

S. J. Thomas, for the defendant.

GRAY, C. J. The bankrupt act of the United States peremptorily requires that any suit upon a claim provable in bankruptcy shall, upon the application of the bankrupt, be stayed to await the determination of the court in bankruptcy upon the question of his discharge, unless there is unreasonable delay on the part of the bankrupt in endeavoring to obtain his discharge, or leave is granted by the court in bankruptcy to prosecute the suit to judgment to ascertain the amount due. U. S. Rev. Sts. § 5106. The object of this enactment is to protect the bankrupt from being harassed by suits before the question of his discharge is determined, as well as to enable the assignee in bankruptcy to come in, if he elects so to do, and assume the defence of the suit. If either the bankrupt or the assignee seasonably avails himself of this privilege, it is not in the discretion of the state courts, or of any referee or other officer acting under their authority, to disobey the act of Congress and defeat its object by compelling the defendant to proceed to trial. *Ray* v. *Wight*, 119 Mass. 426. *Clinton National Bank* v. *Taylor*, 120 Mass. 124. *Towne* v. *Rice*, 122 Mass. 67. *Page* v. *Cole*, 123 Mass. 93.

In the present case it was stated in the suggestion filed by the bankrupt, brought to the notice of the referee before the hearing, and made a part of his award for the purpose of presenting the question of law to the court, that six months had not elapsed since the commencement of the proceedings in bankruptcy, thus showing that there could have been no delay in applying for a certificate of discharge. U. S. Rev. Sts. § 5108. And no order of the court in bankruptcy, giving leave to prosecute the suit to judgment, was produced. It was therefore the duty of the referee to suspend further proceedings before him, at least until application could be made to the court which appointed him for instructions. The objection having been seasonably interposed before the referee, and renewed

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before the court at the hearing upon the acceptance of the award, the award and judgment for the plaintiff are erroneous, and must be *Set aside.*

JACOB HERSEY *vs.* JOHN W. JONES.

Suffolk. March 8. — 16, 1880. ENDICOTT & SOULE, JJ., absent.

An assignment in bankruptcy, proved to have been executed and delivered by the register to the assignee, is, under the U. S. Rev. Sts. § 5049, conclusive evidence of his right to sue; and any defects or irregularities in the previous proceedings cannot be set up in defence of an action brought by him.

In an action by the assignee of a bankrupt, if the original assignment has not been recorded, and has been lost, secondary evidence of its contents is admissible.

ACTION by the assignee in bankruptcy of Arthur A. R. Bittern to recover back property conveyed by the debtor in fraud of the bankrupt act.

At the trial in the Superior Court, the plaintiff introduced in evidence the docket entries of the District Court of the United States and of its register in bankruptcy, showing the filing of the petition, the adjudication of bankruptcy, the choice of the plaintiff as assignee, his acceptance of the trust, and the execution by the register of an assignment of the bankrupt's estate to him, before the bringing of this action, but no approval of his election by the judge. The defendant introduced from the files of that court the judge's approval of the election at a date subsequent to the bringing of this action, but as of the date of the election. The plaintiff offered to show that the register made and delivered to him the instrument of assignment required by law; and that it had not been filed nor recorded, and had been lost; and offered to show its contents. The plaintiff also offered to show that it was not customary for the judge formally to approve assignees, and that it was customary for the register to deliver the assignment to the person elected assignee, as soon as he had accepted the trust, without waiting for the approval of the judge.

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Wilkinson, J., excluded the evidence, ruled that the assignee had no title to bring and maintain this action, directed a verdict for the defendant, and reported the case for the determination of this court. If the exclusion of evidence and the ruling were right, judgment was to be entered on the verdict; if wrong, the verdict to be set aside and a new trial ordered.

E. Avery, for the defendant. When this action was brought, the assignee had not been approved by the judge, and therefore had no right to act. U. S. Rev. Sts. § 5034. *In re Scheiffer*, 2 Bankr. Reg. 591. The subsequent approval by the judge cannot operate retrospectively. Neither the record of the court nor that of the register shows that any assignment was ever in fact delivered to the assignee. The plaintiff's offer to prove that an assignment had been delivered to him, and its contents, was properly rejected. *Burk* v. *Winters*, 28 Ark. 6. By the U. S. Rev. Sts. § 5049, a copy of the assignment, under the seal of the court and certified by the clerk, is conclusive evidence of the assignee's right to sue. The original assignment and such a certified copy are both primary evidence, and to warrant the introduction of secondary evidence it must be shown that neither could be produced. The customs offered to be proved could not control the express provision of the act of Congress.

H. N. Shepard, for the plaintiff.

GRAY, C. J. The bankrupt act of the United States provides that, if no choice of assignee is made by the creditors at the first meeting, the judge, or, if there be no opposing interest, the register, shall appoint one or more assignees, and that "all elections or appointments of assignees shall be subject to the approval of the judge;" U. S. Rev. Sts. § 5034; that, as soon as an assignee is appointed and qualified, the judge, or, where there is no opposing interest, the register, shall make an assignment to him of the debtor's property; § 5044; and that "a copy duly certified by the clerk of the court, under the seal thereof, of the assignment, shall be conclusive evidence of the title of the assignee to take, hold, sue for and recover the property of the bankrupt." § 5049.

We have not considered whether the facts of this case show a want of such approval of the plaintiff's election as assignee as

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the bankrupt act requires; because, if an assignment is proved to have been executed and delivered by the register to the assignee, it is conclusive evidence of his right to sue, and any defects or irregularities in the previous proceedings cannot be set up in defence of the action, but can only be availed of by application to the supervisory jurisdiction in equity of the Circuit Court of the United States. U. S. Rev. Sts. § 4986. *Wheelock* v. *Hastings*, 4 Met. 504. And if the original assignment has not been recorded, and has been lost or destroyed, so that it is impossible to produce either the original or a certified copy thereof, secondary evidence of its contents is admissible. *Brigham* v. *Coburn*, 10 Gray, 329. The evidence offered of the execution, delivery and contents of the assignment was therefore wrongly excluded. *New trial ordered.*

VASHTI H. PALMER *vs.* HELEN M. WALL.

Suffolk. March 11. — 16, 1880. ENDICOTT & SOULE, JJ., absent.

A deed of land from A. to B. recited that the consideration had been paid to C., A. holding only the record title; and that C. agreed to release the premises from a certain mortgage. The final clause of the deed stated that C. joined to release an equitable interest in the premises. The deed was signed and sealed by C. as well as by A. *Held*, that B. could maintain an action against C. for breach of the covenant contained in the deed.

CONTRACT for breach of an agreement in a deed of land to release the land from a mortgage. Trial in the Superior Court, without a jury, before *Gardner*, J., who reported the case for the consideration of this court, in substance as follows:

By the deed, Edward S. Rand, Jr., "in consideration of $500 to Helen M. Wall paid by Vashti H. Palmer," quitclaimed unto Palmer a parcel of land in Boston, described by metes and bounds, and stated to be "subject to a proportionate part of a mortgage of $3000, from which Helen M. Wall (by whom the consideration of this deed is received, the said Rand only holding the record title) agrees to release said granted premises." The

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final clause was: "In witness whereof we the said Edward S. Rand, Jr., and Helen M. Wall, who joins to release any equitable interest in said premises, have hereunto set our hands and seals," &c. The deed was signed and sealed by Rand and Wall. The defendant did not release the land from the mortgage described in the deed; and the mortgage was foreclosed.

The defendant asked the judge to rule that she was not liable under the deed. The judge so ruled; and found for the defendant.

If the ruling was wrong, the case was to stand for the assessment of damages; otherwise, judgment for the defendant.

E. B. Callender, for the plaintiff.

A. Russ & W. G. A. Pattee, for the defendant.

GRAY, C. J. The deed of conveyance to the plaintiff recites that Helen M. Wall has been paid the consideration thereof by the grantee, and is signed and sealed by her, as well as by the holder of the legal title, and states that she "agrees to release said granted premises" from a proportionate part of a mortgage for $3000. This is an express covenant by her to procure a discharge of the incumbrance. The final clause of the deed, which states that she "joins to release any equitable interest in said premises," does not state that to be her only purpose, and cannot impair the effect of the covenant previously expressed in apt and explicit terms. *Bartlett* v. *Bartlett*, 4 Allen, 440. *Perkins* v. *Richardson*, 11 Allen, 538. The plaintiff is therefore entitled to recover, and, by the terms of the report, the case is to stand in the Superior Court for *Assessment of damages.*

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JOHN M. CONNELL & others *vs.* JOSIAH T. REED & another.

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Suffolk. March 16. — 17, 1880. AMES & LORD, JJ., absent.

If a person can have a trade-mark in the words "East Indian" in connection with the word "remedy" upon bottles of medicine, (which is at least doubtful,) yet if he has falsely adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, he cannot maintain a bill in equity to restrain an infringement of such trade-mark.

GRAY, C. J. This is a bill in equity to restrain the defendants from infringing upon an exclusive right claimed by the plaintiffs in the words "East Indian," used together with the word "remedy" or "remedies," as a trade-mark upon bottles of medicine.

Although the master reports that there was no evidence that any other person than the plaintiffs or their agents had ever used these words in connection with the manufacture and sale of medicines, it is at least doubtful whether words in common use as designating a vast region of country and its products can be appropriated by any one as his exclusive trade-mark, separately from his own or some other name in which he has a peculiar right. *Canal Co.* v. *Clark*, 13 Wall. 311. *Taylor* v. *Carpenter*, 3 Story, 458, and 2 Sandf. Ch. 603. *Gilman* v. *Hunnewell*, 122 Mass. 139, 148.

But the conclusive answer to this suit is that the master has found, upon evidence which appears to us to be satisfactory, that the plaintiffs have adopted and used these words to denote and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, neither of which is the fact. Under these circumstances, to maintain this bill would be to lend the aid of the court to a scheme to defraud the public. *Pidding* v. *How*, 8 Sim. 477. *Perry* v. *Truefitt*, 6 Beav. 66, 76. *Leather Cloth Co.* v. *American Leather Cloth Co.* 4 DeG., J. & S. 137, and 11 H. L. Cas. 523, 532, 542, 548. *Palmer* v. *Harris*, 60 Penn. St. 156. The decree dismissing the bill must therefore be *Affirmed, with costs.*

J. L. S. Roberts, for the plaintiffs.

C. Robinson, Jr. & G. A. Blaney, for the defendants, were not called upon.

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ALBERT H. CHAPMAN & another *vs.* BANKER & TRADESMAN PUBLISHING COMPANY & another.

Suffolk. March 19. — 22, 1880. AMES & LORD, JJ., absent.

Debts due to different persons severally cannot be joined in one bill in equity under the Gen. Sts. *c.* 113, § 2, *cl.* 11.

If a bill in equity purports at the beginning thereof to be brought by ten persons, who are named therein as plaintiffs, but is in fact signed by only two of them, without any signature, either of themselves or of counsel, in behalf of the others, it is the bill of those two only.

This court will not take jurisdiction in equity, under the Gen. Sts. *c.* 113, § 2, *cl.* 11, of a claim for less than one hundred dollars, the amount and validity of which are not disputed; and two plaintiffs cannot, by improperly joining in one bill two such claims, which are in their nature several and distinct, both at law and in equity, compel the court to take jurisdiction thereof.

BILL IN EQUITY, under the Gen. Sts. *c.* 113, § 2, *cl.* 11; purporting at the beginning thereof to be brought by Albert H. Chapman, John F. Furlong, Charles H. Harding and seven other persons named, against a corporation established by law in this Commonwealth, and its treasurer; alleging that the corporation is severally indebted to the plaintiffs for labor performed in its business, according to several accounts annexed to the bill, and admits the justness and validity of their claims, and has no property within the Commonwealth that can be come at to be attached or taken on execution in a suit at law, but is the owner of certain newspapers, named in the bill, with the subscription lists and advertising contracts, trade-marks and good-will thereto belonging, of great value, which it is about to pass out of its possession and control; praying for a sale of this property, and its application to the payment of the plaintiff's debts and costs; and signed thus: "Albert H. Chapman. John F. Furlong." The bill was sworn to by Chapman and Furlong. The schedules annexed showed the sum of $81.50 due to Chapman, $37.32 to Furlong, $105 to Harding, and various smaller sums to the other persons named at the beginning of the bill.

The defendants filed a general demurrer, which was sustained by *Ames*, J.; and the plaintiffs appealed to the full court.

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H. R. Brigham, for the defendants, submitted the case without argument.

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C. A. Prince, for the plaintiffs.

GRAY, C. J. This is not a "creditor's bill," in the sense in which those words are used in the practice of courts of chancery, by which one or more creditors may sue in behalf of all for the administration of the assets of a deceased debtor, or the enforcement of a trust deed *inter vivos*, and any decree obtained is for the benefit of all. Story Eq. Pl. §§ 99–103 *a*. But it is a bill under the Gen. Sts. *c.* 113, § 2, *cl.* 11, the only purpose of which is to reach and apply to the payment of the debts of those who bring the bill property of the debtor which cannot be come at to be attached or taken on execution in a suit at law. In the form in which this provision was originally enacted, it in terms authorized "a bill by any creditor;" Sts. 1851, *c.* 206; 1858, *c.* 34; and the substitution in the Gen. Sts. of the plural "bills by creditors," in order to conform to the other clauses of the section in which it is incorporated, does not change its scope or effect. Such a bill is in the nature of an equitable attachment, brought by a single creditor for his own benefit, and in which other creditors cannot be admitted to join as plaintiffs, or to share in the benefits of the decree. *Silloway* v. *Columbia Ins. Co.* 8 Gray, 199. *Crompton* v. *Anthony*, 13 Allen, 33, 37. *Barry* v. *Abbot*, 100 Mass. 396. *Phœnix Ins. Co.* v. *Abbott*, 127 Mass. 558, 560.

The draft of the bill before us appears to have been prepared with the intention of having it signed by the ten persons named therein as plaintiffs; but as the bill is in fact signed by only two of them, without any signature, either of themselves or of counsel, in behalf of the others, it is the bill of those two only. The relief which they seek is the security and payment of two several and distinct money debts, one to each plaintiff, for the sum of less than $100, the amount and validity of which are not disputed.

The jurisdiction of this court is not to be invoked in behalf of claims of this kind and amount; and it is the duty of the court, in order to prevent its time from being consumed in frivolous controversies, to the detriment of suitors who are entitled to its attention, to decline to entertain them, although the defendants make no specific objection on this ground, by demurrer

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or otherwise. *Cummings* v. *Barrett*, 10 Cush. 186, 190. *Smith* v. *Williams*, 116 Mass. 510, 513. *Brace* v. *Taylor*, 2 Atk. 253. *Sweadesborough Church* v. *Shivers*, 1 C. E. Green, 453. Story Eq. Pl. §§ 500–502. The plaintiffs cannot, by improperly joining in one bill two such claims, which are in their nature several and distinct, both at law and in equity, compel the court to take jurisdiction thereof. *Jones* v. *Garcia del Rio*, Turn. & Russ. 297. *Paving Co.* v. *Mulford*, 100 U. S. 147.

The case differs from that of a bill by one or more members of a company or association in behalf of all having a common interest, as in *Seaton* v. *Grant*, L. R. 2 Ch. 459, and *Birmingham* v. *Gallagher*, 112 Mass. 190; or a bill by owners of several lots of land injured by the same nuisance, as in *Murray* v. *Hay*, 1 Barb. Ch. 59, and *Cadigan* v. *Brown*, 120 Mass. 493.

Bill dismissed.

DANIEL H. LOVEJOY *vs.* MIDDLESEX RAILROAD COMPANY.

Suffolk. March 22. — 23, 1880. AMES & LORD, JJ., absent.

A person, who witnessed an accident on a street railway, was asked, by an agent employed by the superintendent of the railway corporation, to look up the case, to give a statement of what he knew. He replied that he must first go to the place of the accident and verify the facts, and the agent said "all right." The statement was made and was used by the corporation, and the superintendent agreed that his bill should be paid. In an action against the corporation for his services in going to the place of the accident and in making the statement, the defendant requested the judge to rule that the agent had no authority to employ the plaintiff; and that, if the plaintiff knew that there was no necessity for him to go to the place of the accident, in order to make his statement, he could not recover. The judge declined to give this ruling, left the question of the agent's authority to the jury, and instructed the jury that, if the plaintiff was authorized to go to the place of the accident, and honestly believed at the time that it was necessary to go there, in order to make a correct statement, he could recover, although, in fact, it was not actually necessary. *Held*, that the defendant's exceptions to the rulings given, and to the refusal to rule as requested, must be overruled, with double costs.

CONTRACT for work and labor. Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

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The plaintiff, who was a physician, was a witness of a part of the circumstances of an accident on the defendant's railroad at Malden, by which a person was injured, and to whom the plaintiff rendered some services, though not at the request of any officer of the defendant; and he did not claim in this action any compensation for such services. Samuel Green, the foreman of the defendant's stables in Malden, was directed by the superintendent to look up the case. The superintendent testified that Green had general authority to find out anybody who had witnessed an accident, and to get from him information upon the subject; and that he directed Green to look up this particular case, and Green was discharging his duties to the defendant when he went to the plaintiff as hereinafter stated. Under these instructions, Green went to several witnesses of the accident, among them the plaintiff, and asked them to give him a statement of what they knew about it. The plaintiff testified that Green asked him to give a statement of all he knew about the case; that he told Green, that, in order to give the statement asked for, it would be necessary for him to go to Malden to verify his facts; that Green said, "All right, I will call in the afternoon for the statement;" that the plaintiff went to Malden and talked with a person who was looking out of a window with him at the time of the accident and witnessed it with him, and then came home, wrote a statement, directed it to the defendant, and it was called for and taken away by some person connected with the railroad; and that he then brought this action for his services in going to Malden and writing said statement. A collector, whom the plaintiff sent with his bill to the superintendent, testified that the latter looked at it and said it was all right, and that, if he would call again, the bill should be paid; which the superintendent denied. The statement was received by the defendant and remained in its possession until produced at the trial, and was used with others by the defendant in adjusting the claim made upon it by the representatives of the person killed by the accident. There was no other evidence of the plaintiff's employment. Green denied that he said anything to the plaintiff about going to Malden; and testified that he did not employ him in any way to do so, but simply asked him to give a statement of what he knew about the case.

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The defendant asked the judge to instruct the jury, that if, upon the request for a statement, the plaintiff said that it was necessary for him to go to Malden in order to make the statement, and the jury should believe that it was not necessary for him to go to Malden, and from all the circumstances and what he did in Malden the jury should believe such visit was not necessary or reasonable, then the plaintiff could not recover. The judge refused to give this instruction, and instructed the jury, that if they believed that the plaintiff, when he said he must go to Malden before he made his statement, knew that there was no necessity for him to go there to make his statement, he could not recover; but if they found that he was authorized to go, and that he honestly believed at the time that it was essential that he should do so in order to make a correct statement, then he could recover a reasonable price for his services, although the jury might now believe, under the evidence as it appeared at the trial, that it was not, in fact, actually necessary that he should have gone. The defendant also contended, as matter of law, that Green had no authority to employ any one, or to render the defendant liable for anything in regard to the matter. The judge ruled that it was a question for the jury, and submitted it to them, under instructions not otherwise objected to; and the defendant alleged exceptions to the rulings given and to the refusals to rule as requested.

L. M. Child, for the defendant.

W. P. Wilson, for the plaintiff, moved for double costs.

THE COURT held the exceptions to be frivolous, and therefore *Overruled them, with double costs.*

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CATHERINE C. CLARKE *vs.* MARY A. CHARTER.

Suffolk. March 15. — 24, 1880. AMES & LORD, JJ., absent.

On the defendant's exception to the refusal of the judge to rule that the plaintiff's evidence was insufficient to support a verdict for him, it is not open to the defendant to object in this court that the action was prematurely brought, or to the form of the declaration, or to contend that the proofs did not correspond with the allegations.

If rent is payable in advance on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor.

CONTRACT. The declaration was as follows: "And the plaintiff says the defendant owes her $25, for the use and occupation of a certain tenement hired of the plaintiff by the defendant." Annexed to the declaration was a bill of particulars, in which the defendant was charged with "rent of house 31 Chapman Street, one month in advance, from May 1, 1879, to June 1, 1879, $50," and credited with "Cash, $25." Writ dated May 29, 1879. Answer, a general denial.

At the trial in the Superior Court, before *Putnam*, J., the plaintiff's evidence tended to show that the defendant hired the house in question of the plaintiff, in the early part of 1878, at the rate of $600 per annum, payable $50 per month in advance, on the first day of each month; that the defendant occupied through May 1879, and paid the rent monthly, either on the first day or in the early part of each month, except in May 1879; and that, about May 5, she paid the plaintiff $25 on account of that month's rent, and had paid none since. The defendant's evidence tended to contradict the plaintiff's only in respect to the terms of payment; and to show that the rent was not payable in advance, on the first day of each month, but that the defendant might pay it at any time during the month. The plaintiff, on cross-examination, admitted that she did not demand the rent on the first day of each month, nor on May 1, 1879; but she testified that it might have been on May 2 that she called; that the defendant told her to come again in a few days; and that she went on May 5, and received the $25 credited in the account.

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This was all the evidence in the case; and the defendant asked the judge to rule as follows: "1. The plaintiff's evidence is insufficient to support a verdict for the plaintiff. 2. All of the evidence in the case is insufficient to support a verdict for the plaintiff. 3. The plaintiff's failure to demand the rent upon the first day of the month is a waiver of her right to demand it in advance."

The judge declined so to rule; and instructed the jury that it was a question of fact for them, whether the agreement was made as the plaintiff alleged; that, if it was, the plaintiff was entitled to recover; that if it was not so made, or if there was reasonable doubt about it, she was not entitled to a verdict; and that, if the defendant agreed to pay the rent in advance, the fact that the plaintiff did not call for it on May 1 would not preclude her from recovery.

The jury returned a verdict for the plaintiff in the sum of $25; and the defendant alleged exceptions.

J. W. Pickering, for the defendant. 1. An action for use and occupation will not lie to recover rent due in advance, before the expiration of the month for which it is sought to be recovered. Woodf. Landl. & Ten. (11th ed.) 340. *Angell* v. *Randall*, 16 L. T. (N. S.) 498. 2. A demand not having been made, the right to recover rent in advance was waived.

D. F. Fitz & J. H. Sherburne, for the plaintiff.

By the Court. No objection that the action was prematurely brought, nor to the form of the declaration, nor to any variance between the allegations and the proof, appears to have been made at the trial. No demand of the rent on the day it fell due was necessary to entitle the plaintiff to maintain an action therefor. *Exceptions overruled.*

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MICHAEL GILHOOLEY *vs.* SOLOMON SANBORN & another.

Suffolk. March 10. — 26, 1880. ENDICOTT & SOULE, JJ., absent.

In an action for personal injuries occasioned to the plaintiff by the caving in of earth on the side of a trench, upon which he was employed by the defendant, who was performing the work under a written contract with a city, such contract is *res inter alios*, and inadmissible to prove that it was the duty of the defendant to brace the trench.

TORT for personal injuries. Trial in the Superior Court, before *Wilkinson*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff was employed by the defendant to lay sewer-pipe in a trench in Union Avenue, Jamaica Plain, and, while engaged in such work, was injured by the caving in of the earth on one side of the trench. The trench was not braced; and the plaintiff contended that the accident was occasioned by the negligence of the defendants in failing to brace it.

The defendants were performing the work under a written contract with the city of Boston, by which they undertook to dig the trenches and lay the sewers in Green Street and Union Avenue, the latter street connecting with the former. Prior to the accident, they had dug the trench and laid the sewer as far on Green Street as its junction with Union Avenue, and had braced the trench the entire length on Green Street; but there was evidence that the soil in Union Avenue was different from that in Green Street. There was no evidence as to whether the trenches on Green Street and Union Avenue were of the same or different depth or width. The defendants, prior to the accident, had been at work about a week on the trench in Union Avenue, and had laid the sewer for about 500 feet. No part of this trench had been braced or planked. At the place of the accident, the depth was about seven feet, the width at the bottom about eighteen inches, and at the top about three feet, and the soil was a mixture of loam and sand. There was conflicting evidence as to whether the trench should properly have been braced. The defendants admitted that, if the trench required bracing, it was their duty to brace it. The plaintiff offered in evidence the contract of the defendants with the city, which

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contained the following provision: "The trenches shall be thoroughly braced and planked." The judge inquired of the defendants if they admitted that, if the trench required bracing, it was their duty to brace it; to which they answered that they did. The judge then ruled, that, as the only ground on which the contract could be admitted was as an admission of the duty of the defendants to brace if necessary, and as that obligation was admitted, the contract should be excluded.

The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

R. M. Morse, Jr., for the plaintiff.

W. Gaston & C. L. B. Whitney, for the defendants.

LORD, J. But a single question is presented in this case. The plaintiff contends that he was injured in a trench by reason of the sides' caving because not sufficiently braced. The defendants admitted at the trial, that, if bracing were necessary, it was their duty to brace. It is immaterial to inquire how this duty devolved upon the defendants, though there seem to be only two modes by which it could be: one mode would be by force of law, because of the obligation on the part of an employer to use reasonable precautions to guard against injury to the workmen in his employment; the other mode would be by contract between the parties. A contract between the defendants and a third party is *res inter alios*. As between the parties to this suit, it cannot be used as an admission of duty, or of reasonableness or propriety. No man, by entering into a contract with another to perform work for him, agrees, by entering into the contract, either that the work to be done is necessary, or useful, or reasonable, or proper. He has no responsibility for the work, provided it be not illegal nor immoral. These suggestions preclude the competency of the defendants' contract with the city of Boston, as being *res inter alios*, and liable, if not calculated, to mislead. The admissibility of that contract being the only question submitted to us, the exceptions must be

Overruled.

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JOHN S. HOOPER & others *vs.* WALTER FARNSWORTH & another, trustees.

Suffolk. March 24. — 26, 1880. AMES & LORD, JJ., absent.

A lease of a "store" includes the land under it and to the middle of a private way in the rear, the fee of which is in the lessor.

CONTRACT upon an account annexed, for money had and received, being the amount of over-paid taxes assessed from 1864 to 1877 on premises leased by the plaintiffs of the defendants. Writ dated June 13, 1879. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court on appeal, on an agreed statement of facts in substance as follows:

The plaintiffs and defendants entered into an indenture of lease, by which the plaintiffs hired of the defendants the "store numbered 120 and 122 State Street, Boston," for the term of five years from April 1, 1864, at the rent of $3000 per annum, and agreed to pay "all taxes and duties levied or to be levied thereon during the term, and also the rent and taxes, as above stated, for such farther time as the lessee may hold the same." On April 1, 1869, the lease was renewed for five years "at thirty-five hundred dollars per annum and taxes;" and, on April 1, 1875, the lease was again renewed for five years, "at thirty-five hundred dollars per annum and taxes." The store described in the lease opens upon a passageway in the rear called Butler's Row, used as a back street to this and other stores abutting thereon long before this lease was made, and ever since. The city of Boston, until the year 1860, taxed the store and the land under the same, valuing the two together. From 1860 to 1877 inclusive, the store and land have been valued separately, and the land taxed as containing 1100 square feet. This measurement is found to contain such portion of the passageway as would be enclosed between the side lines of the store extended to the middle of the way and the middle line of the way. The fee in this portion has been in the defendants during the continuance of the lease, but the land had been used for the purposes above described for more than twenty years before this lease was

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signed, and no other use of it has ever been made by the defendants, and no use of it at all by them since this lease was made. The part of Butler's Row on which the store abuts is a private way, and has never been laid out or accepted by the city as a street. In the year 1878, the assessors of the city were notified that a portion of the land assessed by them as part of the premises Nos. 120 and 122 State Street was included in said passageway, and they thereupon made an abatement in the tax for that year for the whole of said portion, on the ground that it was customary where land was used for such purposes not to assess a tax upon it; and it is admitted that such is the custom, and that no such notice had been previously given to the assessors; and that, until the year 1878, such custom was unknown to the defendants, who, however, never supposed that land used by the city as a street was taxed. The tax-bills were rendered to and in the name of the defendants, who called upon the plaintiffs to pay the same; and this was usually done by the defendants sending the bills to the plaintiffs, who paid them to the city collector and kept the receipted bills.

If, upon the above facts, the plaintiffs could recover any portion of the taxes paid upon the land in the passageway, judgment was to be entered for them for such portion as they were entitled to; otherwise, for the defendants.

L. M. Child, for the plaintiffs.

A. L. Lincoln, Jr., for the defendants.

By the Court. The lease of the "store" included the land under it and to the middle of the private way adjoining. *Rogers* v. *Snow*, 118 Mass. 118. *Gear* v. *Barnum*, 37 Conn. 229. *Boston* v. *Richardson*, 13 Allen, 146, 154. *Smith* v. *Howden*, 14 C. B. (N. S.) 398. The whole of that land was rightly taxed, and the plaintiffs were bound by their covenant to pay the tax thereon.

Judgment affirmed.

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PATRICK MURPHY *vs.* REDMOND WELCH.

Middlesex. Jan. 13.—March 2, 1880. COLT & LORD, JJ., absent.

While two parcels of land are owned by the same person, there can be no use of one of them in favor of the other which will create an easement.

If the owner of a parcel of land mortgages it, he cannot subsequently by grant create an easement in the land to the prejudice of the rights of the mortgagee.

The use by the grantee of an easement, in land previously mortgaged by the grantor, does not begin to be adverse until possession is taken by the mortgagee.

An assignment of a mortgage of land from a loan and fund association, concluding, "In witness whereof the said association, by J. S., its president, duly authorized for this purpose, has hereunto set its seal, and the said J. S., president as aforesaid, has hereunto set his hand," signed "J. S., President of" (giving the name of the association), and sealed, is in form executed by the association.

TORT for breaking and entering the plaintiff's close in Lowell. Writ dated February 25, 1878. Trial in the Superior Court, before *Putnam*, J., who directed a verdict for the plaintiff, and reported the case for the determination of this court, in substance as follows:

The plaintiff and the defendant are owners of adjoining lots of land on North Street in Lowell. In 1856 both of these lots were owned by Michael Pendergrast, who, on August 6 in that year, mortgaged, by deed containing a power of sale, the lot now owned by the plaintiff to the Lowell Mutual Loan and Fund Association. On the 12th of the same month, the mortgage still outstanding, he conveyed the lot now owned by the defendant to John Cowley, reserving to himself a right of way four feet wide over the land conveyed, and granting to Cowley a right of way of the same width over the lot which he had mortgaged, as above stated, so that there was a way eight feet wide running from North Street to the rear of the lots, which way was to remain forever open as a way for the common use of the owners of the two lots. It was admitted that the defendant had used this way daily with his horse and wagon.

On June 1, 1858, the Lowell Mutual Loan and Fund Association, without previously entering upon the premises, sold and conveyed, under the power contained in its mortgage, the premises therein described to J. L. Phipps and Henry Souther, and on the same day assigned the mortgage to them, and they at once entered

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and took possession of the premises under the title so acquired. On May 1, 1861, Phipps conveyed his interest to Souther, who, on March 14, 1865, conveyed the lot to the plaintiff. Since the date of the last-named deed the plaintiff has been in possession, claiming title under the same, and he also occupied the land as tenant at will from June 1, 1858, to the date of his deed from Souther.

The defendant contended that the sale under the power contained in the mortgage was invalid, for certain reasons which it is now unnecessary to state; and also contended that no title passed by the assignment of the mortgage. This assignment purported to be the deed of the Lowell Mutual Loan and Fund Association; and the concluding clause was as follows: "In witness whereof the said association, by John W. Graves, its president, duly authorized for this purpose, has hereunto set its seal, and the said John W. Graves, president as aforesaid, has hereunto set his hand," &c. It was signed "John W. Graves, President of L. M. L. and Fund Association," and was sealed. It was also acknowledged by Graves as "the free act and deed of said association."

The defendant offered to show that he and his grantors had acquired a right of way by prescription over the plaintiff's land, against all parties, including the mortgagee, by an uninterrupted use of the passageway from 1846, and also claimed under the conveyance from Pendergrast to Cowley.

The judge ruled that Pendergrast, owning only the equity of redemption, could not create any easement or passageway in the premises mortgaged, either as against the mortgagee or those claiming lawfully under it; that, as the plaintiff's grantor held an assignment of the mortgage, as well as a deed of the premises under the power of sale, it was immaterial whether the power of sale was properly executed or not; and that, as the mortgagee did not take possession under the mortgage until the sale, and as the plaintiff, claiming under said deed and assignment, took possession under the same, the defendant could not set up a prescriptive title to a right of passage, because the defendant, under his title, had the right to use the strip aforesaid, until transfer or sale under the mortgage, namely, until June 1, 1858, and since that time twenty years had not elapsed prior to the

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date of the writ. A verdict was ordered accordingly for the plaintiff in the sum of $1 damages.

If the rulings were correct, judgment was to be entered on the verdict; otherwise, a new trial to be ordered.

G. Stevens & C. H. Conant, for the defendant.

D. S. Richardson & J. Davis, for the plaintiff.

AMES, J. It appears from the report that the lots belonging to these parties respectively were both of them, in August 1856, owned by Michael Pendergrast, and were at that time but one lot. Of course, while they continued to be in his ownership, it would be impossible that there could be such an adverse use as would create an easement in favor of one of the lots within the limits of the other. On the sixth day of that month, Pendergrast mortgaged the lot now held by the plaintiff to the Lowell Mutual Loan and Fund Association, and in that mortgage no reservation or provision of any kind was made for the creation or use of a passageway for the common benefit of the two lots. On the contrary, the mortgage includes in its description the strip of land four feet in width over which the defendant claims the right of passage. For the purposes of this trial, it was correctly ruled to be immaterial whether the foreclosure sale by the association was valid or not. Whatever title the association had in the mortgaged premises was effectually transferred, either by that sale or by the assignment of the mortgage, to the parties from whom the plaintiff derives his title; and it appears that possession of the premises was taken by his grantors, under their conveyance from the association, as early as June 1, 1858. The assignment of the mortgage under which the plaintiff claims purports on its face to be the deed of the corporation, under its seal, affixed by its president duly authorized for that purpose, and acknowledged to be the free act and deed of the association, and signed by its president by its authority. This is sufficient to remove all objection on the ground that it is not duly executed. *Hutchins* v. *Byrnes*, 9 Gray, 367. *Pitman* v. *Kintner*, 5 Blackf. 250.

It is true that the defendant's occupation and use of the passageway began as early as August 1856, but it cannot be said at that time to have had any of the characteristics of an adverse use. On the contrary, it was by virtue of a conveyance of the

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owner of the equity of redemption, and could have no effect upon the rights of the mortgagees and those claiming under them. A mortgagor can make no lease or contract respecting the mortgaged premises effectual to bind the mortgagee or prejudicial to his title. *Perkins* v. *Pitts*, 11 Mass. 125, 130. Exclusive possession by a mortgagor and those claiming under him, with a claim of exclusive ownership, does not of itself amount to a disseisin of the mortgagee so as to invalidate a transfer of the mortgage title. There is nothing in the facts reported to show that any claim adverse to the mortgagee was known to the association. *Sheridan* v. *Welch*, 8 Allen, 166.

The plaintiff claims under the older and paramount title; and, as the defendant fails to show any adverse enjoyment covering twenty entire years before the suit was brought, there must be

Judgment on the verdict.

JOHN HAMILTON *vs.* JOHN M. FARRAR.

Middlesex. Jan. 16. — March 2, 1880. COLT & LORD, JJ., absent.

If two tenants in common of an estate, part of which is a mill privilege, make partition thereof, and execute mutual deeds of release, which stipulate that neither the grantor, nor his heirs, nor any other person claiming under him or them, shall "claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof forever," this is an extinguishment of the privilege, which cannot be revived by a grantee of one of the cotenants as against the other.

COMPLAINT under the mill act, Gen. Sts. *c.* 149. Trial in the Superior Court, without a jury, before *Colburn*, J., who ruled that the respondent was not entitled to flow the complainant's land without compensation, and ordered judgment for the complainant. The respondent alleged exceptions, which appear in the opinion.

H. W. Bragg, for the respondent.

G. C. Travis, for the complainant.

MORTON, J. The city of Boston in 1858 conveyed to Hamilton and Brown a tract of land with the buildings thereon in Framingham, called the "Upper Privilege," upon which was

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then a mill-dam. This undoubtedly conveyed to them the mill privilege and the right to flow the land above the dam in the manner in which it had been flowed. But in 1860, Hamilton and Brown sold the mill building, which was taken down and carried away, and tore down the dam, leaving only a part of the abutments, and used the land above, which had been flowed by it, for agricultural purposes, occupying it as tenants in common. In 1862, they made partition of their land above the dam, the dividing line running across the southerly abutment of the old dam, and executed to each other mutual deeds of release. In each deed, the grantor conveys all his "right, title and interest" in the land described. The habendum clause in the deed from Brown to Hamilton is as follows: "To have and to hold the released premises, with all the privileges and appurtenances thereto belonging, to the said John Hamilton and to his heirs and assigns, so that neither I, the said Joseph Brown, nor my heirs, nor any other person claiming from or under me or them, in the name, right or stead of me or them, shall or will by any way or means have, claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof forever." The habendum clause of the deed from Hamilton to Brown is in the same language, *mutatis mutandis*.

The two grantors, being the owners as tenants in common of the mill privilege and of the land to which it was attached, had the right, if they saw fit, to abandon and extinguish it. *French* v. *Braintree Manuf. Co.* 23 Pick. 216. The continued existence in either of a right to flow the land of the other is inconsistent with the deeds. The assertion of such right is a direct violation of their stipulations. The deeds therefore necessarily operate as a voluntary abandonment and extinguishment of the mill privilege.

It follows that the respondent could not and did not derive from Brown any right to build a dam on the site of the old dam, and to flow the complainant's land without compensation. The ruling of the Superior Court was correct.

Exceptions overruled.

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HIRAM E. HARTFORD *vs.* COÖPERATIVE MUTUAL HOMESTEAD COMPANY.

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Middlesex. Jan. 16. — March 2, 1880. COLT & LORD, JJ., absent.

A by-law of a coöperative building association provided that, "if any member wishes to withdraw from the company, he shall give notice in writing to the clerk of such intention, when the company shall, within one year from the receipt of such notice, pay to said member the sum of money which he has paid as instalments and the one hundred dollars which he originally paid for stock, which certificate of stock he shall deliver to the treasurer." Another by-law provided that, "if any member wilfully neglects his payments, he shall, after one year, take what money he has paid to the company as instalments and for stock, the certificate of which stock he shall surrender to the treasurer." *Held*, that the two by-laws should be construed together; and that a member, who had not given notice of his intention to withdraw until within less than a year before bringing suit, could not maintain an action against the association for the amount of stock and instalments paid by him.

CONTRACT by a member of a coöperative building association, to recover back $100 paid in as capital stock and $140 paid as instalments to the association. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on agreed facts, which appear in the opinion.

G. Stevens & C. H. Conant, for the plaintiff.

A. B. Wentworth & S. W. Hatheway, for the defendant.

MORTON, J. The plaintiff's right to maintain this action depends upon the construction of the eighth article of the by-laws of the defendant corporation. He contends that, by his wilful neglect to pay his instalments for a year, he, without any notice to the corporation, had the right to withdraw, and to require it to pay him the amount of instalments and the capital stock he had paid in. This claim rests upon a misconstruction of the by-laws. The seventh article, which is entitled "withdrawals," provides that, "if any member wishes to withdraw from the company, he shall give notice in writing to the clerk of such intention, when the company shall, within one year from the receipt of such notice, pay to said member the sum of money which he has paid as instalments and the one hundred dollars which he originally paid for stock, which certificate of stock with the bond of his lot he shall deliver to the treasurer." The eighth article, which is entitled "non-payments," provides that, "if any

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member fails to pay his instalments or rent, or both, for sixty days, it shall be the duty of the treasurer to report the same to the directors, who shall examine his case, and, if he can show good reason why he has not paid the same, then the company may assume his payments until such time as he can pay the same and all arrears that may have accumulated thereon. But if any member wilfully neglects his payments, he shall, after one year, take what money he has paid to the company as instalments and for stock, the certificate of which stock, with the bond of his lot, he shall surrender to the treasurer."

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These by-laws are not skilfully drawn, but, construing the two together, we think the object of the first was to provide a mode in which members might withdraw from the corporation, and the object of the other to provide the mode in which the corporation might deal with a delinquent stockholder, either by carrying his stock for such time as it might see fit, or by requiring him after default for a year to take what money he has paid in and withdraw from the company. The first provides for a voluntary withdrawal, the other for an involuntary withdrawal or expulsion at the election of the corporation.

Under the eighth article, a stockholder cannot, by his delinquency in neglecting to make his payment, gain the right to recover of the corporation, against its election, the amount of the stock he has paid in. If he wishes to withdraw, against the consent of the corporation, he must give the notice required by the seventh article. The plaintiff, having failed to give any notice of his intention to withdraw until within less than a year before the date of his writ, cannot maintain this action.

Judgment for the defendant.

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BENJAMIN S. BINNEY *vs.* PHŒNIX COTTON MANUFACTURING COMPANY.

Middlesex. Jan. 14. — March 2, 1880. COLT & LORD, JJ., absent.

A. and B., owners of mills on a small stream, and of a dam and reservoir, built for the purpose of supplying water to the mills, entered into an agreement, by the terms of which B. conveyed to A. all his interest in the dam and reservoir, together with the right of passing over B.'s land to the dam for the purpose of drawing water from the reservoir, during working hours, at the rate of fifty cubic feet per second for the operation of A.'s mill; and A. conveyed to B. the right of using said dam for the purpose of drawing water from the reservoir at the rate of fifty cubic feet of water per second "at any and all times during working hours" for the purpose of running B.'s mill "or such other mill or mills as may be erected on his privilege." The agreement further provided that, if A. should waste the water in the reservoir or draw therefrom at other times than working hours, so that B. should fail to have the supply of water required for his mill, the agreement should be void. At the time the agreement was made, the mills on the stream were cotton-mills, the working hours of which were eleven hours a day. B. subsequently changed his mill to a paper-mill, which ran day and night. *Held*, that the term "working hours" meant the working hours of the mills at the date of the agreement; and that B. could not maintain an action against A. for preventing him from using the water at night.

CONTRACT, with a count in tort, for the unlawful detention by the defendant of water in the Shirley Reservoir, so called.

At the trial in this court, before *Colt*, J., it appeared that the plaintiff had a lease from Samuel Hazen of a mill with the right to draw water from the Shirley Reservoir, to the full extent secured to Hazen by an indenture entered into by him on April 17, 1865, with the trustees of the United Society in Shirley; and that the defendant claimed title under a deed from the same trustees, which conveyed to it another mill and all the rights of the trustees in the reservoir as modified by the same contract between Hazen and the trustees.

The judge directed a verdict for the plaintiff; and reported the case for the determination of the full court, such judgment to be entered as law and justice might require. The material provisions of the contract of April 17, 1865, and other facts essential to an understanding of the case, appear in the opinion.

E. R. Hoar & S. Hoar, for the defendant.

T. H. Sweetser & F. A. Worcester, for the plaintiff.

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MORTON, J. The right of the plaintiff to maintain this action depends entirely upon the construction of the contract of April 17, 1865. In *Phœnix Cotton Manuf. Co.* v. *Hazen*, 118 Mass. 350, it is said in the opinion that we were inclined to think that by this contract Hazen had the right to draw water from the reservoir during the night if required to run his mill. But, as is there stated, it was not necessary to decide that question; and, upon a more careful consideration of the subject, we are of opinion that such a construction is not in accordance with the understanding and intentions of the parties to the contract. By the contract, Hazen conveys to the trustees of the United Society in Shirley all the interest which he had as joint owner with them in the reservoir and its dam; "also the right, privilege and easement of passing over land of said Hazen to said dam at any and all times for the purpose of drawing water from said pond, during working hours, through an aperture in the gateway of said dam, at the rate of fifty cubic feet of water per second, for the operation of the Phœnix Mill in said Shirley, or any other mill or mills erected on the same privilege."

The trustees sell and assign to Hazen, "his heirs and assigns, the right and privilege of using said dam for the purpose of drawing water therefrom for the use of the factory of said Hazen, situated at or near said Hazen's dam next below said reservoir dam, and all the right, easement and privilege of entering upon said reservoir dam, at any and all times, for the purpose of drawing from said reservoir pond, through an aperture in the gateway of said dam, fifty cubic feet of water per second, (if there be water sufficient in said pond,) at any and all times during working hours, for the purpose of running the mill of said Hazen situated next below said reservoir dam, or such other mill or mills as may be erected upon his said privilege, when said trustees, their successors or assigns, are not drawing said quantity of water for the use of their mill or mills; and if the said trustees, their successors or assigns, shall draw for the use of their mill or mills less than fifty cubic feet of water per second, then the said Hazen, his heirs and assigns, shall have the right and privilege of drawing so much water as shall make up the amount of water drawn to fifty cubic feet per second."

The contract also contains the further provision, "that if the

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said United Society, the said trustees and their successors in office or trust, or their assigns, shall, for the space of one year, neglect to maintain and keep up said dam, or waste the water in said reservoir pond or draw more than fifty cubic feet of water per second therefrom, or draw water therefrom at other times than working hours, so that said Hazen, his heirs or assigns, shall fail to have the supply of water required for the operation of the machinery of his mill or mills next below said reservoir dam, and to fully or substantially comply with all the agreements and stipulations contained in this writing, then this instrument shall be void and of no effect."

The object of the parties was to restrict the quantity of water which Hazen could rightly draw from the reservoir. The restriction extended, not only to the amount of water he could draw per second, but also to the hours of the day during which he could draw water. The language used to express the restriction as to time, "at any and all times during working hours for the purpose of running the mill of said Hazen," or such other mill as may be erected on his privilege, is equivocal. The plaintiff contends that, having built on the Hazen privilege a paper-mill, which is run night and day, he has the right to draw water during the whole of the twenty-four hours of the day for the purpose of running his mill. The defendant contends that the words "during working hours" mean the usual working hours of the cotton-mills upon the stream.

Looking at the situation and general purposes of the parties, to aid us in ascertaining the meaning with which they intended to use this language, we are of opinion that the construction of the defendant is the right one. At the time the contract was made, there were three mills on the stream, all of which were cotton-mills, whose working hours were eleven hours per day. The stream was a small one, and there was a necessity for a careful storing and an economical use of the water, in order to furnish an adequate supply for them as they were then run. The purpose of the parties was to put some restriction upon the time during which water could be drawn; it is not reasonable to suppose that it was contemplated that one of the parties might, by building a new mill, or changing his business in the old one, draw water to the extent of fifty cubic feet per second

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during the whole of the twenty-four hours, and thus obtain the exclusive use and benefit of a large part of the water for twelve or more hours of the day, to the injury of the other mill-owners. Such a construction would defeat the principal purpose which all had in view, of storing water during the night so as to furnish a supply when the mills were running. We are of opinion that, by the expression "during working hours," used in this and in other clauses of the contract, the parties meant the usual working hours of the mills on that stream. Under it, Hazen had the right to draw water during the usual working hours, and then only for the purpose of running the mill on his privilege. The addition of the words, "or such other mill or mills as may be erected upon his said privilege," was not intended to enlarge the limit of time designated as working hours, but to protect him from the possible claim that the right applied only to his mill then existing.

It follows that, as the defendant has only prevented the plaintiff from drawing water in the night-time, the plaintiff cannot maintain this action upon either count.

Judgment for the defendant.

JAMES BURKE *vs.* THOMAS J. DUNBAR.

Norfolk. Jan. 29. — March 29, 1880. MORTON & SOULE, JJ., absent.

B. agreed in writing to build a sea-wall for A. The contract did not define the exact location of the proposed wall, and said nothing about a pile foundation being required. B. built the wall on the lines pointed out by A., and it proved to be defective for want of a pile foundation. *Held*, that an action would lie against A. for the price agreed to be paid for the wall.

CONTRACT on an agreement in writing, signed by the plaintiff and the defendant, by which the plaintiff agreed to build a sea-wall, of certain dimensions, at Ferry Point in North Weymouth, "in a thorough and workmanlike manner," to the satisfaction of the defendant, for $2 per perch, $100 to be paid on the completion of the front wall, $100 on the completion of one side wall, and the balance on the completion and acceptance of the

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work. Answer, a general denial. At the trial in the Superior Court, before *Colburn*, J., there was evidence tending to prove the following facts:

The wall mentioned in the agreement was designed to enclose a permanent wharf for a steamboat landing, to be filled in with earth. The lines of this wall were marked out by an agent of the defendant, who had the superintendence of the work, and the plaintiff began to lay the stones on these lines upon what appeared to him and the agent to be a bed of sand and gravel, and upon which both the plaintiff and the agent thought it would be safe to build the wall. As the work progressed, it appeared that this bed of sand and gravel was merely a stratum over a bed of mud, which was fifteen feet deep at the end wall, and of less depth towards the shore. As soon as the plaintiff found that the foundation of the wall was insufficient, he notified the defendant, who told him to do the best he could to save the wall, and soon after sent a person experienced in building sea-walls to superintend it. This agent put a row of piles outside of the end of the wall, and paid the plaintiff an extra price for putting the stones already laid on these piles, and for making the end wall of a greater thickness than the contract called for. The agent did not furnish a pile foundation for the side walls, which had progressed but a short distance at this time, and he did not object to the plaintiff building these walls without piles.

There was also evidence tending to show that the defendant made the payments called for by the contract upon the completion of the end wall and one of the side walls; and that he accepted the whole work, agreed upon a person to measure the wall, who made the measurement and reported the amount to the parties; and that the defendant agreed to pay the balance to the plaintiff.

The defendant's evidence tended to show that the side walls settled on account of having an improper foundation; that the stones were insufficient in size; and that the wall was not constructed in a thorough and workmanlike manner. But upon all these points the evidence was conflicting.

The defendant asked the judge to rule as follows: "1. It was the duty of the plaintiff to build the wall, of the dimensions

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therein specified, in a thorough and workmanlike manner, and to the acceptance of the defendant. 2. The plaintiff being a wall-builder, and holding himself out as such to the defendant, and the defendant being unskilled, it was the duty of the plaintiff to have learned whether a pile or stone foundation for the wall was required, and so notified the defendant. 3. If, through his own negligence or deceit in obtaining the contract, he constructed the walls in the mud, or upon insecure foundations, by reason of which the walls sank and bilged, and became unfit for the purpose designed, or unfit or insecure as sea-walls, the burden of the loss falls upon the plaintiff, and he is in fault. 4. It was the duty of the plaintiff, under this contract, to have constructed his walls upon a secure foundation. 5. After the plaintiff began to lay his stone, if he found that there was deep mud and an unsafe foundation for the structure, and mud so deep as to endanger the walls, it was his duty to have notified the defendant, and to have ceased filling in the stone; and, after he had reasonable grounds to believe the stones were slipping away and sinking into the mud, he should have ceased laying the wall and laid a foundation, or notified the defendant to lay a foundation. 6. It was the duty of the plaintiff to know whether a foundation was required for the walls, and if required, and he did not regard it as his duty to furnish a foundation, it was his duty, when called upon by the defendant, to supply a foundation before erecting the walls."

The judge gave the first instruction as requested, and, in place of giving the other instructions as requested, instructed the jury that the agreement did not require the plaintiff to furnish a pile or other artificial foundation for the walls; that, as the agreement was silent as to the precise lines upon which the walls were to be built, he was required to build them upon such lines as the defendant, or his agents, marked out; that, if the plaintiff had any knowledge, or grounds of belief, of the insufficiency of the foundation, which he had any reason to believe the defendant or his agents did not have, it was his duty to disclose such knowledge, or grounds of belief, to the defendant or his agents; that if, after he began the wall, he discovered any defect in the foundation not before known to the defendant or his agents, it was his duty to disclose such defect to the defend-

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ant or his agents, and cease building the wall on such defective foundation until the defendant or his agents had opportunity to take such action as they saw fit; that, if he built the wall upon a foundation which he knew, or had reason to believe, was defective, without disclosing its condition to the defendant or his agents, and the walls proved defective in consequence, he was not entitled to recover in this action. But if he disclosed to the defendant or his agents all his knowledge or grounds of belief of any defect in the foundation, and all that he discovered of defect as the work progressed, and built the walls only on such foundations as the defendant furnished, or knew that the wall was being built upon, and the defendant allowed him to proceed without objection, he did all that the agreement required, so far as the foundations were concerned.

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The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

A. R. Brown & E. A. Alger, for the defendant.

J. L. Eldridge, for the plaintiff.

AMES, J. As the first instruction requested by the defendant was given, the verdict of the jury imports that the wall was built, of the dimensions specified in the contract, in a thorough and workmanlike manner, and to the acceptance of the defendant. The evidence reported plainly indicates that, after the work had begun, a difficulty about securing a proper foundation for the wall became manifest, which was not in the contemplation of either party when the contract was entered into. The plaintiff's undertaking was to build the wall, of the dimensions specified in the written contract. No special stipulation was made in regard to the foundation, and it was apparently assumed by both parties that the natural foundation would be sufficient without the driving of piles or any special precaution or extraordinary support of any kind. The instructions given by the court as to the plaintiff's duty under the circumstances as actually developed, appear to us to have been carefully guarded, well adapted to the state of the evidence, and all that could reasonably and fairly be asked for by the defendant. The jury were told that he had a right to build upon such lines as the defendant or his agents marked out, and that, if he built the wall upon a foundation which he knew or had reason to believe

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was defective, without disclosing its condition to the defendant or his agents, and the walls proved defective from that cause, he was not entitled to recover.

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We must infer from the verdict, under the instructions given, that he satisfied the jury that he disclosed to the defendant or his agents all his knowledge or grounds of belief of any defect in the foundation, and all that he discovered of defect as the work progressed, and built only on such foundations as the defendant furnished, or knew that the wall was being built upon, the defendant allowing him to proceed without objection. This was all that he was bound by the contract to do.

Exceptions overruled.

AGAWAM NATIONAL BANK *vs.* INHABITANTS OF SOUTH HADLEY.

Hampden. Sept. 23, 1879. — April 3, 1880. ENDICOTT & LORD, JJ., absent.

Since the St. of 1875, *c.* 209, an action cannot be maintained against a town on a promissory note given by its treasurer for borrowed money, unless the vote of the town authorizing the treasurer to borrow money shows either that the debt was in anticipation of the taxes of the year in which the debt was incurred, and of the year next ensuing, and expressly made payable therefrom, or that the vote was passed by two thirds of the legal voters present and voting at a legal meeting.

If a town treasurer borrows money in a manner unauthorized by the St. of 1875, *c.* 209, the lender cannot maintain an action against the town to recover it back, although the money is used by the treasurer in payment of debts of the town.

CONTRACT upon two promissory notes, each signed "The Inhabitants of South Hadley, by Ira B. Wright, town treasurer." By the first, dated March 1, 1878, the defendant promised to pay, three months after date, to the order of the plaintiff's cashier, the sum of $2000, "the same being part of the sum that the treasurer was authorized to borrow by vote of March 19, 1877." The second was dated May 4, 1878, and differed from the first only in the amount, and in the date of the vote referred to, which in this note was March 18, 1878. The declaration also contained a count for money had and received,

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being the amount of the above notes. Trial in the Superior Court, without a jury, before *Dewey*, J., who allowed a bill of exceptions in substance as follows:

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It was admitted that Ira B. Wright was the treasurer of the defendant town when the notes in suit were executed, and that the signatures thereon were genuine. The following certified copies of votes of the town, which were filed with the plaintiff, were put into the case and admitted to be correct transcripts from the town records, and the only votes of the town purporting to authorize the treasurer to execute the notes or borrow the money sued for in its behalf: "March 19, 1877. Voted, that the treasurer be authorized to borrow on the credit of the town such sums as may be needed, not exceeding ten thousand dollars at any one time, in anticipation of taxes." "March 18, 1878. Voted, that the treasurer be authorized to borrow such sums as may be needed, in anticipation of taxes, not exceeding ten thousand dollars at any one time."

F. S. Bailey, cashier of the plaintiff bank, testified that Wright kept an account as town treasurer at the bank, and kept no individual account; that he discounted the first note, and paid the proceeds to Wright at the date of the note; and that he also discounted the second note at its date, and placed the proceeds to the credit of Wright as town treasurer.

The plaintiff then offered to show that the identical money paid to Wright from the discount of the first note was all used by him in the payment of debts legally due from the town; and that the proceeds of the second note were all paid out by checks drawn by Wright as treasurer, to pay debts due from the town.

Upon this evidence and offer of proof, the defendant contended that no authority had been shown which, under the St. of 1875, *c.* 209, would authorize the town treasurer to borrow money; and that, for this reason, the plaintiff could not maintain this action on the notes, or on the count for money had and received. The judge so ruled, and found for the defendant. The plaintiff alleged exceptions.

N. A. Leonard, for the plaintiff.

C. Delano & M. P. Knowlton, for the defendant.

COLT, J. By the St. of 1875, *c.* 209, entitled an act to regulate and limit municipal indebtedness. it is provided in § 2 that

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"no debts shall hereafter be incurred by any city or town, except debts for temporary loans in anticipation of the taxes of the year in which such debts are incurred, and of the year next ensuing, and made payable therefrom by vote of the said city or town; and except as hereinafter provided." Section 3 provides that "debts, other than those authorized by the second section of this act, shall hereafter be incurred by a town, only by a vote of two thirds of the legal voters present and voting at a legal meeting," and by a city only by a two-thirds vote of both branches of the city council. It is provided, however, by § 10, that these restrictions shall not exempt any city or town from its liability to pay debts contracted for purposes for which it may lawfully expend money.

The statute thus deprives cities and towns of the authority to contract debts for borrowed money, which they had previously possessed, whether derived from express grant, or held to exist as an implied power; and, instead of it, gives to these municipalities a limited power which can be lawfully exercised only in the mode specially pointed out. It contains a positive prohibition of all debts contracted for borrowed money in any other mode. The plain object of the law is to protect cities and towns from the creation of municipal debts without sufficient necessity and consideration, and without proper provision for payment, and to prevent improvident and reckless expenditures of public money, as a natural consequence of debts so contracted. All its provisions, reasonably interpreted, with reference to these salutary ends, must be regarded as prohibitory. They establish a plain limit to the exercise of the power to borrow money.

The towns of this Commonwealth are declared by statute to be bodies corporate, but they are public political corporations, with comparatively limited powers and duties. They are charged with the support of schools, the relief of the poor, the laying out and repair of highways, and are empowered to preserve the peace and good order, maintain internal police, and generally to direct and manage their prudential affairs in a manner not repugnant to the laws of the state. They may dispose of their corporate property, and make contracts necessary and convenient for the exercise of their corporate powers. *Stetson* v. *Kempton*, 13 Mass. 272. *Parsons* v. *Goshen*, 11 Pick. 396. *Allen* v. *Taunton*, 19 Pick. 485.

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The power to appropriate money and levy taxes is derived wholly from the statutes, and is limited to the corporate necessities of the town, and all these special powers which are held for political purposes are at all times subject to legislative control. Gen. Sts. *c.* 18. When an authority to create a debt for money borrowed is given to such a corporation, and confined to a mode plainly prescribed, that mode is a limitation of the power, of which all persons are bound to take notice.

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The votes offered in evidence in this case did not authorize the treasurer to borrow money on the credit of the town. The proposed loans were not made payable by vote of the town from the taxes of that or the succeeding year, nor were the votes passed by two thirds of the legal voters present at the meeting. The notes given by the treasurer in the name of the town were therefore given without lawful authority. *Lowell Savings Bank* v. *Winchester*, 8 Allen, 109. *Benoit* v. *Conway*, 10 Allen, 528. *Dickinson* v. *Conway*, 12 Allen, 487. Without the authority of a legal vote, the town is not liable in any form for money borrowed.

The present case does not require a consideration of how far innocent holders of negotiable securities, issued by a municipal corporation in violation of conditions imposed by law, may recover upon such securities against the corporation; or what evidence of compliance with such conditions will be sufficient against the corporation by way of estoppel or otherwise. Those questions have been many times discussed in the Supreme Court of the United States in cases involving the validity of bonds issued in aid of railroad enterprises. Whatever difference of judicial opinion may exist in that or in other courts, it is settled that a municipal corporation may successfully defend against such bonds in the hands of any person whatever when its officers and agents have issued them without any power so to do; *Aspinwall* v. *Daviess County*, 22 How. 364; *Marsh* v. *Fulton County*, 10 Wall. 676; and may successfully defend against all except *bona fide* holders without notice, when provisions limiting the exercise of a granted power have been disregarded. In the recent case of *Warren County* v. *Marcy*, 97 U. S. 96, it was declared to be the doctrine of that court, that, when there was lawful power to issue bonds or other negotiable securities,

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dependent only on the adoption of certain preliminary proceedings, such as a popular election of the constituent body, the holder in good faith had a right to presume that such preliminary proceedings had taken place, if the fact was certified on the face of the instrument by the authority whose primary duty it was to ascertain it.

In the case at bar, the plaintiff is not a holder without notice. It took the notes in suit with certified copies of the illegal votes of the town in its possession, and with full notice of the treasurer's want of authority.

But the plaintiff contends that it is entitled to recover upon the last count in the declaration for money had and received; and, at the trial, offered to show that the money paid or credited to the town treasurer upon the notes in suit was used by him in the payment of debts due from the town. This evidence was properly rejected. It fails to show that the money was received by the town in its corporate capacity, or that the act of the treasurer in applying it to the payment of its debts was ever authorized or ratified by the town. The difficulty is, that the money was paid to one who had no authority as treasurer or as agent of the town to receive it in the name of the town and apply it to the payment of town debts. If a town could be held in an action for money had and received, under such circumstances, then the purpose of the second and third sections of the statute would be wholly defeated. It makes no difference that the treasurer used this specific money in payment of the town debts. There is nothing to show any appropriation of such payments by the town to its own use, or any ratification of the act. The money in the hands of the treasurer did not belong to the town. For all that appears, funds may have been previously supplied by the corporation from other sources for the payment of these very debts. The relations of the treasurer to the town are not disclosed; he may then have been, and may now be, a defaulter to more than the amount of the alleged payments. The treasurer is an independent accounting officer. *Hancock* v. *Hazzard*, 12 Cush. 112. If he applies money unlawfully obtained to the payment of town debts, that fact alone creates no liability on the part of the town to refund the money to the party from whom it was obtained.

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It was decided in *Kelley* v. *Lindsey*, 7 Gray, 287, that money advanced on account of the defendant to one in his employ, but who had no authority to borrow money for him, created no debt against the defendant, although advanced for the purpose of being expended in his business and to pay his debts, and actually so applied. It was said by Dewey, J., that "no one can thus make himself a creditor of another by the unsolicited payment of his debts; and it is not enough to create a liability, that the defendant had the benefit of the money." And in *Railroad National Bank* v. *Lowell*, 109 Mass. 214, which was an action for money had and received, it was decided that the action would not lie, although the money in question, obtained by the city treasurer without authority from the city, was put into a drawer with money of the city and paid out for the city debts, the treasurer being a defaulter to the city for an amount larger than that drawn from the bank. This decision upon the point now under consideration is conclusive.

It is said that an action for money had and received may be maintained against a municipal corporation, when the money has been received under such circumstances that, independently of express contract, the obligation of repayment is imposed as a matter of right and justice. Thus, when it is received under a contract made without authority or in violation of law, the duty arises to refund the money to the party from whom it was received, if, without affirming the illegal contract, the latter seeks only to recover his own money and prevent the defendant from unjustly retaining the benefit of its own illegal act. *Morville* v. *American Tract Society*, 123 Mass. 129. *Dill* v. *Wareham*, 7 Met. 438. *White* v. *Franklin Bank*, 22 Pick. 181. See also *Thomas* v. *Richmond*, 12 Wall. 349, 355. But in such cases it must appear that the money was actually and beneficially appropriated by the town or city in its corporate capacity. It cannot be treated as appropriated, merely because it has been applied by the unauthorized act of the town treasurer, or of any other person, to the payment of municipal debts, for the payment of which other provision had been made. It is sometimes said, indeed, with reference to money borrowed in disregard of positive prohibition, when both parties are in fault, that it cannot under any circumstances be recovered back, because that would be to defeat the

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prohibition in favor of a guilty party. *McDonald* v. *Mayor, &c. of New York*, 68 N. Y. 23. *Parr* v. *Greenbush*, 72 N. Y. 463, 472. *Herzo* v. *San Francisco*, 33 Cal. 134. *Argenti* v. *San Francisco*, 16 Cal. 255, 282. See also Dillon Mun. Corp. § 383.

Exceptions overruled.

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MARY D. FREELAND *vs.* FOSTER FREELAND & others.

Worcester. Oct. 3, 1879. — April 3, 1880. ENDICOTT & LORD, JJ., absent.

A man and a woman entered into an antenuptial contract by which they were to retain their respective estates, with power to each to manage and dispose of them as they should see fit, and at their decease to have the same descend to their respective heirs, or otherwise disposed of as they might respectively order and appoint, with the proviso that in case of his death, she surviving, there should, within one year from the time of his death, be paid to her the sum of $1500 as a debt against his estate. He further covenanted that his representatives should pay her, if she survived him, the above sum within one year after his decease; and she covenanted that upon his death, she surviving, she would by deed release all interest in his estate, excepting the claim of $1500. The parties subsequently married, and the man died. The woman was never paid the sum of $1500, and there were no assets of her husband's estate. *Held*, that she was barred of dower in his estate.

WRIT OF DOWER by the widow of Freeman Freeland. The case was submitted to the Superior Court, and, after judgment for the tenants, to this court on appeal, on agreed facts, the material parts of which appear in the opinion.

W. S. B. Hopkins, for the demandant.

H. B. Staples, (*E. P. Goulding* with him,) for the tenants.

SOULE, J. The tenants contend that the demandant's right to dower was barred by an antenuptial contract between her and Freeman Freeland. That contract was duly executed and recorded, and was made in view of the intended marriage of the parties, and recites and sets forth an agreement that both "shall retain their respective estates, with such as may hereafter accrue to them, separate and apart from the other, subject to the payment of their respective debts, with power to each to manage and dispose of their estate as they shall see fit, and at their decease to have the same descend to their respective heirs at

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law, or otherwise disposed of as they may respectively, by last will and testament, order and appoint. Provided always, that in case of the decease of the said Freeland, she, the said Mary, surviving him, there shall, within one year from the time of his decease, be paid to the said Mary the sum of fifteen hundred dollars as a proper debt against his estate." Then follow, "for the purpose of effecting the intention of said parties," the conveyance of the estate of the demandant to a trustee, on trusts consistent with the agreement set forth; and the covenant of Freeland with the trustee to allow him and the demandant to have the entire control of her estate, and to receive the rents and profits thereof to her separate use, and that he will do no act or thing to prevent the full execution of the trust; and his further covenants that, in case he should survive the demandant, he will allow her separate estate to go and descend to her heirs at law as if she were sole, or if she should make a will, that on her decease the same may be proved and allowed, and her estate be disposed of according thereto, and that his representatives shall pay the demandant, if she survive him, the sum of fifteen hundred dollars within one year after his decease. Then follow the proper covenants on the part of the trustee; and finally the covenant of the demandant that "upon the decease of the said Freeland, she surviving, she will by deed release all interest in his estate, excepting said claim of $1500."

This is a valid contract under the Gen. Sts. *c.* 108, §§ 27, 28, so far as it relates to the interest of either of the parties to the intended marriage in the estate of the other during the coverture. So far as it relates to the rights of the survivor in the estate of the other after the termination of the marriage relation by death, it is valid, independently of the statute. *Jenkins* v. *Holt*, 109 Mass. 261.

The demandant contends, however, that her dower is not barred by the contract, because she has never been paid the sum of fifteen hundred dollars from the estate of her husband, and, by reason of there being no assets in the hands of the administratrix, no part of that sum will ever be paid to her.

It is true that when, by reason of the default or neglect of the husband, the wife has lost the benefit intended to be secured to her by a contract of this nature, her right to dower in his estate

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is not barred by virtue of the stipulations in the contract. For, though the covenant not to claim dower is valid independently of the statute, when made for an adequate consideration and with a full understanding of its force and effect, nevertheless, when it is contained in the same instrument with covenants and agreements of the husband, which form a part, with it, of one mutual arrangement, the failure of the part of the arrangement which is designed for the benefit of the wife, through the fault or negligence of the husband, is enough to destroy the binding effect of her covenant. *Sullings* v. *Sullings*, 9 Allen, 234. *Butman* v. *Porter*, 100 Mass. 337.

This principle, however, is not the controlling one in the case at bar. The benefit of the provision in the marriage contract, that the wife, through her trustee, shall have the entire control of her estate during her life, or the power to dispose of it at her death, and that, failing any disposition of it, it shall go to her heirs at law, to the exclusion of her husband, has been fully enjoyed by her. The provision as to the fifteen hundred dollars is not inserted in the contract as a condition precedent to her covenant becoming binding. The words "Provided always," by which the clause concerning that sum is introduced, are designed merely to qualify the preceding provision, that the husband may dispose of his whole estate by will, or have it descend to his heirs. The contract does not contemplate the giving of security by the husband for the payment of this sum. It is to be a debt which the wife may claim against the estate. He covenants that his administrator shall pay it, and she covenants that at his decease, she surviving, she will by deed release all interest in his estate, "excepting said claim of fifteen hundred dollars." This is consistent only with the idea that she is to take her chance of the assets being sufficient to pay this amount. Otherwise, she would not have covenanted to release her interest in the estate before receiving the money. The fact that this agreement for fifteen hundred dollars is not the only stipulation in consideration of which the demandant agreed to release her dower, but is merely one of several agreements which together make up the marriage contract, takes the case out of the doctrine which governs where the agreement is to accept a mere pecuniary provision instead of dower.

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It is to be observed that there is no claim on the part of the demandant that she was led into the contract which she made by any fraud or deceit practised on her by her husband, or that there was any fraudulent disposal or conveyance of personal property for the purpose of preventing her from recovering the sum of fifteen hundred dollars from his estate. It is unnecessary for us, therefore, to consider what result would follow, if either of those matters were in the case.

We are of opinion that there was no such failure on the part of the husband to perform what he undertook by the marriage contract, as to prevent the covenant of the demandant from being binding upon her. That an agreement to accept a pecuniary provision instead of dower may be availed of in defence to an action at law to recover dower, was settled in *Vincent* v. *Spooner*, 2 Cush. 467; and we see no reason why a valid antenuptial contract should not be availed of in the same way.

Judgment affirmed.

BARNSTABLE SAVINGS BANK *vs.* CALVIN SNOW & others.

Barnstable. Jan. 29. — April 6, 1880. MORTON & SOULE, JJ., absent.

In an action by a savings bank, against two persons, upon a joint and several promissory note, the defendants cannot set off, either under the Gen. Sts. *c.* 130, § 8, or the St. of 1878, *c.* 261, the amounts severally due them from the bank.

CONTRACT against Calvin Snow, Washington H. Taylor, and Franklin Gould, upon a joint and several promissory note, dated April 26, 1877, payable six months after date, and signed by the first-named defendant as principal, and by the others as sureties. Writ dated September 29, 1879. The case was submitted to the Superior Court, and, after judgment for the defendants, to this court on appeal, on agreed facts in substance as follows:

On May 3, 1878, the plaintiff corporation was perpetually enjoined from doing business, and receivers were appointed who have ever since been winding up its affairs. On March 10, 1879, the defendant Taylor had on deposit in said bank the sum

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of $80.37, and the defendant Gould had on deposit in said bank the sum of $548.03; and these deposits were owned and held by the defendants severally before any proceedings were had to restrain said bank from doing its usual business, or the issuing of any order under the St. of 1878, *c.* 73. On said March 10, Taylor and Gould severally tendered to the receivers the deposits and the books and evidences thereof, and offered to set off the same against their indebtedness on the note in suit, the aggregate of their deposits being then the same as the amount due on the note, but the receivers refused the same.

If the court should be of opinion that the receivers ought to accept the tender and offer of set-off, judgment was to be rendered for the defendants; otherwise, for the plaintiff.

G. A. King, for the plaintiff.

H. P. Harriman, for the defendants.

LORD, J. The defence known as "set-off" is not a common-law defence, but is wholly the creature of statute and is regulated by statute. Although in loose and general language a set-off is spoken of as a defence, this language is in no sense apt or correct as matter of pleading. It is not a denial of the plaintiff's claim, and, in order to be asserted, it must be declared on with the same formality that any demand is declared on in an original writ, and the party against whom it is filed must answer in the same manner as the defendant in any other action. Gen. Sts. *c.* 130, §§ 16, 17. It is substantially a cross action, although under the statute it requires no original writ. Being thus the creature of statute, it can be availed of only in the mode prescribed by statute. The Gen. Sts. *c.* 130, § 8, expressly provide that, "if there are several defendants, the demand set off shall be due to all of them jointly," with an exception wholly unimportant in this case. This statute, therefore, in terms forbids the set-off claimed in this case.

It is contended, however, by the defendants, that they are authorized by the St. of 1878, *c.* 261,* to avail themselves of

* Section 1 of this act, which took effect May 16, 187[illegible] is as follows: "Any person indebted to a savings bank in this Commonwealth, whether his indebtedness is secured or not, may, in any proceeding for the collection thereof, or for the enforcement of any security therefor, set off the amount of any deposit in said bank held and owned by him at the time of the

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this set-off. Although this statute does not say in terms that the sum to be set off need not be due from the same persons who are defendants in the pending action to the same persons who are plaintiffs, yet it is contended that by implication such must be its proper construction; that, inasmuch as a depositor in a savings bank had the same right to set off his deposit against a claim of the bank as any other defendant had to set off a claim against any other plaintiff, no new right is given by the statute, it was therefore useless in such view, and it is the duty of the court to find some mode in which it shall have an effective operation; and that the claim which is set up by these defendants is so strictly equitable, and so little violence is done to the language of the statute in adopting this construction, that it is the duty of the court so to construe it, and thus give it efficacy.

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This court would be slow to say, under any circumstances, that a statute whose whole force is a reënactment of existing law effected any change in the law. It is within the knowledge of every lawyer that purely declaratory statutes are not infrequently enacted. In this case, however, it may well be doubted whether this is such a law. As we have before seen, a set-off is not a defence. With much more propriety may it be called a cross action; and as a depositor was not authorized to bring an original suit against a savings bank under injunction, the Legislature might have deemed that a set-off was so much in the nature of an action against the bank that it might not be allowed; or, for the purpose of solving or to prevent the raising of the question, whether a set-off might or might not be declared on against such bank, passed the law in question.

Whatever might have been the purpose of the Legislature, or whatever end it might have had in view, it is clear that the law is in no respect changed by that act, unless it be that, under the law as it stood before, no set-off could be pleaded against

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commencement of such proceeding and of the interest due thereon: *Provided, however*, that this act shall not authorize the set-off of any deposit purchased or acquired from another after the commencement of proceedings in equity to restrain such bank from doing its usual business, or after the issuing of an order under the provisions of chapter seventy-three of the acts of the year eighteen hundred and seventy-eight."

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the bank because of its partaking so much of the character of a suit against it.

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It is the duty of the court to declare what is, not what ought to be, the law. If equity and justice demand a change in the law, the court has no power to make it; and whenever it is found that existing laws operate unequally or unjustly, the Legislature will be ready to modify or repeal.

Upon this view of the law, there must be

Judgment for the plaintiff

JOHN B. MARTIN & another *vs.* ELLEN DRINAN.

Suffolk. March 8. — April 5, 1880. ENDICOTT & SOULE, JJ., absent.

An agreement, by the grantee in a deed poll, to keep in repair a building on adjoining land of the grantor, is not a covenant, and will not sustain an action by a subsequent grantee of the adjoining land.

CONTRACT for breach of an alleged covenant contained in a deed from William Williams to the defendant.

At the trial in the Superior Court, before *Wilkinson*, J., it appeared that the plaintiffs and the defendant were owners of adjacent estates, and the privies hereinafter referred to were both on the estate of the plaintiffs; that Williams was originally the owner of both estates, and, in 1863, conveyed to the defendant her estate by a deed poll in the usual form, which contained, after a description by metes and bounds, one of which was on an arched passageway, the following clause: "With all the privileges and appurtenances, especially a right in said arched passageway, and in the two water-closets or privies adjacent to said passageway, and next to the land hereby conveyed, the grantee agreeing for herself, her heirs and assigns, to keep the same in repair, and pay all expenses connected therewith or incident thereto;" and that subsequently Williams conveyed to the plaintiffs the estate upon which the privies were situated, with all the rights, privileges and appurtenances thereto belonging, said conveyance being subject to the privileges and rights in the deed to the defendant.

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The plaintiffs contended that the defendant had broken her covenant to keep the privies or water-closets in repair; and introduced evidence tending to show that, in May 1877, the privies were out of repair, that the defendant neglected to repair them, and that the plaintiffs repaired them.

The defendant asked the judge to rule that the plaintiffs could not recover, because the provision in the deed from Williams to her, if a covenant at all, was not a covenant running with the land. The judge so ruled; and the plaintiffs alleged exceptions.

J. C. Park, for the plaintiffs. The defendant's agreement is contained in a sealed instrument, and is a covenant. The plaintiff stands in Williams's place and stead, with all his rights, as well as subject to all his obligations. There is a privity between the plaintiff and the defendant. *Morse* v. *Aldrich*, 19 Pick. 449. *Torrey* v. *Wallis*, 3 Cush. 442, and cases cited.

G. W. McConnell, (*G. A. Bruce* with him,) for the defendant.

GRAY, C. J. The agreement to repair buildings upon land adjoining the defendant's, being contained in a deed poll to her, and not being under her seal, is not a covenant, and this action is in the nature of assumpsit on the promise implied from the acceptance of the deed. *Maine* v. *Cumston*, 98 Mass. 317, 320, and cases cited. It would be difficult, if not impossible, to maintain the action against an assign of the promisor. *Parish* v. *Whitney*, 3 Gray, 516. *Bronson* v. *Coffin*, 108 Mass. 175, 186. And it is quite clear that it cannot be maintained in the name of an assign of the promisee. *Standen* v. *Chrismas*, 10 Q. B. 135. *Bickford* v. *Parson*, 5 C. B. 920.

Exceptions overruled.

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WILLIAM H. TOWNE, administrator, *vs.* ELBRIDGE WASON.

Suffolk. March 11. — April 6, 1880. ENDICOTT & SOULE, JJ., absent.

It is a good defence to a promissory note, that the plaintiff, although in possession of the note, has no interest in it, and is prosecuting the action, not for the benefit of the person beneficially interested, but against his objection.

CONTRACT on the following promissory note, signed and indorsed by the defendant: "Boston, Aug. 11, 1874. For value received, I promise to pay to my own order thirty-one hundred twenty-five dollars on demand, with interest, this money being a fund belonging to the estate of the late Leonard Chase." Trial in the Superior Court, before *Putnam*, J., who allowed a bill of exceptions in substance as follows:

The plaintiff produced the note declared on, which the defendant admitted that he executed and delivered to the plaintiff's intestate on the day of its date; and thereupon the plaintiff rested his case. The defendant then offered evidence tending to prove that Leonard Chase, of Milford, New Hampshire, died intestate in 1868, and Gilbert Wadleigh was duly appointed his administrator; that Chase was a member of the firm of Putnam & Chase, which firm owned certain shares of stock of the Souhegan Manufacturing Company; that the mills belonging to this company were burned, and, upon recovery of insurance, the treasurer deposited the money in the Souhegan National Bank, of Milford, of which the plaintiff's intestate was president, with the dividend book of the company, and with instructions to the cashier to pay out the money to the stockholders and take receipts therefor; that Daniel Putnam, as surviving partner, receipted for the amount due the firm of Putnam & Chase, and, taking his share, left with the bank the amount belonging to the estate of Chase; that the defendant's wife was a daughter of Chase, and one fourth of the money so left belonged to her; that, a short time after the money was left at the bank, the plaintiff's intestate suggested to the defendant that he should take the money, give his note for it, and thus have it at interest; that the defendant declined, and suggested that the plaintiff's intestate should take the money and give his note for it, but finally it

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was decided that the defendant should take the money and give his note for it; that subsequently the plaintiff's intestate brought the money to Boston and presented the note to the defendant to sign, being of the tenor of the above, except that it stopped at the word "interest;" that the defendant declined signing it in that form, and the plaintiff's intestate added the remaining words, whereupon the defendant received the money and signed and indorsed the note, which the plaintiff's intestate retained in his possession; that the cashier of the bank afterwards saw the note in an envelope marked in the handwriting of the plaintiff's intestate, "Property of heirs of L. Chase," and it was afterwards taken from the bank by the plaintiff's intestate, who afterwards told the administrator of Chase that the defendant had the money represented by the note; that the heirs of Chase desired that the defendant should hold the money for their benefit; that the widow of the plaintiff's intestate saw the note in the possession of her husband in an envelope marked "Belonging to the heirs of late L. Chase;" that Wadleigh, who had not completed the settlement of the estate before the trial, demanded in writing the note of the plaintiff, and forbade the prosecution of the suit; and that all of the heirs of Chase had in writing objected to the suit, and directed the plaintiff before the trial to deliver the note to Wadleigh as administrator.

The plaintiff contended that the note was the property of his intestate; and introduced evidence tending to prove this. The defendant thereupon offered evidence tending to show that R. M. Wallace, who was appointed administrator in the place of the plaintiff, knew of no claim that he had as administrator against the estate of Chase; and that the four children and administrator of Chase knew of no such claim, nor did the widow of the plaintiff's intestate.

The plaintiff objected to all the evidence offered by the defendant; and contended, and asked the judge to rule, that such evidence constituted no defence to the action, and that he could recover. But the judge declined so to rule; and instructed the jury that the plaintiff was *prima facie* entitled to recover; that his possession of the note was *prima facie* evidence of his ownership of it; and that he could recover, unless the defendant satisfied them that the plaintiff had no interest in the note or its

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proceeds, and had no claim or unsettled accounts with or against the estate of Chase, and was not in any way beneficially interested in the note, and that the suit was not prosecuted by him for the benefit of the parties who were beneficially interested, but against their objection.

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The jury returned a verdict for the defendant; and the plaintiff alleged exceptions.

H. G. Parker, for the plaintiff.

H. D. Hyde, for the defendant.

LORD, J. Upon a careful examination of the points and arguments of the respective counsel, we think the difference between them is not upon any principle of law, but upon the application of the law to the facts of the case. It is agreed that the actual manual possession of a promissory note, payable to bearer, or indorsed in blank, gives to the holder *prima facie* a right to sue upon it; and there does not seem to be any controversy between the parties upon the question whether the lawful possession gives to the party holding it absolutely the right to sue upon it without regard to the holder's title to or interest in the note. Upon the other hand, it is not contended that, if the note is stolen, the thief may maintain an action upon it, although he may have the actual manual custody of it, and *prima facie* the right to sue upon it. In the argument of the cause, the plaintiff contended that simple possession, without regard to title or interest, is sufficient, unless such possession is fraudulent. The defendant contended that possession is insufficient if that possession be *mala fide*. Of course, we understand these propositions to be identical.

In this case, the defendant contended that the plaintiff's intestate had neither title to, interest in, nor lawful possession of, the note in suit; that he never had actual, personal possession; that he happened to be the president of a bank in which the money, the consideration of this note, was deposited for the use of certain heirs; that, although he took the money and exchanged it into this note, made payable to the defendant's order and indorsed by him in blank, yet that he did not take it under any claim of interest in it or personal possession of it, but that he put it immediately into the possession of the bank, indorsing upon the envelope in which it was enclosed the fact that it

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belonged to and was "property of heirs of L. Chase;" that, when the note was presented to the defendant for signature, there was nothing written beyond the word "interest;" and that, before signing it, he required this additional phrase to be inserted, "this money being a fund belonging to the estate of the late Leonard Chase;" that the plaintiff's intestate never had, or claimed to have, any title or interest or right of possession to the note; that it was never in any manner a part of his estate, and there was no right in this plaintiff to assume to take it as a part of the assets of that estate; and that his possession of it was fraudulent and *mala fide*. And, if we understand the bill of exceptions aright, this plaintiff has ceased to be the administrator of William B. Towne; the present administrator makes no claim of title to, interest in, or possession of the note; and the administrator of the estate of Leonard Chase, which is in process of settlement, claims it as belonging to that estate, and has demanded it of the plaintiff, as having without right converted it to his own use.

It is true that the plaintiff contended that his intestate had an interest of some kind in the note; and the question whether he had or had not any interest in the note was submitted to the jury upon instructions quite sufficiently favorable to the plaintiff, and that issue was found against him. The only embarrassment we find in the case is in determining whether or not the issue of lawful possession of the note by the plaintiff was presented with sufficient distinctness and carefulness by the presiding judge. Upon a consideration of the full case as reported, and upon the real issues tried, as shown by the bill of exceptions, we are satisfied that the question was necessarily involved in the issues presented under the instructions of the court. It seems apparent that the real issue tried was whether the plaintiff's intestate had any right or interest in the note, or whether he had any "claim or unsettled accounts with or against the estate of said Chase." These facts could be important only upon the question of the plaintiff's rightful possession of the note; and when the judge adds that in addition to those facts the defendant must also prove that the plaintiff "was not in any way beneficially interested in the note, and that the suit was not prosecuted by him for the benefit of the parties who were

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beneficially interested, but against their objection," the conclusion seems to be irresistible, that the holding of the note by the plaintiff was by reason of an unlawful and fraudulent withholding it from the true owner, and thereby converting it to his own use, in which case the possession of it under the facts stated could not be lawful.

It is, however, strenuously urged that the Chase heirs are not parties to this suit, have no rights in it, and cannot be affected by any judgment in it. This is true, and is of itself the strongest reason why the defendant should be allowed to make this defence. He has been notified by the true owner that the note has been fraudulently obtained by the plaintiff; that it was a demand note, and subject to all the defences which might exist to it even in the hands of an innocent holder. He is notified that the present holder is a fraudulent holder; that he has no claim upon the note, or the proceeds of it; that the true owner will require of him payment of the note; and that, if he pays it to the fraudulent owner, or permits the fraudulent owner to recover judgment without interposing the defence which the true owner is prepared to furnish him, he will do so in his own wrong. *Exceptions overruled.*

ANNE E. LARKIN *vs.* CITY OF BOSTON.

Suffolk. March 10. — April 7, 1880. ENDICOTT & SOULE, JJ., absent.

A notice to a city that a person has been injured by a defect on a certain street does not sufficiently designate the place of the injury, under the St. of 1877, c. 234, § 3, if it appears that the street named is half a mile long.

TORT for personal injuries occasioned to the plaintiff by a defect in Windsor Street in Boston. At the trial in the Superior Court, before *Putnam*, J., the jury returned a verdict for the defendant; and the plaintiff alleged exceptions, which appear in the opinion.

G. W. McConnell, for the plaintiff.

T. M. Babson, for the defendant.

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LORD, J. The St. of 1877, c. 234, makes great changes in the law as heretofore existing in relation to the public duty of keeping ways in repair, and the liabilities of those who fail in the performance of such duties. The particular change to which our attention is directed in this suit is as to the condition precedent to a right of action by an individual who suffers injury or damage by reason of such failure.

Section 3 of that act is: "Any person injured in the manner set forth in the preceding section shall within thirty days thereafter give notice to the county, town, place or persons by law obliged to keep said highway, town way, causeway or bridge in repair, of the time, place and cause of the said injury or damage, and if the said county, town, place or persons do not pay the amount thereof, he may within two years after the date of said injury or damage bring an action of tort against said county, town, place or persons, in the Superior Court, to recover the same."

The notice in this case, signed by the plaintiff's attorney on February 25, 1879, and sent to the mayor of the defendant city, was as follows: "Sir: I hereby notify you that on February 5, 1879, on Windsor Street, in said Boston, Mrs. Anne E. Larkin received injuries which were caused by a defect and want of repair in said street." The judge ruled that such notice was insufficient under the statute, and ordered a verdict for the defendant; and the correctness of that ruling is the question to be decided.

It will be observed that the notice is dated February 25, 1879, stating the time of the injury to have been February 5, 1879. The notice was therefore within the statute time. It states the day, without in any mode indicating the part of the day, whether before noon or afternoon, whether in the daytime or in the night-time. Whether any more particularity as to time is necessary, we are not called upon to inquire. It is possible that some injuries, under some circumstances, might require a more particular designation of time than others, and possibly time may, under special circumstances, be so involved in the cause of the injury as to require a more specific designation than would otherwise be necessary. We decide nothing as to the sufficiency of the notice in reference to time, and

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reter to the subject only to say that it has not been considered by us.

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It is urged that the place is not sufficiently designated. The injury is stated to have occurred "on Windsor Street, in said Boston." The bill of exceptions finds that there are in Boston two streets named Windsor Street; that they are both in that part of Boston which was formerly Roxbury, and both within the same ward; that one of them, not that in which the injury was sustained, is a mile and a half long; and the length of the other is not given. It was stated at the bar during the argument, as an undisputed fact, that the length of that street is half a mile.

We do not deem the fact that there are two streets of the same name in the same city to be of any special importance; and if any confusion, doubt or uncertainty arises from such fact, we are not prepared to say that the city can avail itself of such uncertainty. The real question which we are to determine is, what particularity of place does the statute require; and this is to be determined by the object and purposes to be attained by the enactment, and the mischiefs to be guarded against. It would not be claimed that it would be sufficient to state that the injury was received in the town liable to keep the street in repair, for that would be no statement of the place, inasmuch as it is only the streets which are within the limits of the town that the town is required to keep in repair; nor would the purposes of the act be accomplished by holding that it would be sufficient to designate a large territorial tract by any of those subdivisions which are familiarly known in cities and towns as wards, fire districts, police districts, school districts, territorial parishes, and the like. There can be no doubt that the Legislature, in requiring the party to be notified of the place, intended such notice of the locality as to enable the precise spot where the injury was received to be ascertained with substantial or reasonable certainty. To say that an injury was received on Washington Street, or on Tremont Street, would allow to the mind of a citizen of Boston a range of miles; and such notice of place would be so utterly worthless that it were absurd to attribute such intention to the Legislature. Although the city of Boston would be bound to know the names and the lengths of its various

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streets, yet the court is not supposed to have such knowledge. It may be that there are streets, ways, alleys or courts, which the city is bound to keep in repair, which are so extremely limited in length that the statement of the name of the street, alley or court might designate the exact spot where the injury was received, with substantial or reasonable certainty. We are not, therefore, called upon to say, that under no circumstances whatever would it be sufficient to state the name of the street. In the case at bar, it is found that there is really a length of two miles of street, known as Windsor Street; yet it is proper for us to consider the street thus designated to be but half a mile in length; or, to speak more accurately, we may properly take the view most favorable to the plaintiff which under any circumstances could be taken. We are therefore to determine whether the place is sufficiently designated when, by the designation, the spot may be anywhere within the limits of half a mile; and we are of opinion that such designation is clearly insufficient under the statute. It is true that if it had been said in the notice that the injury was in front of number 15 Windsor Street, such statement might indicate different localities, perhaps several miles apart; but such uncertainty, as before suggested, would arise from the act of the defendant itself, and would indicate no want of precision on the part of the plaintiff, who would not in law be bound to know that there was more than one street of that name, while the defendant might be bound to know, and to guard against the difficulties, inconveniences and uncertainties arising from the duplicating of names. We have therefore no doubt of the insufficiency of the notice as to place.

It is contended by the defendant that the notice is deficient also in the statement of the cause of the injury. It is contended that the statement that the road was out of repair, or defective, or both, gives no information, because there must also exist that cause, and there can be no other described in general terms; that the statute means that the nature and character of the defect should be pointed out; that otherwise a statement of the cause is unnecessary and useless. This is a question of much practical importance; but it is not essential to the decision of this case to pass upon it. There are some aspects in which, as we have remarked in relation to time, more particular description of the

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cause may be required, under some circumstances, than would be required under other circumstances; and we are, therefore, not to be understood as expressing or intimating any opinion as to the sufficiency of the notice of the cause.

Exceptions overruled.

JAMES GALVIN *vs.* DENNIS COLLINS.

Suffolk. March 16. — April 19, 1880. AMES & LORD, JJ., absent.

A misdescription of the courses of the boundary lines in a deed of land to the grantor of a vendor will not justify a purchaser in refusing to accept a deed, and enable him to recover back the part of the purchase money already paid, if the monuments referred to so clearly identify the land that the courses may be rejected as erroneous, or where the vendor's grantor had been in exclusive possession of the land for more than twenty years.

A mortgage on the estate of a vendor of land will not justify the purchaser in refusing to accept the deed, and enable him to recover back the part of the purchase money already paid, if the vendor at the time is able and willing to have the mortgage discharged.

CONTRACT to recover back $200, paid on account of the purchase money, which was $4050, of a parcel of real estate, sold by auction to the plaintiff.

At the trial in the Superior Court, before *Gardner*, J., it appeared that the plaintiff signed the written conditions of the sale, the material parts of which were as follows: "$2000 to be paid in cash on delivery of deed; balance of the purchase money may remain on mortgage, power of sale, with interest at eight per cent per annum, payable semiannually; or all cash may be paid, if desired. Conveyance to be made on or before Oct. 10, 1874, by good and sufficient deed of warranty; $200 to be paid at the sale to bind the bargain and form part of the purchase money."

On the evidence in the case, which appears in the opinion, the judge, neither party desiring to go to the jury, directed a verdict for the defendant, and reported the case for the determination of this court. If, upon the evidence, the plaintiff was

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entitled to recover, judgment was to be entered for him for $200 and interest; otherwise, judgment on the verdict.

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C. F. Donnelly & J. W. O'Brien, for the plaintiff.

J. C. Crowley & J. A. Maxwell, for the defendant.

MORTON, J. The plaintiff can maintain this action only by showing a readiness on his part, and a refusal or inability on the part of the defendant, to perform the contract.

It appeared at the trial that, before the day when the deed was to be delivered, the plaintiff refused to perform the contract on his part. Regarding the evidence in the view most favorable to the plaintiff, he put his refusal upon two grounds. The first was that there was a misdescription of the lot of land in the deed from Jonathan Hunnewell to Thomas Cains, dated June 25, 1817, which formed part of the defendant's claim of title. There are two answers to this objection. In the deed from Hunnewell, the lot conveyed is described as follows: "Beginning at the northwesterly corner of Second and B Streets, running southwesterly on Second Street eighty-two feet six inches, then turning and running at right angles one hundred feet on land belonging to Thomas Perkins to a twenty-foot passageway, then turning and running on said passageway eighty-two feet six inches to B Street, then turning and running on said B Street one hundred feet to the point of beginning." Upon applying this description to the land, it is seen that there is a palpable and self-evident error in the use of the words "northwesterly" and "southwesterly." It is impossible to begin at the "northwesterly corner of Second and B Streets," and run "southwesterly on Second Street." If we reject these two words as erroneous, the deed furnishes a description which can be accurately applied to the land. Beginning at the corner of Second and B Streets, we run on Second Street to land of Thomas Perkins, which furnishes a fixed monument; then turning at right angles and running on Perkins's land to a twenty-foot passageway now called Bolton Street, another monument; then turning and running on Bolton Street to the corner of Bolton and B Streets, a third monument; and then on B Street to the point of beginning. This gives a rectangular lot of land, having Second Street, Perkins's land, Bolton Street, and B Street for its boundaries. A glance at the plan used at the trial, and made

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part of the report, shows that there can be no mistake as to what lot was intended. No other lot can answer the description. We are of opinion, therefore, that the description is so certain by reason of the fixed monuments as to justify the rejection of the words "northwesterly" and "southwesterly" as erroneously and inadvertently used. It follows that the misdescription is immaterial, and that, notwithstanding it, the defendant had a good title.

There is another conclusive answer to this objection of the plaintiff. The deed from Hunnewell to Cains is dated in 1817. It appeared at the trial, and was not disputed, that Cains, whose title the defendant has, then entered into open, exclusive and adverse possession of the land, and continued such possession without interruption until his death in 1865. This clearly gave him a title by prescription, and, in this view, the misdescription is immaterial.

The other ground upon which the plaintiff refused to perform the contract was that there was an incumbrance upon the premises. The plaintiff having made the specific objection to performing the contract that there was a misdescription in the deed to Cains, and persisting in this objection, the defendant was not required to go through the useless ceremony of discharging the mortgage and tendering to the plaintiff a deed which he had notified the defendant would not be accepted. *Gerrish* v. *Norris*, 9 Cush. 167. *Carpenter* v. *Holcomb*, 105 Mass. 280. *Curtis* v. *Aspinwall*, 114 Mass. 187.

The only outstanding mortgage was one in favor of Daniel L. Bradford, who testified that he had agreed with the defendant to discharge it at any time upon payment of the amount secured by it. This testimony was competent to show the defendant's ability to discharge the incumbrance if the plaintiff would waive the objection of the misdescription in the deed. There was sufficient evidence in the case to show the defendant's ability and readiness to perform the contract on his part.

The plaintiff had the right to go to the jury upon this point, but he waived this right, and agreed that a verdict should be ordered for the defendant, which was to stand, unless this court should be of opinion that, upon the evidence, a verdict should have been rendered for the plaintiff. We are of opinion that

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the jury would have been justified in finding, if not required to find, a verdict for the defendant; and therefore, according to the terms of the report, there must be

Judgment on the verdict.

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CALEB PRATT *vs.* ANGELIA LAMSON.

Suffolk. March 19. — April 19, 1880. AMES & LORD, JJ., absent.

A promissory note, which matures more than two years after the giving of bond by the executor of the will of the deceased maker, is a debt for which provision is made in the Gen. Sts. c. 97, § 8; and, if the holder does not present his claim to the Probate Court under that section, he cannot maintain an action thereon against the legatees of the deceased under the Gen. Sts. c. 101, § 31.

CONTRACT against the defendant as residuary legatee under the will of Stephen G. Davis, upon a promissory note for $5000, dated July 15, 1874, signed by Davis, and payable to the plaintiff in three years from date, with interest. Writ dated July 13, 1878.

Trial in the Superior Court, without a jury, before *Putnam*, J., who ruled that the plaintiff could not recover; found for the defendant; and reported the case for the determination of this court. If the ruling was correct, judgment was to be entered for the defendant; otherwise, judgment for the plaintiff. The facts appear in the opinion.

E. C. Gilman, for the plaintiff.

J. F. Colby, for the defendant.

MORTON, J. This action is brought under the Gen. Sts. c. 101, § 31, which provide that "after the settlement of an estate by an executor or administrator, and after the expiration of the time limited for the commencement of actions against him by the creditors of the deceased, the heirs, next of kin, devisees and legatees, of the deceased, shall be liable, in the manner provided in the following sections, for all debts which could not have been sued for against the executor or administrator, and for which provision is not made in chapter ninety-seven."

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Section 32 provides that "a creditor whose right of action accrues after the expiration of said time of limitation, and whose claim has not been presented to the Probate Court, or if presented has not been allowed as provided in chapter ninety-seven, may, by action commenced within one year next after the time when such right of action accrues, recover the same against the heirs and next of kin of the deceased, and the devisees and legatees under his will; each one of whom shall be liable to the creditor to an amount not exceeding the value of real or personal estate that he has received from the deceased."

Section 31 defines and fixes the limits of the liability of heirs, devisees and legatees.

The object of the thirty-second and the succeeding sections is to provide the manner in which this liability may be enforced, and not to extend the liability. The language of § 32, "whose claim has not been presented to the Probate Court, or if presented has not been allowed as provided in chapter ninety-seven," taken literally, would include the case of a creditor having a debt for which provision is made in chapter ninety-seven, but who has neglected to avail himself of that provision. But, thus construed, it would be inconsistent with § 31. We are, therefore, of opinion that § 32 was intended to be limited to the cases of creditors who have not presented their claims to the Probate Court because not within the provisions of the ninety-seventh chapter, or, if within such provisions, whose claims have been presented and disallowed; and that it does not extend the liability of heirs, devisees or legatees to debts which, being within those provisions, have not been presented under them to the Probate Court.

The question in this case then is, whether the plaintiff's debt is a debt of the deceased "for which provision is not made in chapter ninety-seven." The testator died in April 1875. The first and final account of the executrix of his will was filed January 2, 1876, and was allowed by the court. The note in suit was signed by the deceased, and became payable on July 18, 1877. At the death of the testator, it was a debt due by him payable in the future. A right of action did not accrue upon it within two years after the giving of the administration bond on May 24, 1875. Such a debt is within the Gen. Sts. *c.* 97, § 8,

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which provides that "a creditor of the deceased, whose right of action does not accrue within two years after the giving of the administration bond, may present his claim to the Probate Court at any time before the estate is fully administered; and if, on examination thereof, it appears to the court that the same is justly due from the estate, he shall order the executor or administrator to retain in his hands sufficient to satisfy the same," or that a sufficient bond shall be given for the payment of the claim. This gives a creditor, situated as the plaintiff was, the right to present his claim at any time after the death of the debtor, and before the estate is fully administered. *Hammond* v. *Granger*, *ante*, 272. *Ames* v. *Ames*, *ante*, 277.

The plaintiff had the right to present his claim to the Probate Court; in other words, provision for his debt is made in *c.* 97; and, as he neglected to avail himself of this provision, it follows that he cannot maintain an action against the heirs, next of kin, devisees or legatees of the deceased debtor.

Judgment for the defendant.

EDWARD KELLY *vs.* JOHN M. JOHNSON.

Suffolk. March 23. — April 19, 1880. AMES & LORD, JJ., absent.

In an action for personal injuries occasioned to the plaintiff by the negligence of the defendant's servant, it appeared that the plaintiff was a machinist in the employ of W., a builder of steam-engines; that the defendant, a teamster, was employed to transport an engine from W.'s shop to the railroad station, and went with his truck and servants to do this work; that, after the engine was loaded upon the truck, he falsely represented to the plaintiff that W. had agreed to send two of his men to the station to assist in loading the engine upon the car; and that the plaintiff was thereby induced to go to the station and assist the defendant, and, while putting the engine upon the car, was injured. *Held*, that the plaintiff did not become the servant of the defendant; and that the action could be maintained.

TORT for personal injuries occasioned to the plaintiff by the negligence of the defendant's servant. Trial in this court, before *Endicott*, J., who, after verdict for the plaintiff, reported the case for the determination of the full court. The facts appear in the opinion.

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J. F. Pickering, (*J. W. Pickering* with him,) for the defendant.
W. Gaston & C. L. B. Whitney, for the plaintiff.

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MORTON, J. The verdict of the jury settles the fact that the plaintiff was injured by the negligence of a servant of the defendant in the course of his employment.

At the trial, the defendant contended that he was not responsible for the injury, because the plaintiff was a fellow-servant of the person by whose negligence he was injured. Upon this point, the following facts appeared, and were established by the verdict. The plaintiff was a machinist in the employ of one Winchester, a builder of steam-engines and machinery. The defendant, a teamster, was employed to transport an engine from Winchester's shop to the railroad station. He went with his team and servants to do this work. After the engine was loaded upon the truck, he falsely represented to the plaintiff that Winchester had agreed to send two of his men to the station to assist in loading the engine upon the car. The plaintiff was thereby induced to go to the station to assist the defendant, and while putting the engine upon the car was injured.

The presiding justice rightly instructed the jury that, upon these facts, the plaintiff did not become the servant of the defendant. A servant cannot recover of his master for an injury caused by the negligence of a fellow-servant, because, when he enters into the service, he by implication agrees that he will take the ordinary risks of the service, including the risk of the negligence of fellow-servants. But the plaintiff did not enter into the service of the defendant. There was no contract of service between them. The plaintiff could not recover any wages of the defendant. He was in the service of Winchester, and believed and understood that he was doing the work of Winchester. He was induced to assist the defendant by his false representations, but the defendant cannot thus impose upon him the incidental and implied obligations of a contract of service into which he has not entered. *Judgment on the verdict.*

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PETER CUMMINGS *vs.* MARY CUMMINGS & another.

Berkshire. Sept. 9, 1879. — June 24, 1880. ENDICOTT & LORD, JJ., absent.

On a petition to the Probate Court to have the final account of a guardian reopened, it appeared that the matter in controversy was tried and determined by that court after hearing the same parties at the allowance of the account, which was more than two years before the application to reopen it, from which no appeal was taken; and that the balance of that account was the basis of the inventory filed by the guardian as administrator of his ward, and of his account as administrator, which was allowed by the Probate Court and by this court on an appeal taken by the present petitioner. *Held*, that, under these circumstances, the Probate Court was not authorized to reopen the account, upon the mere ground that its decision of a question of fact, fully heard and determined at the hearing upon the allowance of the account, was erroneous.

APPEAL by Peter Cummings from a decree of the Probate Court, allowing the petition of the appellees to have the account of the appellant, as guardian of Edward Cummings, an insane person, reopened. Hearing before *Soule*, J., who reported the case for the determination of the full court, in substance as follows:

On July 16, 1872, the appellant was appointed guardian of Edward Cummings, who was on that day adjudged by the Probate Court to be insane, and the guardianship continued until the death of Edward, on December 4, 1872. On January 7, 1873, the appellant was appointed administrator of the estate of Edward, and duly qualified as such. On February 4, 1873, he filed an inventory of said estate as administrator. On July 15, 1873, he filed his final account as guardian of Edward, which was allowed by the Probate Court on January 6, 1874, after a hearing at which the appellees opposed the allowance, because three promissory notes, amounting to the sum of $1000, which had formerly belonged to Edward, and which had come into the hands of the appellant and had been in part collected by him, were not accounted for by him in his account. The appellant contended that they had been given to him by Edward before he became insane, in consideration of kinship and affection; and the appellees contended that the gift was void because made after Edward became insane. The Probate Court decided that the gift was a valid one, and allowed the account as filed; and

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from this decree no appeal was taken. Neither the notes nor the proceeds thereof were included in the inventory filed by the appellant as administrator. On March 7, 1876, the appellant filed his account as administrator, in which neither the notes nor the proceeds thereof appeared, showing a balance due him from the estate. This account was allowed by the Probate Court on May 2, 1876, and an appeal was taken, the report of which appears in 123 Mass. 270.

The appellees admitted that there was no error in any of the items of the guardian's account which they seek to have reopened; and that the only purpose of their petition was to have the decree allowing that account annulled, and the question of allowance reopened and reheard, in order that the question of the sanity of Edward, when he gave the notes to the appellant, might be reheard.

The judge ruled that the Probate Court had no authority to annul the decree allowing the account, and reopen the matter for a rehearing of the questions passed on when the account was allowed. If the ruling was correct, the decree of the Probate Court was to be reversed; otherwise, to be affirmed.

J. Tatlock, for the appellees, cited *Stetson* v. *Bass*, 9 Pick. 27; *Waters* v. *Stickney*, 12 Allen, 1; Exodus xxii. 22–24; Deut. xxiv. 17, and xxvii. 19; Psalm lxviii. 5; Mark x. 7, 8.

M. Wilcox & W. T. Filley, for the appellant.

GRAY, C. J. A decree of the Probate Court, allowing the account of an executor, administrator or guardian, may doubtless be opened and revised by that court, on application seasonably made, and upon proof of fraud, or of manifest mistake of the parties. *Stetson* v. *Bass*, 9 Pick. 27. *Field* v. *Hitchcock*, 14 Pick. 405. *Davis* v. *Cowdin*, 20 Pick. 510. *Waters* v. *Stickney*, 12 Allen, 1, 11. And it is provided by statute that an account settled in the absence of any person adversely interested, and without notice to him, may be opened on his application within six months afterwards; and that any mistake or error in a former account of an executor or administrator, and even, by leave of court, in a matter actually contested and determined, may be corrected at the hearing upon any subsequent account of his before the estate is finally settled. Gen. Sts. *c.* 98, § 12. *Granger* v. *Bassett*, 98 Mass. 462.

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But neither statute nor precedent warrants the reopening of the appellant's guardianship account in the present case. There is no evidence that the parties have been influenced by fraud, or by any mistake of fact. The very matter now sought to be contested anew was tried and determined, after hearing these same parties, at the allowance of the final account of the guardian. That account was allowed by the Probate Court more than two years before the application to reopen it. The balance of the account so allowed was the basis of the inventory filed by the appellant as administrator of his ward, and of his account as such administrator, which was allowed by the Probate Court, and by this court on an appeal taken by these appellees. *Cummings* v. *Cummings*, 123 Mass. 270. Under these circumstances, the Probate Court was not authorized to reopen the final account of the guardianship upon the mere ground that its decision of a question of fact, fully heard and determined at the hearing upon the allowance of that account, was erroneous. *Bassett* v. *Granger*, 103 Mass. 177. *Decree of Probate Court reversed.*

SOLOMON H. AMIDON *vs.* QUARTUS W. BENJAMIN.

Franklin. Jan. 7. — June 25, 1880. COLT & LORD, JJ., absent.

At the trial of a petition to enforce a mechanic's lien upon land, under the Gen. Sts. *c.* 150, it appeared that in the certificate of lien the respondent was alleged to be the owner of the land; that, before the contract with the petitioner was made, the respondent, who had then merely a bond for a deed of the land, borrowed a sum of money from his daughter, and told her he would give her a deed when he got one, and secure her on the place; that, after he got his deed, without her knowledge, he caused a deed, conveying the land to her absolutely, to be executed and recorded, and subsequently told her that a deed had been made; but there was no evidence that she ever had possession of the deed or of the land, or knew of the form or contents of the deed; and that the petitioner had knowledge of the deed when he filed his certificate of lien. *Held*, that this evidence would warrant a finding for the respondent.

PETITION, under the Gen. Sts. *c.* 150, inserted in a writ dated May 2, 1877, to enforce a mechanic's lien for labor performed and materials furnished in the erection of a building in Montague,

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alleging that the respondent was the owner of the land; that the work was done and the materials furnished with his knowledge and consent; and that a certificate of the amount due the petitioner, containing a description of the property, and the name of the owner of the land, was filed in the office of the town clerk of Montague. At November term 1877, the petitioner filed a motion alleging that Emma J. Benjamin had the record title to the land, and praying that she be summoned to answer the petition; and this motion was granted. After the former decision, reported 126 Mass. 276, the case was tried in the Superior Court, without a jury, before *Dewey*, J., who reported the case for the determination of this court, in substance as follows:

Early in 1876, Alden W. Grout gave the respondent a bond for a deed of the land in question. The respondent thereupon began to build a house on the land, and soon after made the contract with the petitioner on which his claim is founded. Grout lived in the neighborhood, and frequently passed the premises while the building was in progress. On December 1, 1876, Grout made a deed of the land to the respondent, but the deed was not delivered until January 18 following, when the respondent mortgaged the land to one King, and both deeds were delivered at the same time.

There was no controversy as to the amount due the petitioner, nor as to the filing of the claim of lien, and bringing suit in proper season after said filing.

There was evidence that in November 1876, during the erection of the building, Benjamin borrowed $150 of his daughter, Emma J. Benjamin, and afterward borrowed of her a farther sum of $250, and that he told her he would give her a deed when he got a deed and secure her on the place. On February 10, 1877, without her knowledge, he executed and caused to be recorded an absolute deed of the lot in question and of other real estate. This deed remained in the registry until after the bringing of this suit, when it was taken away by the respondent and placed in the hands of counsel. Emma J. Benjamin was informed by her father that a deed had been made, but she never had possession of it and there was no evidence that she ever had possession of the land described in it. It did not appear that

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she ever had knowledge of its form or contents. The petitioner had knowledge of the making and record of this deed.

Upon the foregoing facts, the respondent asked the judge to rule that the lien could not be maintained; the judge so ruled, and ordered judgment to be entered for the respondent. If, upon the foregoing facts, the petitioner was entitled to maintain the petition, judgment was to be entered for him, and the proper order made for sale of the premises; otherwise, the judgment for the respondent to stand.

G. D. Williams, for the petitioner. 1. The instrument executed by the respondent to his daughter never took effect as a conveyance. It was never delivered to the grantee named therein, or to any agent on her behalf; nor does it appear that she assented to it. *Maynard* v. *Maynard*, 10 Mass. 456. *Hedge* v. *Drew*, 12 Pick. 141. *Shaw* v. *Hayward*, 7 Cush. 170. *Marsh* v. *Austin*, 1 Allen, 235. *Hawkes* v. *Pike*, 105 Mass. 560. On the other hand, it appears that the agreement was that she should be "secured" on the place on which the house was being erected. The agreement therefore called for a mortgage of the place, but the instrument executed by the respondent was a deed of the place, and it did not appear that the grantee ever had even knowledge of the contents of the instrument.

2. If the instrument executed by the respondent to his daughter took effect as a conveyance, it was only as a mortgage. The evidence is that the respondent borrowed the money which his daughter let him have, and that he agreed to "secure her on the place." Any instrument made in pursuance of this agreement must be a mortgage. Jones on Mortgages, § 324, and cases there cited. If this instrument, absolute in form, is in fact only a mortgage, and as such would permit of redemption in equity, then it must be so treated in this proceeding; for to do otherwise would be to give effect to its form, fraudulent as to this petitioner.

A. De Wolf, for the respondent.

SOULE, J. The petition sets forth that Quartus W. Benjamin is the owner of the land on which a lien is claimed, that the work was done with his knowledge and consent, and that a certificate of the amount due the petitioner, stating the name of the owner of the land, was filed in the office of the town clerk of

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Montague. There is no dispute as to the amount due, nor as to the seasonableness of the filing of the certificate. It appeared, however, at the trial in the Superior Court, that a deed of the premises to Emma J. Benjamin had been made and recorded before the certificate was filed in the office of the town clerk, and that the petitioner knew this. The respondent contended that the lien could not be maintained, because the certificate did not state the name of the owner of the premises, as required by the statute. Gen. Sts. *c.* 150, § 5. The petitioner contended that the statute had been complied with, on the ground that the deed to Emma was never delivered, and, if delivered, was inoperative, because given without consideration and with the intent to defraud the creditors of Quartus. If he had established the facts on which he relied, they would have sustained the allegation of ownership in the petition. *Amidon* v. *Benjamin*, 126 Mass. 276. The judge who presided at the last trial found for the respondent, and must, therefore, have found that the deed to Emma was made for a valuable consideration, and was delivered and was valid against creditors of the grantor. This finding was warranted by the evidence. The grantor, being in debt to Emma, promised to convey the premises to her when he obtained a title. He made the deed in about three weeks after the conveyance to himself, having first incumbered the premises with a mortgage to one King. Emma never had the deed in her possession, but she was informed that it had been made, and it was put in evidence after she had been summoned in to defend her title against this petition. There is enough in these facts to warrant the finding that Emma assented to and accepted the deed in payment of the debt due her from the grantor.

It follows that the petitioner lost his lien, because he did not state in his certificate, filed in the town clerk's office, the name of the owner of the land, it being known to him.

Petition dismissed.

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HIRAM M. BLACKMER *vs.* ELNATHAN DAVIS & another.

Worcester. Sept. 30, 1879. — June 24, 1880. ENDICOTT & LORD, JJ., absent.

If a contract in writing, purporting to be between two persons, and containing mutual and dependent stipulations to be by them severally performed, is signed by them, and also by a third person, in such a manner as not to indicate the capacity in which he is a party to the contract, no action can be maintained thereon by one of the parties named in the body of the contract against him and the other party jointly; and parol evidence is inadmissible to show that he signed it intending to be bound, and as surety for the other defendant.

CONTRACT against Elnathan Davis and Francis G. Davis, to recover a balance of $200, alleged to be due the plaintiff, upon a contract to build a shop. The declaration alleged that the plaintiff had performed his part of the contract; but the defendants refused to perform their part. Trial in the Superior Court, before *Dewey*, J., who allowed a bill of exceptions, in substance as follows:

The plaintiff offered evidence tending to show that he had some conversation with the defendant Francis G. Davis, with reference to building a shop; that he made a verbal arrangement with Francis to build the shop, and that Francis then drew up the following contract: "This contract made and entered into this fifth day of July 1876, by and between Hiram Blackmer, of Worcester, and Francis G. Davis, of Millbury, witnesseth: First, the said Hiram Blackmer, for himself and his legal representatives, in consideration of the promise and agreement hereinafter written, hereby covenants and agrees to build upon land of the said Davis, in Millbury, a frame building in a good and workmanlike manner, and according to the specifications hereto annexed; that he will finish said building ready for painting and plastering on or before October 1st, 1876. Second, the said Davis, for himself and his legal representatives, in consideration of the foregoing, hereby covenants and agrees to pay the said Blackmer upon the completion of said building, according to the specifications hereto annexed, the sum of fourteen hundred and thirty dollars, of which sum the said Blackmer agrees to take and receive one hundred dollars in carriage-work."

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The plaintiff further testified that the contract was signed by Francis and by the plaintiff, but the plaintiff told him at the time he would not go on under the contract, unless Elnathan Davis, who, as the plaintiff had then learned, owned the land, would sign the contract; that thereupon, and before the contract was delivered, Francis took the contract to Elnathan, his father, who then owned the land, and Elnathan signed the contract, and it was delivered to the plaintiff, who performed his part of it; and that only a part of the contract price had been paid. The signatures to the contract appeared in the following order: "Francis G. Davis. Elnathan Davis. H. M. Blackmer."

The plaintiff offered to show by parol, that the defendants and the plaintiff understood that Elnathan Davis signed the contract intending to become surety to it and be bound thereby, and that all the parties understood that he was so bound and intended that he should be. The judge excluded the evidence.

The plaintiff asked the judge to rule as follows: "1. If the defendant, Elnathan Davis, signed the contract with the understanding between the parties that he should be liable as one of the parties thereto, he is liable by the terms of said contract, and an action can be maintained thereon. 2. Parol evidence is competent to show that it was the intention of the parties that Elnathan Davis should be jointly liable to the plaintiff upon the contract. 3. Upon the evidence, the jury would be warranted in finding a joint written contract between the parties, Francis G. Davis and Elnathan Davis of the one part, and the plaintiff of the other part."

The judge refused so to rule; and instructed the jury that it was immaterial with what intent Elnathan Davis signed the contract, or what the intention of the parties was in relation to it; and that no action could be maintained against Elnathan Davis thereon; that if, after the written contract was made between Francis G. Davis and the plaintiff, Elnathan Davis and Francis G. Davis jointly made a verbal contract with the plaintiff to go on and erect the building specified in the contract and they would pay him for it, and he performed the contract on his part, the defendants were bound to pay him therefor.

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The jury returned a verdict for the defendants; and the plaintiff alleged exceptions.

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F. T. Blackmer, for the plaintiff.

J. Hopkins, for the defendants.

COLT, J. The action is against the defendants as joint promisors, to recover the balance due upon a contract with the plaintiff to build a shop, which it is alleged had been performed. Under the declaration in this case, the right to recover would be established by proving the performance of either a written or verbal contract with the defendants jointly. The plaintiff relied on the written contract set out in the bill of exceptions. The plaintiff and Francis G. Davis were the only parties to this contract as originally drawn up. There was evidence tending to show that the plaintiff refused to go on with the work, unless the other defendant, Elnathan Davis, would also sign the contract; and thereupon he subscribed his name to it, without any addition to or alteration of its terms, and it was delivered to and accepted by the plaintiff, who then went on and completed the work for which he seeks compensation. It was with reference to the written contract that all the rulings excepted to by the plaintiff were made. Under instructions not excepted to, the plaintiff failed to establish an oral contract made with the defendants jointly for the work to be done.

The judge excluded parol evidence offered by the plaintiff to show that all parties understood that Elnathan Davis signed the contract intending to become jointly liable to the plaintiff as surety, and refused to rule that he would be liable if he signed with that understanding. He also refused to rule that the jury would be authorized from the evidence to find a joint written contract between the two defendants and the plaintiff; and instructed the jury that it was immaterial with what intent Elnathan Davis signed the contract, or what the intention of the parties was in relation to it.

The correctness of these rulings depends upon familiar rules applicable to the interpretation and validity of all written contracts. The intention of the parties to such contracts is to be ascertained only from the language used, as applied to the subject-matter and explained by surrounding circumstances. It cannot be shown by extrinsic parol evidence how the contract

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when made was understood by the parties. *Bigelow* v. *Collamore*, 5 Cush. 226. *Harper* v. *Gilbert*, 5 Cush. 417. *Gould* v. *Norfolk Lead Co.* 9 Cush. 338. The security of the written contract cannot be so impaired; and the evidence offered was properly excluded.

The more difficult question arises upon the refusal of the judge to permit the jury to find that the defendants were by the written agreement joint contractors with the plaintiff; in other words, refusing to rule that, by the terms of the contract, the defendants could be held as jointly liable to the plaintiff. The construction of the contract is for the court. If, after applying all known rules of interpretation, the intention of a party whose name is signed to a contract cannot be ascertained from its terms, then it is a case of incurable uncertainty, and the contract cannot be enforced against him.

In applying the rule which requires that effect be given, if possible, to all parts of a written instrument, courts have in many instances held liable, as parties to the contract, those who have thereto subscribed their names, but are not elsewhere mentioned in it. Several of these cases were cited in the argument.

In *Clark* v. *Rawson*, 2 Denio, 135, a written memorandum for the delivery of property was signed by the contracting party named in the body of the instrument, and by another not named therein. It was executed only by them, and not by the plaintiff, to whom it was delivered. It was decided to be the joint contract of both signers, on the ground that it was evident, without resorting to extrinsic evidence, that such was the intention. The writing in that case, it is to be noticed, contained a promise in favor of the plaintiff only, and the implication is strong in such a case that the one who subscribed without being mentioned in it intended for the benefit of the plaintiff to add the security of his name to the promise.

In *Parks* v. *Brinkerhoff*, 2 Hill, 663, a promissory note, which purported to bind the Fishkill Iron Company alone, was signed by several individuals, and the signatures of the latter alone were held to indicate an intent to be responsible as sureties and joint and several promisors, *ut res magis valeat quam pereat.* So the intent of one to be bound by the terms of an appeal bond

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was held to be plain from the fact of his executing it, although not named in the body of the instrument. *Ex parte Fulton*, 7 Cow. 484.

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The rule has been repeatedly applied by this court. *Ahrend* v. *Odiorne*, 125 Mass. 50. *Smith* v. *Crooker*, 5 Mass. 538. *Union Bank* v. *Willis*, 8 Met. 504. *National Pemberton Bank* v. *Lougee*, 108 Mass. 371. *Danker* v. *Atwood*, 119 Mass. 146. The principle which governs these cases is, that one who signs and delivers a written instrument, containing a distinct promise to the party to whom it is delivered, must be presumed to have intended to bind himself to the performance of the promise. It applies to cases where the contract is unilateral, and contains promises only in favor of the party to whom it is delivered, or in whose favor it is made.

The difficulty in applying it to the instrument here produced is, that this is a contract containing mutual and dependent stipulations between the original parties named in it. The plaintiff agrees to build a shop for Francis G. Davis, and the latter agrees to pay the plaintiff for it. The signature of Elnathan Davis appears at the bottom between the signatures of the original parties. There is nothing in the contract showing any consideration affecting him, or inducing him to become a party, or showing relations to either party which should lead to the inference that he was a surety for and joint promisor with one rather than the other original party. In the absence of parol evidence, no inference arises one way or the other. It is not enough that the two defendants bear the name of Davis. And all that can be said is, that, if Elnathan intended to become a joint promisor with Francis G. Davis, then the written agreement fails to show it. The case before us stands upon the construction of the written instrument only, not upon the question whether there was evidence in connection with it to go to the jury, showing an independent oral joint contract to perform the stipulations contained in it. *Exceptions overruled.*

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MARY E. BAKER & another *vs.* EDWARD J. BLOOD.

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Worcester. Sept. 30, 1879. — June 24, 1880. ENDICOTT & LORD, JJ., absent.

When this court, by a rule under the Gen. Sts. *c.* 117, § 19, establishing forms to be used in all the Probate Courts, has required the last publication of a notice in probate proceedings to be two days at least before the return day, a Probate Court has no authority to order such publication to be one day at least before such day; and all proceedings based upon such a notice are invalid.

APPEAL by Edward J. Blood from a decree of the Probate Court removing him from the office of guardian of the petitioners. *Colt*, J., affirmed the decree; and the guardian alleged exceptions, which appear in the opinion.

J. N. Marshall, for the guardian.

C. R. Johnson, for the petitioners.

COLT, J. The citation issued by the Probate Court, upon a petition for the removal of the appellant from his office as guardian, was in this case ordered to be served upon the appellant personally, or by publication in a newspaper three weeks successively, the last publication to be one day, instead of two days, at least, before the return day. It was served by publication, and the last publication was in fact but one day before the court at which the decree for removal was passed. The appellant was not present, and had no actual notice or knowledge of the proceedings. In support of his appeal, he contends that the Probate Court had no jurisdiction, because the order of notice in form and in the service of it failed to comply with an established rule of court requiring the last publication to be two days at least before the return day of the citation.

By the Gen. Sts. *c.* 117, among other provisions regulating the practice and proceedings in Probate Courts, it is required in § 19 that the several judges of probate shall, from time to time, make rules for regulating the practice and conducting the business of their courts in all cases not expressly provided for by law; and shall return a statement of their rules and course of proceedings to this court, as soon as conveniently may be thereafter. The power to make other and further rules from time to time is also given to this court, for the declared purpose of securing regularity and uniformity in the proceedings. Under the provisions of this section, a committee of the judges of the Probate Courts

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having prepared forms for proceedings in those courts, upon one general plan and system, and, the same having been examined and approved by this court, it was ordered on January 15, 1862, in order to secure regularity and uniformity in the proceedings of the Probate Courts in the several counties, that they be filed in this court, and recognized as standard forms to be adopted and used in all the Probate Courts of this Commonwealth.*

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* "Commonwealth of Massachusetts.

"Suffolk ss. Supreme Judicial Court.

"Whereas, by the General Statutes, chapter 117, section 19, it is provided that the several judges of the Probate Court 'shall from time to time make rules for regulating the practice and conducting the business in their courts in all cases not expressly provided for by law, and shall return a statement of their rules and course of proceedings to the Supreme Judicial Court, as soon as conveniently may be after making the same,' and that 'the Supreme Judicial Court may alter and amend the same, and make other and further rules, from time to time, for regulating the proceedings in the Probate Courts as it deems necessary, in order to secure regularity and uniformity in the proceedings.'

"And whereas Judges John Wells and William A. Richardson, a committee of the judges of the Probate Courts, have framed certain forms for proceedings in said courts for the probate of wills, the allowance of foreign wills, the appointment of executors, administrators, special administrators, administrators with the will annexed, administrators *de bonis non* with the will annexed, trustees, appraisers, guardians of minors, insane persons and spendthrifts, and guardians *ad litem*, for accounts, the distribution of intestate estates among widows and next of kin, and of insolvent estates among creditors, for the sale of real estate to pay debts and legacies and more than enough therefor, and for the maintenance of wards and investment, for the adoption of children, the change of names of persons, for setting off dower and making partition of real estate, for allowance to widows, affidavits to perpetuate evidence of notice, and judge's and register's certificates, including petitions, citations, decrees, bonds, oaths, returns and letters, with the necessary records for the same; all upon one general plan and system.

"And whereas said forms have been examined, considered and approved by this court,

"Therefore, in order to secure regularity and uniformity in the proceedings of the Probate Courts in the several counties, it is ordered that copies of all said forms be filed in this court, and recognized as standard forms to be adopted and used in all the Probate Courts of this Commonwealth.

"By the Court,

"Geo. C. Wilde, Clerk.

"Boston, January 15, 1862."

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Among the forms so approved and established is the form for citations upon petitions and proceedings pending, by which, when service is by publication, it is required to be once a week for three weeks successively, "the last publication to be two days at least before said court;" and we are of opinion that the form of the citation, and the mode of its service thus fixed, cannot in any material respect be departed from without destroying the validity of all proceedings founded thereon. It has become binding by rule of court, and by § 20 of the same chapter of the General Statutes, the power of the judges to frame forms for process "in conformity with the principles of law and the usual course of proceedings in this State" is expressly limited to cases when no form "is prescribed by statute or the rules of the court." A rule of court thus established has the force of law, and is equally binding upon the parties and the court. It cannot be dispensed with to suit the circumstances of any particular case.

Thus, when a plea in abatement was by mistake not offered until the fifth day of the term, and was then by leave of a judge of the Court of Common Pleas filed as of the fourth day, the filing was held by this court to have been improper, because in contravention of the rules of that court. *Thompson* v. *Hatch*, 3 Pick. 512. The judges of that court were held in another case not to be the final and exclusive judges of the construction and legal effect of their own rules, but their decisions respecting them are matter of law, and subject to the revision of this court. *Rathbone* v. *Rathbone*, 4 Pick. 89. In *Tripp* v. *Brownell*, 2 Gray, 402, where a motion for a new trial was not seasonably filed in a case tried in this court, it was said that a general rule of practice, made by the whole court pursuant to statute, when no discretionary power is reserved, is binding upon a judge at *nisi prius*, and that he has no authority to dispense with it.

In the present case, the appeal is to this court as the Supreme Court of Probate, and the rule in question is one of its own rules. The change from the established form which was here made was a material alteration, because it reduced the required time of notice to which the appellant was entitled. There is no claim that the service of it was sufficient notwithstanding the defect, or that the error was cured by an appearance, or was

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otherwise waived. The court had no authority to remove the appellant without the service of legal notice upon him. Gen. Sts. *c.* 109, § 24.

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The issuing of a formal and legal notice or citation, and a service thereof as therein directed, were necessary to give the court jurisdiction, and, without considering other objections to the validity of these proceedings, the entry must be

Exceptions sustained.

EVELINE UPHAM & another *vs.* GEORGE H. MARSH.

Worcester. Oct. 1, 1879. — June 24, 1880. ENDICOTT & LORD, JJ., absent

If a surveyor of highways judges it to be for the interest of the town to dispose of soil, taken from land within the limits of a highway for the purpose of lowering the highway, by depositing it on his own land as the best way of clearing the road of useless material, rather than to use it elsewhere on the road, he is not liable to an action by the person who owns the fee of the road at the place where the soil was taken.

TORT for breaking and entering the plaintiff's close in Dudley, and carrying away and converting to his own use a quantity of earth and gravel. The case was submitted to the Superior Court, and, after judgment for the defendant, to this court on appeal, on the following agreed facts:

The plaintiffs are owners in fee of a farm in Dudley, through which the town in 1816 laid out a public way, which it has ever since maintained. The defendant took and carried away the soil from the way, where it is laid out through the farm, in June 1875, and in October 1877. In 1875, E. L. Upham was highway surveyor of the district where the road lies, the town being then and ever since under the highway district system. In 1877, the defendant was himself the highway surveyor of the district. At both times the travelled road-bed, including the gutters, was ploughed lengthwise to the lines of the road banks, and the soil, which was taken and carried off, was loosened and turned up by such ploughing. The road was thus ploughed on both occasions, to lower the same and as a measure of repair thereof, and by

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direction of the highway surveyor for the time being. The place lowered in 1877 was a continuation of that lowered in 1875, and the entire lowering, a distance of eight rods, was on the south side of a very steep hill, and on each side of the located road opposite the place so lowered was the mowing-land of the plaintiffs. Nearly one hundred rods south of the place lowered, at the foot of the hill, was a hollow, and the soil carried off by the defendant, if it had been used to raise the hollow, would have improved the road. The defendant in both cases put the soil so carried away by him on his own land, which adjoined the road south of the plaintiffs' land, and was fifty rods from the place of lowering. The defendant was authorized by the surveyor, in 1875, to take and carry off the soil then removed by him, and did so under an agreement with the surveyor that the defendant might have the soil for carting it off from the road; and all was done as a part of the repairs then in progress, and with a view of clearing the road of needless material. In 1877, the defendant, as surveyor, took and carried off the soil then removed by him in his capacity as surveyor, and under the authority he possessed as such, and took the soil to his own use to pay him for carting it off from the road; and all was done as a part of the repairs then in progress, and with a view to clearing the road of needless material. In both cases the surveyor judged it better for the interest of the town thus to dispose of the soil, than to use it elsewhere on the road. The soil was used by the defendant on his own land for grading purposes. In both cases the defendant used his own horse and cart and men for the removal of the soil, and charged the town nothing for the work so done.

The first time he took eight loads of the agreed value of twenty-five cents a load, the last time he took twenty-five loads of the same agreed value per load. On these facts the court was to render such judgment as the law required.

H. L. Parker, for the plaintiffs.

H. B. Staples, for the defendant.

COLT, J. The highway surveyors of the town of Dudley, for the purpose of repairing the roads of that town in the years 1875 and 1877, authorized and directed in each of those years that several loads of earth be taken from the plaintiffs' land within

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the limits of the highway, and deposited on the land of the defendant, who was himself the surveyor during the last-named year. In both instances, the soil was removed for the purpose of lowering the road at that point, and was deposited on the defendant's land as the best way of clearing the road of useless material, and because, in the discharge of their duties, the surveyors in each year judged it for the interest of the town to dispose of it in that manner, rather than to use it elsewhere on the roads of the town. It does not appear that the plaintiffs made any objection to such disposition of the soil at the time, or contended that it should be deposited on their own premises, outside the limits of the way, where without their consent it could not be rightfully left.

There is nothing in the facts agreed which shows such abuse of authority on the part of the surveyors, or either of them, as would make them or their servants and agents liable in tort for the conversion of the soil so removed.

When land is taken for a highway, the public acquires, as incident to the easement, the right to use the soil and materials for constructing and keeping in repair a way safe and convenient for all descriptions of public travel. And the power to determine what is necessary in order to maintain such a way is given by law to highway surveyors, whose decision must, from the nature of the question, be final and conclusive. The only remedy to the party suffering damage is the right to compensation given by statute. Gen. Sts. *c.* 44, §§ 19, 20. Upon the question of necessity, the judgment and action of these public officers cannot be revised by the jury in any action at law. And if the act be done within the scope of the surveyors' authority, it does not become illegal by reason of the motive which influenced it. *Benjamin* v. *Wheeler*, 8 Gray, 409. *Denniston* v. *Clark*, 125 Mass. 216.

The surveyors of Dudley, therefore, had the right to remove the soil in question, if the same was in their judgment an obstruction to the public travel, or if they deemed it necessary to change the grade of the road on the side of the hill; and their decision that it was necessary to remove it was conclusive on all parties. Gen. Sts. *c.* 44, § 8. *Morrison* v. *Howe*, 120 Mass. 565. *Bay State Brick Co.* v. *Foster*, 115 Mass. 481.

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But it is contended on the part of the plaintiffs, that, as neither the town nor any officer of the town had any right to appropriate the soil and material belonging to them for any purpose other than the repair of the way, the defendant must be liable for the soil deposited upon his land and used by him. It is true that, under the pretence of repairing highways, town officers would have no right to take the soil of the landowner and by sale or otherwise appropriate it to their own sole use. That is not this case. Here the right to remove the plaintiffs' soil upon the facts stated is undoubted. It was not only the right, but it was the duty, of the surveyor to remove it; and removal implies the right to deposit it somewhere else. It has never been decided that it is necessary to the right of removal from one place that the material should be needed, or should be subsequently used, for repairs at some other point. The material itself may be wholly unfitted for such use, or may not be needed at a place to which it could be taken without disproportionate expense. It is not enough that, in the opinion of others, the soil in question might have been advantageously used in repairing this road at a more distant point. The judgment of the surveyor upon such questions must be of controlling weight. And, upon the whole case, we cannot see that more was done in this case than was reasonably necessary and incidental to the convenient and proper execution of the work of repairing the road where it crossed the plaintiffs' land. It follows that the plaintiffs lost all title to the soil when so removed from land belonging to them, and cannot maintain an action for its conversion.

Judgment affirmed.

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JOEL WALKER *vs.* INHABITANTS of WEST BOYLSTON.

Worcester. Oct. 3, 1879. — June 24, 1880. ENDICOTT & LORD, JJ., absent.

The election by a town of road commissioners, under a proper warrant therefor, is not illegal because they are chosen at a special meeting called for that purpose, nor because the St. of 1871, *c.* 158, providing for the election of road commissioners, is accepted at the same meeting.

Under the St. of 1871, *c.* 158, as amended by the St. of 1873, *c.* 51, providing that the road commissioners of a town "in matters concerning streets, ways," &c. "shall exclusively have the powers, and be subject to the duties, liabilities and penalties of selectmen and surveyors of highways," the petition of a landowner for an assessment of damages occasioned by a change of grade in a highway, after the town has accepted the statute and elected road commissioners, should be presented to the commissioners, and not to the selectmen.

PETITION to the Superior Court, under the Gen. Sts. *c.* 44, §§ 19, 20, for a jury to assess the damages occasioned to the plaintiff's estate by a change of grade in a highway in the respondent town. The case was submitted to the Superior Court, and, after judgment for the respondent, to this court on appeal, on an agreed statement of facts, the material parts of which appear in the opinion.

H. B. Staples, for the plaintiff.

W. S. B. Hopkins & H. F. Harris, for the respondent.

COLT, J. The application of the petitioner, for damages occasioned by a change of grade in the highway, was made to the selectmen of West Boylston, and not to the road commissioners of that town. The provisions of the St. of 1871, *c.* 158, entitled, "An act to provide for the election of road commissioners," had been accepted, and commissioners duly elected by the town, before the grade of the highway was changed.

It is no objection to the legality of the election, that the commissioners were chosen at a special meeting called for that purpose, to serve for the term of one, two and three years. The statute itself provides, that they may be elected at any meeting called for that purpose, and declares that the terms of service shall run from the date of the annual meeting next preceding the election.

Nor was the election of commissioners illegal because they were chosen at the same meeting at which the act was accepted. The statute requires that, before the election is had, the act

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must have been accepted; but there is nothing which implies that different meetings must be had, one for the acceptance and another for the election. It is enough if, after a vote of acceptance, commissioners are elected under a sufficient article in the warrant at the same meeting. All the conditions exist which give the town a right to elect. The warrant in this case gave notice that one of the subjects to be acted on would be the election of road commissioners under the existing statute. It is to be presumed that the provisions of the statute were known by all, and that no election could be had, unless, under a previous article in the same warrant, the act, with all its provisions and without alteration, was accepted by the town.

The case differs from *Locke* v. *Lexington*, 122 Mass. 290, where it was held that an article calling on the inhabitants to determine whether they would accept the provisions of a bill then pending before the Legislature, contained in a warrant which was issued and served before the bill became a law, was not a sufficient notice of the subject-matter to be acted on, because until it became a law it could not be known what its provisions would be. *Torrey* v. *Millbury*, 21 Pick. 64. *Hadsell* v. *Hancock*, 3 Gray, 526. *Avery* v. *Stewart*, 1 Cush. 496.

But it is contended that the plaintiff's petition was properly presented to the selectmen rather than the road commissioners, even if the latter were legally elected, because the authority to estimate the damage under the Gen. Sts. *c.* 44, § 19, has not been transferred to the road commissioners.

By the St. of 1871, *c.* 158, as amended by the St. of 1878, *c.* 51, it is declared that road commissioners "in matters concerning streets, ways," &c. "shall exclusively have the powers, and be subject to the duties, liabilities and penalties of selectmen and surveyors of highways." Under the General Statutes, the owner of land adjoining the highway, who sustained damage by reason of any act of repair, was entitled to compensation, to be determined by the selectmen. The assessment of damages was a duty concerning the making and repairs of highways which was imposed upon the selectmen. It was a duty concerning "streets and ways," which was expressly transferred by the later statute to the road commissioners. It is none the less a duty because it is partly judicial, rather than ministerial and

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executive, in its character. The language of the act is broad enough to include all acts of the selectmen of towns pertaining to the repair of highways. The policy of the Legislature has been to make officers, performing duties in respect to the laying out and repair of highways, judges in the first instance of the damages caused by their acts. The statutes of 1871 and 1873 afford no evidence of an intention to change this policy. All the powers and duties of selectmen are vested in the road commissioners, and the original application for damages should have been presented to the latter board. The petition for a jury to assess damages in the Superior Court, founded on the application to the selectmen, was properly dismissed. *Judgment affirmed.*

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ABIGAIL P. B. RAWSON *vs.* LOUISA PUTNAM.
SAME *vs.* WILLARD WARD.

Worcester. Oct. 3, 1879. — June 24, 1880. ENDICOTT & LORD, JJ., absent.

A tenant in a writ of entry, who claims under a deed from a disseisee, and who is in possession of the land at the time the writ is brought, may set up such title in defence; and the fact that his deed is merely one of quitclaim with limited covenants of warranty does not affect the case.

A disseisee who enters upon the land of which he is disseised and removes a fence therefrom, against the wishes of the disseisor, is liable to an action of trespass by the latter, although the entry is made without a breach of the peace, and the effect of it, followed by abandonment of possession by the disseisor, is to give to the disseisee a good title to the land.

COLT, J. These two cases grow out of a controversy about the same strip of land. The first is a real action, in which the tenant, by the deeds under which she claims, and apart from the question of disseisin, shows a good title to the land in dispute. There was evidence that, when the land was conveyed to the tenant by one Broad, and when it was conveyed to Broad by one Morse, both grantors were disseised by the demandant. The land in dispute was separated from the rest of the land so conveyed by a fence, and was occupied and used as a necessary part of two house-lots belonging to the demandant. The possession was open, and so far adverse that it would have

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ripened into a good title by presumption of grant, if it had continued for a sufficient length of time. *Johnson* v. *Bean*, 119 Mass. 271. *Boston & Worcester Railroad* v. *Sparhawk*, 5 Met. 469. *Proprietors of Locks & Canals* v. *Nashua & Lowell Railroad*, 104 Mass. 1.

It was found by the court that, before this action was brought, the tenant, by her authorized agents, entered upon the land, moved back the fence, and thereby took possession of the same. But there was evidence that this was done against the remonstrance of the agent of the demandant.

The judge was asked to rule that, if the grantors in the deeds referred to were disseised when those deeds were made, then the tenant claiming under them could not, by an entry made against the remonstrance of the demandant, acquire a title which would defeat this action. This ruling was properly refused. By the form of her action, the demandant now admits that the tenant is in possession of the land demanded, claiming title; and, as between the two, the latter shows the better title to the same by deed.

A deed of land of which the grantor is disseised is not wholly void. It is good as between the parties, and it gives to the grantee the right to recover seisin and possession to his own use, in the name of the grantor. It is said that no title passes which will support a real action in the name of the grantee, or give him a right of entry against the disseisee, or those claiming under him. *Loud* v. *Darling*, 7 Allen, 205. *Dadmun* v. *Lamson*, 9 Allen, 85. And yet it is settled that, if the grantee obtains possession of the land, he can unite that possession to the title acquired by such a deed, and so, by way of estoppel and to prevent circuity of action, defeat a real action brought by the disseisor to recover the same. The disseisin is terminated by the entry and occupation of one who claims title by deed from the true owner, and not adversely, and the latter, as well as all those from whom by successive deeds the title is derived, are estopped by their several deeds to deny that title. The disseisor is permitted to dispute it only so long as his disseisin continues. *Cleaveland* v. *Flagg*, 4 Cush. 76. *Farnum* v. *Peterson*, 111 Mass. 148. *McMahan* v. *Bowe*, 114 Mass. 140. It is declared in the case last cited that the same result would follow when the disseisor

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abandons his possession, because the abandonment enures to the benefit of the grantee, and gives him a seisin and a title valid against a stranger who subsequently disseises him. And so, although the deed gives to the grantee no right of entry, because such right is not assignable at common law, yet if he enters and obtains possession, even against the wishes of the party in possession, the title is thereby made good against the latter, and cannot be disputed in an action which puts the title directly in issue. In an action of trespass the grantee may indeed not be able to justify such entry. But, as was said in *Wade* v. *Lindsey*, 6 Met. 407, it does not follow for that reason that he has no defence to a real action. He does not by his tortious entry forfeit his right to recover possession in the name of the grantor; and, because he has this right, the demandant is not allowed to set up his claim in a real action against the tenant. Nor does the fact that the deed under which the tenant immediately claims is a quitclaim deed with limited covenants affect this result. The fact that the deed is effectual to convey a title good against the grantor, and to give the grantee a right of action in the grantor's name, is sufficient to create the estoppel. It was so held in the case last cited, where the tenant claimed title by quitclaim deeds to three undivided quarter-parts of the land of which he was disseised. See also *Sparhawk* v. *Bagg*, 16 Gray, 583; *Heard* v. *Hall*, 16 Pick. 457, 460; *Comstock* v. *Smith*, 13 Pick. 116, 120.

In the first case, therefore, the demandant has no just ground of exception to the rulings, refusals and finding of the court.

The other action is tort in the nature of trespass against Ward for entering upon the land in controversy and removing the fence, as the agent of Mrs. Putnam. The judge, for the reasons above given, properly refused to rule that the plaintiff was not in possession of the premises in dispute by disseisin, and found, as a fact, that Mrs. Putnam was disseised at the time of the alleged trespass; and that the plaintiff was entitled to recover the damages assessed.

Until Mrs. Putnam had recovered possession by entry, and so made the deed to her effectual to pass a good title, she was a stranger, without right of entry against the plaintiff; and the entry of her agent, against the plaintiff's wishes, was a trespass for which the defendant is liable, although such entry was made

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without a breach of the peace. *Ward* v. *Lindsey*, 6 Met. 107, 413. It was a tortious entry, although, as we have seen, the effect of it, followed by abandonment of possession by the disseisor, was to give to Mrs. Putnam a good title to the land, and a possession which, once acquired, was good against a mere disseisor. *Exceptions overruled in both cases.*

F. T. Blackmer & R. Hoar, for Rawson.

F. P. Goulding & H. E. Hill, for Putnam and Ward.

ABIGAIL T. JULIAN *vs.* BOSTON, CLINTON, FITCHBURG & NEW BEDFORD RAILROAD COMPANY.

Worcester. Jan. 7. — June 25, 1880. COLT & LORD, JJ., absent.

A widow, who has received personal property under her father's will, admitted to probate in another state, is not barred from recovering her dower in land in this Commonwealth, of which her husband was seised during coverture, from a tenant holding under a warranty deed from her father, to whom her husband conveyed by a deed in which she did not join.

WRIT OF DOWER. The case was submitted to the Superior Court, and, after judgment for the demandant, to this court on appeal, on an agreed statement of facts, in substance as follows:

The demandant in 1832 was legally married to Luke Julian, who was seised and possessed of the demanded premises in 1837. He afterwards conveyed the same to Theodore Moses, the demandant's father, by a deed which she did not sign, nor has she at any time since, in any manner, released her right of dower in said premises. Luke died in 1877, and the demandant made legal demand on the tenant to assign her dower in said premises before bringing this writ. Moses afterwards conveyed said premises by warranty deed, and the same came to the tenant by mesne conveyances, so that the tenant relies upon the warranty in Moses's deed. Moses died in 1862, in New Hampshire, of which state at the time of his decease and for many years he was a resident, and his children are and always have been residents of that state. He left an estate which by will was given to trustees for the benefit of eight children living at his decease,

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the income to be paid to them during their lives. His will was duly admitted to probate in New Hampshire; his estate has been settled in due course of law, and paid over to said trustees; and the time limited for commencement of actions against the executor by the statutes of this Commonwealth and of New Hampshire has expired. No provision was made in the will for the payment of any claim arising from or under his conveyance of said premises. The sum of $4000 was given to said trustees for the benefit of the demandant during life to the extent of the income thereof, some of the other children receiving a much larger sum and none a smaller; and, under the residuary clause of the will, there was received by each of said children the sum of $839.10, which sum is less than the value of the demandant's dower interest in the premises, but the income received from said trust fund added to the same would exceed the value of her dower interest.

G. A. Bruce, for the demandant.

G. A. Torrey, for the tenant.

SOULE, J. The demandant has not received, as heir of her father, any real estate. She has not, therefore, received anything which, independently of our statute, would be assets to render her liable to her father's grantee or his assigns on the covenants in her father's deed. The same would be true if she had inherited lands lying in the State of New Hampshire. *Austin* v. *Gage*, 9 Mass. 395.

Our statute provides that, in certain cases, heirs, next of kin and devisees shall be liable to the creditors of deceased persons, to the extent of the personal estate, as well as of the real estate which they have received from the deceased. Gen. Sts. *c.* 101, §§ 31, 32. This liability by reason of the receipt of personal estate is created by the statute, and exists only in the cases provided for in the statute. It arises, therefore, only after the settlement of an estate by an executor or administrator appointed in this Commonwealth. Until such settlement, it cannot be ascertained that there is not sufficient estate of the deceased within the Commonwealth to pay his debts and satisfy his covenants. *Royce* v. *Burrell*, 12 Mass. 395. *Hall* v. *Bumstead*, 20 Pick. 2. *Russ* v. *Alpaugh*, 118 Mass. 369. Money received in another state, from an executor or administrator appointed there,

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is no more assets under our statute, than real estate lying in another state and inherited from the grantor in a deed was assets to make the heir liable on the covenants of his ancestor at common law.

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It follows that the tenant would have no right of action against the plaintiff, on the covenants in her father's deed, if she should recover her dower as sued for. He therefore fails to establish any facts which bar her right to recover her dower in the lands described in her writ, it being conceded that her husband was seised of those lands during coverture, and that she has not released her right to dower therein.

Judgment affirmed.

THOMAS H. DOLLIVER, administrator, *vs.* GEORGE W. ELA.

Essex. January 7. — June 22, 1880. COLT & LORD, JJ., absent.

A., while in possession of land belonging to B., who had agreed to give him a deed upon certain terms, erected a building thereon under an agreement that it was not to be the property of B., but that A. should have the right to remove it at any time. Subsequently A., without the knowledge of B., sold the building by bill of sale, not recorded, to C. Afterwards B., at the request of A., conveyed the land to D. by a warranty deed, which made no mention of the building. At the same time, B.'s agreement to convey to A. was given up, and A. gave B. a release of the land "with all the privileges and appurtenances thereto belonging." C. then brought an action against B. for the conversion of the building. *Held*, that, as against B., the title to the building passed by the sale to C.; and that the action could be maintained.

TORT for the conversion of certain buildings. Trial in the Superior Court, without a jury, before *Pitman*, J., who reported the case for the determination of this court, in substance as follows:

It appeared that the buildings in question were erected by one Ashworth, upon land of the defendant, in such a manner as to become a part of the realty but for the contract hereinafter referred to, and that they were never physically severed from the realty up to the date of the writ. At the time of their erection, which was in the spring of 1868, Ashworth was in the possession

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of the land under the following circumstances. He had been previously a tenant of the defendant under a written lease, and had erected a brewery which had been destroyed by fire. On February 17, 1868, the lease was cancelled by mutual consent, and a warranty deed was made and signed by the defendant, conveying the premises for a price agreed to Ashworth, and at the same time Ashworth executed a mortgage back to the defendant to secure a part of the purchase money. The mortgage deed was delivered to the defendant, but the warranty deed was not delivered. The defendant gave to Ashworth, as a part of the same transaction, a written agreement by which he agreed to deliver the deed upon receiving that portion of the purchase money not covered by the mortgage. This money was never paid, nor the deed delivered. Ashworth continued to occupy the premises under an agreement to pay defendant, quarterly, a sum equal to the quarterly interest upon the purchase money.

Prior to the erection of the buildings in question, it was understood and agreed, but not in writing, between the defendant and Ashworth, that they were not to be the property of the defendant, but that he, Ashworth, should have the right to remove them at any time. While Ashworth was in possession of the premises as aforesaid, on October 3, 1868, he conveyed the buildings, by a bill of sale in common form and under seal, to the plaintiff's intestate, for a valuable consideration, and she took possession. On April 7, 1869, the defendant, at the request of Ashworth, conveyed the land, by warranty deed in common form, to one King; and thereupon, and as a part of the same transaction, the agreement for a deed from the defendant to Ashworth was given up, and Ashworth gave to the defendant a release of the land "with all the privileges and appurtenances thereto belonging."

At the time of the deed to King, the defendant did not know of the conveyance from Ashworth to the plaintiff's intestate. The deed to King and the deed of release to the defendant were duly recorded on April 9, 1869. King had no knowledge of the bill of sale of Ashworth to the plaintiff's intestate. The deed to King made no mention of the buildings, but described the land by metes and bounds, and the habendum contained the usual phrase "with all the privileges and appurtenances thereunto

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belonging." The defendant had no actual possession of the premises from Febuary 17, 1868, down to October 1872, when he entered to foreclose a mortgage of the estate given by King to him.

The defendant asked the judge to rule as follows: "1. No title to the buildings, while annexed to the realty, could pass to the plaintiff's intestate, as against the defendant, by the bill of sale. 2. This action will not lie against the defendant upon the evidence, even though the plaintiff's intestate had the right of removal. 3. There was no evidence which would authorize a finding that the defendant converted the buildings."

The judge refused so to rule, but held, as matter of law, that, as against the defendant, the title to the buildings did pass to the plaintiff's intestate by the bill of sale; that this action would lie upon the facts; and that the deed from the defendant to King operated as a conversion of the buildings, enabling King, a purchaser without notice, to hold the same as against the plaintiff's intestate, as a part of the realty; and, upon these findings and rulings, found for the plaintiff, and assessed damages in the sum of $1302.40, being the value of the buildings for purpose of removal at the date of the defendant's deed, with interest thereon.

If there was error in the refusal to rule as requested, or in the rulings made, a new trial was to be had; otherwise, judgment to be entered for the plaintiff.

E. T. Burley, for the defendant.

J. C. Sanborn & W. S. Knox, for the plaintiff.

MORTON, J. It has been decided by this court, in several cases, that, if a man puts a house or other building upon land of another, under an agreement with the owner of the land that he may remove it, the building remains his personal property. He may lose his right to it if the land is sold to an innocent purchaser without notice of the agreement. He cannot set up his title against such innocent purchaser, whom he has misled by permitting the building to be attached to and apparently a part of the realty bought by him. But, as against the original owner of the land and all persons taking under him with notice, the building never becomes a part of the realty, but remains personal property, and he, or a purchaser from him, may maintain replevin or trover to recover it or its value, even while it remains

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upon the land and apparently a part of the realty. *Hunt* v. *Bay State Iron Co.* 97 Mass. 279. *Curtis* v. *Riddle*, 7 Allen, 185. *Hinckley* v. *Baxter*, 13 Allen, 139. *Brooks* v. *Prescott*, 114 Mass. 392. *Hartwell* v. *Kelly*, 117 Mass. 235.

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In the case at bar, it is found as a fact, that Ashworth put the buildings in controversy upon the land of the defendant under an agreement "that they were not to be the property of the defendant, but that he, Ashworth, should have the right to remove them at any time." By virtue of this agreement, they never became a part of the defendant's real estate, but remained the personal property of Ashworth. He had the right to sell them to the plaintiff's intestate, and the plaintiff can maintain this action of tort in the nature of trover against the defendant if he converted them to his own use.

The question whether, upon the facts proved, the defendant was guilty of a conversion, is not free from difficulty. To understand it, it is necessary to refer to the facts which show the relations between the parties. The defendant had agreed to give Ashworth a deed of the land, upon his paying a part of the price, and giving a mortgage for the balance. Ashworth was thus the equitable and beneficial owner of the land, and he was in the occupation of it under an agreement to pay the defendant a sum equal to the interest upon the price. While thus in possession, he sold the buildings by a bill of sale, not recorded, to the plaintiff's intestate. Afterwards Ashworth requested the defendant to convey the land to one King, which the defendant did by a warranty deed in the common form, which made no mention of the buildings. At the same time, the defendant's agreement to convey to Ashworth was given up, and Ashworth gave to the defendant a release of the land "with all the privileges and appurtenances thereto belonging." At the time of this transaction, the defendant did not know of the sale to the plaintiff's intestate. But he knew that, by virtue of the agreement he had made, the buildings remained personal property, and he is presumed in law to have known that the effect of his sale of the land to King would be to give him a title to the buildings, and thus deprive the owner of all right to them. This sale to King was the exercise of dominion over the property inconsistent with the right of the plaintiff's intestate, who was

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the owner. It is similar to the common case where a man innocently sells and appropriates to his own use the property of another, in ignorance of the ownership. Such appropriation, though not made with any intent to wrong the owner, is in law a conversion. We are, therefore, of opinion, that the rulings at the trial in the Superior Court were correct.

Judgment for the plaintiff.

MARTHA LARRABEE *vs.* INHABITANTS OF PEABODY.

Essex. November 6, 1879. — June 25, 1880.

A town is not liable to a person, who has been visiting a public building of the town for the purpose of attending an entertainment of a society, to which the free use of the building had been given, for an injury received by falling into a trench near the building and outside of the highway; and the fact that, before the accident, the town had occasionally let the building for meetings and entertainments, is immaterial.

MORTON, J. The plaintiff was injured by falling into a trench near a public building used for a town-house and school-house, and brought this action of tort against the town to recover damages for the injury. It is not contended that the town is liable as for a defect in a highway. The trench was not in the highway, nor in dangerous proximity to it. But the plaintiff contends that the trench was in dangerous proximity to the way or path leading to the town-house; and that the town is liable to the same extent as a private owner who invites persons to enter his hall would be. If we assume, in favor of the plaintiff, that, upon the evidence, a private owner would be liable to her for her injury, yet we are of opinion that the town is not liable. The only ground upon which it is contended that a city or town is liable for defects in, or negligence in the repair or management of, a building owned by it, is that, at the time the liability attaches, it is using the building for emolument or profit, as a private owner might. *Oliver* v. *Worcester*, 102 Mass. 489. *Hill* v. *Boston*, 122 Mass. 344. In the present case, this element of liability is wanting. The plaintiff visited the town-house for the purpose of attending an entertainment given by

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a temperance society. It appeared that, on this occasion, and during the previous summer, the society had the gratuitous use of the hall for their meetings. The town received no compensation or profit from the use. The case, therefore, is not within the reason of the rule relied upon, which creates a liability of the town. The fact that the town had before this occasionally let the town-house for public meetings and entertainments, is immaterial. Such occasional lettings would not create a permanent and continuing liability. The liability, if any, attaches because the town deals with and uses the public building for the purposes of profit, as a private enterprise, and it continues only so long as it thus uses it. *Exceptions overruled.*

S. C. Bancroft, for the plaintiff.

H. Wardwell, for the defendant.

PHINEAS R. WESTON & another, trustees, *vs.* CHARLES I. JENKINS.

Essex. January 27. — June 25, 1880. COLT & LORD, JJ., absent.

A testator gave the residue and remainder of his estate to trustees in trust to keep the same, "with so much of its accumulations as may be added thereto," at interest, and to pay to his wife "such part of the interest or income of the same as in her opinion she may need, or as she may from time to time signify to them a desire to receive, for her use or benefit during her natural life, it being my will that she shall always have at her command, so long as she shall live, as much of said interest or income as may seem to her desirable." He then provided that the trustees should pay $500 to each of his two children semi-annually, and that "such part of said interest or income as may not be needed to pay said sum to each of my said children semiannually, and to supply the wants of my said wife during her life, shall, from time to time, when received, or when on hand, be added to said residue and remainder of my estate here given in trust," with remainder in fee to the children, after the death of the wife. The will also contained this clause: "Having provided as above that my said wife shall receive, or have at her command, at all times, so much of the interest or income of the estate here given in trust as she may need to meet all her wants of whatever nature that may at any time during her life arise, and so much thereof as may seem desirable to her for her own personal benefit, and for all other purposes to which she may be disposed or have occasion to apply the same; it is my will that my said son and daughter remain with their mother in her family so long as may be agreeable to them, and that no charge

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be made against either of them for board." *Held*, that the widow was entitled to call for and receive the entire income of the estate, at least after deducting the annuities to the children, although her entire personal and household expenditures did not exceed one fourth part of the income.

A trustee under a will, who is directed therein to pay the entire income of a fund to A. for life, with an annuity to B. during the continuance of the trust, and who, after the death of B., pays the annuity to his legal representatives, by the direction of A., out of the income, may credit himself with it in his account, although, by the true construction of the will, the annuity terminated on the death of B.

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APPEAL by Charles T. Jenkins from a decree of the Probate Court allowing the ninth account of the trustees under the will of Nathaniel Weston. The case was heard by *Ames*, J., and reported for the consideration of the full court, in substance as follows:

The testator, in his will which was duly admitted to probate in December 1868, by the first article gave certain real estate to his widow in fee, with all his furniture. By the second article, he gave to trustees the sum of $40,000 for the benefit of the widow and children of a deceased son. The material parts of the third article were as follows:

"Third. To my said trustees and their executors and administrators, I give and devise all the residue and remainder of my estate upon the special trust here following. They and their successors shall keep the same, with so much of its accumulations as may be added thereto, at interest, or invested in such manner as they may judge best, with power to sell or purchase real estate at any time and to change any investment at their discretion; and they or their successors shall pay to my wife such part of the interest or income of the same as in her opinion she may need, or as she may from time to time signify to them a desire to receive, for her use or benefit during her natural life, it being my will that she shall always have at her command, so long as she shall live, as much of said interest or income as may seem to her desirable; and they or their successors shall also pay to my said son Nathaniel Weston and my daughter Lucy D. Weston five hundred dollars each semiannually during the continuance of this trust, such part of said interest or income as may not be needed to pay said sum to each of my said children semiannually, and to supply the wants of my said wife during her life, shall, from time to time, when received or when on hand,

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be added to said residue and remainder of my estate here given in trust." "As soon as may be after the decease of my said wife, my said trustees or their successor shall convey, transfer, or pay to my son and daughter in equal shares all the estate here given in trust, if they both survive my said wife." "In case either of them should die in the lifetime of my said wife, leaving no issue, the said estate given in trust shall be transferred or conveyed to the survivor." "Having provided as above that my said wife shall receive or have at her command at all times so much of the interest or income of the estate here given in trust as she may need to meet all her wants of whatever nature that may at any time during her life arise, and so much thereof as may seem desirable to her for her own personal benefit and for all other purposes to which she may be disposed or have occasion to apply the same, it is my will that my said son and daughter remain with their mother in her family so long as may be agreeable to them, and that no charge be made against either of them for their board."

By the last clause of the will the persons named as trustees were appointed executors.

The testator left a widow, Christiana Weston, a son, Nathaniel, a daughter, Lucy D. Weston, and the representatives of a deceased son. Lucy D. married the appellant on July 31, 1869, removed from her mother's house, and died intestate on March 22, 1874, leaving a minor son, Clarence W. Jenkins, born December 23, 1872. The appellant was duly appointed administrator of her estate and guardian of the minor son.

The executors filed and settled their first and final account on January 1, 1870, and added $6191.76 to the principal from income not called for by Mrs. Weston. The estate, so augmented, was transferred by the executors to themselves as trustees, and Mrs. Weston thereupon signified her intention to draw the entire net income of the trust estate in future; and thereafter from time to time in each year, at her request and upon her receipt, the net income as it accrued was paid to her by the trustees, with the exception of a trifling balance in each year which was added to the principal of the trust fund. The amount of the income was about $15,000 a year, and the greater part thereof, after its receipt by her, was invested by her with the

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knowledge of the trustees, one of them acting as her attorney in making the investments. The entire personal and household expenditures of Mrs. Weston were on a very moderate scale, and did not exceed a fourth part of the income so received by her, and this was known to the trustees. Mrs. Weston died testate on April 25, 1877, having accumulated and invested about $70,000 out of the income received as above stated. The trustees filed annual accounts in January of each year from the date of their appointment, showing in each account the amounts of income received and the payments as above stated made to Mrs. Weston.

The appellant contends that Mrs. Weston should not have been paid the entire net income, but only such amounts as she used for purposes other than investment, and that the amounts overpaid ought to be charged to the trustees, either in their ninth account, or by reopening the previous eight accounts.

The trustees paid out of the income to Nathaniel Weston and Lucy D. Weston five hundred dollars each, semiannually, during the continuance of the trust, and these annuities were duly paid and credited to the trustees in their annual accounts up to the death of Lucy D. Jenkins. After her death, the amount of the annuity apportioned to the time of her death was paid to the appellant as her administrator. From that time the annuity was paid to the appellant as guardian of Clarence W. Jenkins, and the payments were so charged in the several accounts approved as aforesaid. The appellant gave his receipts for these payments, signing as administrator or guardian according to the fact, in every case except one, in which he signed in his individual capacity a receipt for $500 charged to him as guardian. Before making these payments, the trustees, being in doubt whether the annuity to Mrs. Jenkins continued in force after her death, after presenting the facts and the question to Mrs. Weston, obtained from her a release under seal of all her interest in the legacy to Lucy D., to the time of her own death, and a direction to them to pay the legacy to the child of Lucy D. for such time as by the will it would have been paid to Lucy D. The appellant contended that the payments so made to him of amounts accruing after the death of his wife were improperly made, and should be charged back to the trustees in this account.

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S. B. Ives, Jr. & S. Lincoln, Jr., for the appellant.

W. G. Russell & G. Putnam, for the appellees.

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SOULE, J. After certain legacies, the testator gave, by his will, the residue of his estate to trustees, in trust, among other things, to pay to his widow "such part of the interest or income of the same as in her opinion she may need, or as she may from time to time signify to them a desire to receive, for her use or benefit during her natural life; it being my will that she shall always have at her command, so long as she shall live, as much of said interest or income as may seem to her desirable." He then provided for an annuity of one thousand dollars each to his son and daughter, during the continuance of the trust, which was to terminate on the death of the widow.

Under the provision in her behalf, the widow was entitled to demand and receive from the trustees the whole income of the "residue," after payment of the annuities to the son and daughter, and to make such disposition of it as she saw fit. It was to be paid to her for her own use and benefit, and not upon any trust, nor with any remainder over. The provision for accumulation was to be operative only in case she did not call for the whole income. The phrase, "not needed to supply the wants of my said wife," in that provision, is not to be regarded as intended to restrict the gift of the income in the previous clause, but is to be interpreted as a comprehensive expression covering the right given to the widow to call for such part of the income as she might elect to appropriate. This is the only interpretation which is consistent at once with the terms of the clause in which her right to the income is created, and the terms of the later clause in which the testator recites that he has provided that she "shall receive and have at her command at all times so much of the income of the trust fund as she may need to meet all her wants of whatever nature that may at any time during her life arise, and so much as may seem desirable to her for her personal benefit, and for all other purposes to which she may be disposed or have occasion to apply the same."

It appears by the report that, until January 1870, the widow failed to call for the whole amount of the income, and that the surplus which had accumulated was then added to the principal sum, and the whole trust fund was then transferred by the execu-

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tors to the trustees. The widow thereupon signified her intention to draw the entire net income in future, and thereafter she did draw and receipt for substantially the whole, from year to year. The payments to her by the trustees were in accordance with their duty, and were properly allowed in their accounts.

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The payments of the amount of the annuity to the daughter of the testator, made after her death, were not authorized as payments of the annuity, because the annuity died with the annuitant named in the will. *Weston* v. *Weston*, 125 Mass. 268. They were made out of the income of the trust fund which belonged to the widow, and at her request. They were made, therefore, to her, and the amount was properly chargeable by the trustees to the income, and was properly allowed in their account.

We find no error in the decree of the Probate Court, allowing the account of the trustees, and the entry must be

Decree of Probate Court affirmed.

WILLIAM V. CLARK *vs.* INHABITANTS OF WALTHAM.

Middlesex. Jan. 13. — June 25, 1880. COLT & LORD, JJ., absent.

A town is not liable for an injury occasioned to a traveller by a defect in a public common, which has been conveyed to the town upon the condition that it should "forever after be kept open as and for a common for the use of the inhabitants of the town," and across which the town has constructed footpaths; and the fact that a portion of the land originally conveyed to the town is occupied by a building used in part for the pecuniary benefit of the town, but which portion is by the conveyance excepted from the condition, and is separated from the common by a fence, does not operate to make the town liable, the accident having happened in a part of the common remote from the building.

TORT for personal injuries received by the plaintiff while travelling on a public common, with footways, in the defendant town, which it was alleged the defendant had negligently suffered to be out of repair and unsafe. Trial in the Superior Court, without a jury, before *Pitman*, J., who reported the case for the determination of this court, in substance as follows:

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The defendant derived title to the common, including also the land on which Rumford Hall stands, by two deeds from the Boston Manufacturing Company. The first deed, dated June 19, 1854, is an ordinary deed, with no conditions, and covers the entire premises, except a certain part described and specially excepted therein. The second deed, dated August 1, 1859, covers the excepted portion, and contains the following clause: "And this conveyance is made upon the following condition, to wit: that no building shall ever be erected on the lot of land above described or the land adjoining the same, owned by said inhabitants and conveyed to them by deed of said Manufacturing Company, dated June 19, 1854, and that both of said lots of land shall forever after be kept open as and for a common for the use of said inhabitants of the town of Waltham. But this condition shall not attach or be held to apply to so much of the northeast corner of the land conveyed by said deed dated June 19, 1854, as is now used for and in connection with Rumford Building so called, and the small shop in the rear of the same, being bounded on the west and south sides by the fences and the lines of the small shop as they now stand." Rumford Hall is a building owned by the defendant, and the first story is occupied in part by the post-office and by stores, for which the defendant receives rent; the hall above is used for municipal purposes, and occasionally rented for other purposes, as is usual with town-halls.

On August 13, 1877, the plaintiff, a boy nine years of age, in returning after dark from the post-office, to which he had helped carry a mail-bag from the depot, went, for a short distance, up Main Street, which bounds the common on the north, looking into the shop windows, and from thence proceeded to return home across the common, following one of the footpaths made by the defendant through the same. As he was passing thereupon, and just before leaving the same and entering upon the line of Elm Street, one of the public streets of the town, which bounds the common on the east, and being barefoot at the time, he stepped upon a rough iron stub of a post, which lacerated his foot and caused the injury complained of. This iron stub was the remnant of an iron post or rod fastened into a stone sleeper, which originally, with other posts, protected an

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opening in a continuous fence around said common from all but foot-passengers, and was at the entrance upon the common, but slightly outside of the limits of the street. The post had been broken off a long time before the accident.

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The plaintiffs requested the judge to rule as follows: "1. The building being so rented and standing upon the parcel of land so held by the defendant as a common, from and to which a convenient foot-passageway is made and kept in repair to all parts of the common by the defendant, the town is liable. 2. Although the iron rod upon which the injury occurred was at the outside of Elm Street it was contiguous to the street, and the defendant was bound to keep the same in repair, and if, by reason of the same being out of repair, the plaintiff passing into or upon the street was hurt thereon, using due care, the defendant would be liable." The judge, being of opinion that upon the foregoing facts the defendant was not in law liable, declined so to rule, and ordered judgment for the defendant. If this view of the law was erroneous, the case was to stand for trial; otherwise, judgment to be entered for the defendant.

D. B. Gove, for the plaintiff.

C. A. Welch, for the defendant.

MORTON, J. The plaintiff was injured while travelling upon a public park having footpaths across it, which, it is alleged, the defendant had negligently suffered to be out of repair and unsafe. The park was conveyed to the town upon the condition that it should "forever after be kept open as and for a common for the use of said inhabitants of the town of Waltham." By accepting the deeds of conveyance, the town agreed to the condition, and therefore holds the park for the use of the public. It had constructed footpaths and walks over the park in various directions, but these paths were not a part of the system of highways. They were not laid out as public ways, and the town is not liable under the statutes respecting highways or town-ways for any defect or want of repair which may exist in them. *Oliver* v. *Worcester*, 102 Mass. 489. *Gould* v. *Boston*, 120 Mass. 300. Nor can the town be held liable upon the ground that it negligently suffered a dangerous place to exist in the park, and failed to give proper notice to persons using the park by its invitation or license. It holds the park, not for its own profit or emolu-

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ment, but for the direct and immediate use of the public. If it can be said that there is any duty in the town to construct paths over it, or to keep such paths in repair, it is a corporate duty, imposed upon it as the representative and agent of the public and for the public benefit. For a breach of such a duty, a private action cannot be maintained against a town or city, unless such action is given by statute. *Hill* v. *Boston*, 122 Mass. 344, and cases cited.

But the plaintiff contends that this case is not within this general rule, but falls within the second decision in *Oliver* v. *Worcester*, above cited. This claim is not sustained by the facts of the case. It is true that a small portion of the land originally conveyed to the town, its northeast corner, is occupied by the Rumford Hall used in part as a town-hall for municipal purposes and occupied in part by the post-office and by stores for which the town receives rent. But this portion is not a part of the common. It is by the deeds excepted from the condition that the land is to be kept open as a common, and it is in fact separated from the common by a fence. The accident to the plaintiff happened in a part of the common remote from Rumford Hall, and had no connection whatever with the building or the fact that it was in part used for emolument or profit. The town might be liable, as a private individual would, for negligence in the management or the repairs of Rumford Hall, but this cannot make it liable for a defect in the common, which is entirely distinct, and is held by a different tenure and for a different purpose.

We are, therefore, of opinion that the Superior Court correctly ruled that the defendant was not liable.

Judgment for the defendant.

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LAURA G. GERRISH *vs.* HORACE B. SHATTUCK.

Middlesex. Jan. 14. — June 30, 1880. COLT & LORD, JJ., absent.

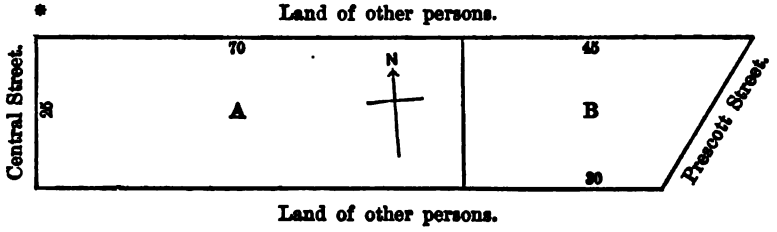
If the owner of two lots of land conveys one of them, which fronts on a street, by deed excepting and reserving to himself a passageway four feet wide from the street to his remaining lot, evidence that, when the deed was made, the whole of the lot granted was covered by a building except along a strip on the northerly side nine feet in width, part of which strip was covered by outside stairs attached to the building, four feet and a half in width, and that the grantor was accustomed to pass and repass along the remaining space, is a location of the passageway mentioned in the deed along this space; the grantee cannot obstruct it by building a wall along his northerly boundary line sixteen inches in thickness; and evidence that the grantor's tenants had a flower-garden a foot wide along the northerly line, maintained a plank walk twenty inches wide outside of this, and did not invariably walk within four feet of the northerly boundary, is immaterial.

BILL IN EQUITY, filed October 11, 1879, to restrain the defendant from obstructing a passageway running from Prescott Street in Lowell to the plaintiff's land. The case was heard by *Ames*, J., and reported for the consideration of the full court, in substance as follows:

On September 8, 1857, Nathaniel Wright, who then owned the lots marked A and B on the plan, a copy of which is printed in the margin,* conveyed by metes and bounds to William H. Burnap lot B, by deed containing the following clause: "excepting however and reserving to myself, my heirs and assigns, a passageway four feet wide, in, through and over said premises from said Prescott Street to my tenement on the westerly side thereof."

Wright died in 1858, and the plaintiff, his daughter, is the owner, by inheritance and by deed from the other heirs, of lot A, and of the right of way over lot B. The defendant acquired

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in 1879 the rights of Burnap in lot B, subject to the right of way over it.

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At the time of the conveyance from Wright to Burnap, and for many years before, Wright had a building on lot A which covered the greater part of the lot, the only entrance to the basement of which was by a door about ten feet distant from the easterly side of this lot, and this door occupied a space four feet in width, measuring from the northerly boundary line. The only access from this building to Prescott Street was by this door, and thence along by the northerly boundary line of the two lots, and this way was used in 1857, and for many years before, by the tenants of Wright's building.

Lot B was, at the time of this conveyance, covered by a building except a strip nine feet in width on the northerly side thereof, and in this space there was, for a distance of twenty feet from Prescott Street, an outside flight of stairs, four feet and a half in width, attached to the building.

In the summer of 1857, Wright built a fence along the northerly line of lot B, and, to the end of this fence on Prescott Street, attached a gate a little less than four feet wide, which fence and gate remained until September 1879, when they were removed by the defendant. The only access to the way from Prescott Street was through this gate. The passageway to Prescott Street was used by the tenants of the building on lot A and others having occasion to go to or from the rear part of that building; but the judge found that, in using the way, the passengers did not invariably confine themselves to the four feet in width, or that there was any apparent bound or definite track (except so far as may be inferred from the facts above stated) showing the exact or precise width of the way to be four feet. Part of the time planks, not exceeding twenty inches in width, were laid for passengers to walk on, and one of the occupants of the building, for several seasons, used a strip of land about a foot in width, next the northerly boundary of the lot, as a flower-bed. The planks were next to this bed. It also appeared that in winter-time, for the last seven years, the snow that fell or collected there was left undisturbed and not removed.

The defendant has begun to put in the foundations of a permanent building, three stories high, to cover the whole of his

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lot, and declares an intention so to build as to leave a passage-way forty-five feet in length and four feet wide in the clear through his building, for the use of the plaintiff, which passage-way is to have a floor of asphalt or concrete resting upon the wooden framework of his building, over the cellar thereunder, and is to be covered over at the height of eleven feet above the floor by the second floor of his building, and this second floor of the building is to be supported by a brick wall, sixteen inches thick, standing upon the northerly line of the defendant's lot, and that such arrangements shall be made as to doors and windows to the passageway as may be reasonably necessary to the plaintiff's accommodation. In pursuance of this purpose, the defendant has begun to dig for the proper foundations of the proposed building, and has excavated the whole of his lot, including the passageway, to the depth of about ten feet, and in so doing has occasioned a temporary obstruction to the plaintiff's use of the passageway. There was no evidence of any objection to the plaintiff's use of said way.

The judge found that the passageway was never used as a carriage-way, and was not suitable or intended to be so used; that the plaintiff was not the owner in fee, and had no exclusive title to the soil under the way, or to the strip of land of the width of four feet; that this right of way had never by use or the acts of the parties been confined and limited to any exact or visible track, and was not otherwise limited by use than that it was in the northerly part of the defendant's lot; that the building which the defendant was about to erect would, if his plan should be carried out, have the effect to place the passageway, for about forty-five feet of its length, eighteen inches further south of the northerly boundary of the lot than the line claimed by the plaintiff to be the true northerly line of the way, but that, in so building, the defendant would still leave to the plaintiff a right of way and a passage four feet in width through his building, which practically would furnish to her the means of going to and from her lot by way of Prescott Street, in all respects as convenient and useful as she had at any time heretofore enjoyed, and that the operations of the defendant would not be an unreasonable obstruction of the passageway or a violation of the plaintiff's right.

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The judge ordered the plaintiff's bill to be dismissed, with costs; and the plaintiff appealed to the full court.

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J. N. Marshall, for the plaintiff.

D. S. Richardson & G. F. Richardson, for the defendant, cited *Adams* v. *Emerson*, 6 Pick. 56; *Atkins* v. *Bordman*, 2 Met. 457; *Brown* v. *Stone*, 10 Gray, 61; *Richardson* v. *Pond*, 15 Gray, 387; *Stevenson* v. *Stewart*, 7 Phila. 293.

SOULE, J. It appears that when Burnap, the grantor of the defendant, became the owner of the premises now owned by the defendant, the premises were so built upon that the only part of them over which access could be had by foot-passengers from Prescott Street to the building on the land now owned by the plaintiff, was a strip, on the northerly side, about four and one half feet wide. It appears further, that while Wright, the plaintiff's father, the grantor of Burnap, was in possession of the plaintiff's land, and Burnap owned the defendant's land, a fence was standing on the northerly line of the Burnap land, and the tenants of Wright were wont to use the strip of land immediately south of this fence as a passageway to and from Prescott Street. From these facts it follows that the passageway four feet wide, which was reserved by Wright in his deed to Burnap, was fixed and located by the parties, along the northerly side of the land of Burnap, now owned by the defendant. The facts that a part of that space was used by Wright's tenants as a flower-garden, while a narrow plank walk only twenty inches wide was maintained over another part of the space, and that the tenants did not invariably walk within four feet of the fence, have no tendency to show that the way was not located by the parties. The two considerations, that there was no place where the way could be enjoyed except along that strip, and that it was thus used and enjoyed, are decisive. *O'Brien* v. *Schayer*, 124 Mass. 211.

The way being of a fixed and definite width, by the terms of the reservation, and having been located by the acts of the parties, the rights of the plaintiff therein are perfectly clear. She is entitled to have it kept open for its entire width, on the territory where it was located. The erection of a wall covering eighteen inches in width of the way, would create an obstruction, and infringe the plaintiff's rights. *Tucker* v. *Howard*, 122 Mass.

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529, and 128 Mass. 361. *Nash* v. *New England Ins. Co.* 127 Mass. 91.

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The defendant proposes to erect a building covering his whole lot, with a wall along the northerly side of the lot sixteen inches thick, and which would push the northerly line of the passage-way eighteen inches further south than the line as located by the parties. This he has no right to do; and he cannot compel the plaintiff to accept a substitute for the way to which she is entitled, although that substitute, if kept in order, may be convenient and useful. The plaintiff has therefore made a case which entitles her to the aid of the court in protecting her rights, and the decree dismissing her bill must be reversed.

Decree for the plaintiff.

FREDERICK AYER *vs.* FREDERICK F. AYER & others, administrators.

Middlesex. Jan. 16. — June 30, 1880. COLT & LORD, JJ., absent

A testator, by his will, gave to his brother a fund which he was to set apart and invest, with power to use and expend the principal, the income to go to him during his life, and, at his death, the principal to go to his children, or, in default of children, to the testator's heirs at law. *Held*, that the legatee was entitled to the income of the fund from the death of the testator, and to interest thereon from the expiration of a year after the testator's death.

CONTRACT against the administrators with the will annexed of James C. Ayer to recover a legacy. Writ dated September 23, 1879. The case was submitted to this court on agreed facts, by which it appeared that the testator died on July 3, 1878, and his will was duly admitted to probate; and that, after the entry of this action, the defendants paid the plaintiff the principal sum and interest thereon from the expiration of one year from the death of the testator. The clause of the will relating to the legacy in question appears in the opinion.

If the plaintiff was entitled to recover the income or interest on the legacy for the year succeeding the death of the testator,

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judgment was to be entered for the plaintiff for $6000 and such interest thereon as he was entitled to receive; otherwise, for the defendants.

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A. P. Bonney, for the plaintiff.

J. G. Abbott, (*B. Dean* with him,) for the defendants.

MORTON, J. The question presented in this case is whether the plaintiff is entitled to the income or interest, from the death of the testator, of the fund given to him by the ninth clause of the will of his brother. This clause is as follows: "I give and devise unto my brother, Frederick Ayer, the sum of one hundred thousand dollars, but in and upon the trust that he shall invest the same in his name as trustee under the article ninth of this will, and during his life keep the same, or so much thereof as shall remain unexpended as hereinafter authorized, so invested in such property or securities as he shall deem expedient, and all the income accruing therefrom during his life have, receive, and appropriate to his own use, with power and authority to use, expend and apply from time to time so much of the said principal sum or of the property wherein the same shall be invested, to or for his own use as he shall find occasion for and elect to so use and expend. And upon his decease the said sum, or the estate or property wherein the same shall be invested, or so much thereof as then remains unexpended as above authorized, shall be equally divided among and paid to the children of said Frederick, if any, surviving him, to whom the same is hereby given and devised for their use and behoof forever. But if it shall happen that no child of said Frederick shall survive him, then said principal sum or property, or residue thereof then remaining, shall upon his decease be distributed to and among my heirs at law in the same manner and proportions that the same would be if I had deceased at the time of the decease of my said brother Frederick, possessed of the same and intestate."

If we strike out the provision giving Frederick the power of disposing of the principal of the bequest, the construction of the will would be too clear to admit of doubt. It gives to Frederick, without any words of inheritance or perpetuity, a fund, which he is to set apart and invest, the income of which is to go to him during his life, and at his death the principal to go to his

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children, or in default of children to the testator's heirs at law. This clearly gives him a life estate only.

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The insertion of the provision giving Frederick the power to use and expend the principal does not seem to us to indicate an intention of the testator to give him an absolute property, and such is not its necessary legal effect. He does not clothe the legatee with all the attributes of ownership. He does not give him the power to dispose of the whole or any part of the property by will. This fact, together with the fact that he makes careful provisions for the disposition of the property at the death of Frederick, shows that his intention was not to give him the absolute property, but only a life estate with a power to use and expend the principal. If the legatee had died leaving children, we cannot doubt that such children would take under the will whatever of the principal fund remained undisposed of at his death. *Kuhn* v. *Webster*, 12 Gray, 3. *Johnson* v. *Battelle*, 125 Mass. 453. *Smith* v. *Snow*, 123 Mass. 323. *Herring* v. *Barrow*, L. R. 13 Ch. D. 144. We are of opinion that the plaintiff took under the will a life estate.

This being so, he was entitled to the income of the fund from the time of the death of the testator. The general rule of law is well established, that a tenant for life is entitled to the income of a fund set apart for his benefit from the time of the testator's death. *Sargent* v. *Sargent*, 103 Mass. 297. *Pollock* v. *Learned*, 102 Mass. 49. And this rule is in harmony with the provisions of the Gen. Sts. *c.* 97, § 23, which declare that when, by a will, an annuity, or the rent, use, income or interest of any property, or the income of any fund, is given to, or in trust for the benefit of, a person for life, he shall be entitled to receive the same from and after the decease of the testator. The fact that the testator has given the life tenant a power of disposition over the principal fund does not take this case out of the rule. The effect of doing so would be to take the first year's income from the life tenant, and apply it to increase the general residuum of the estate. The testator's intention to give to this life tenant the income from his decease is as manifest as in any other case of a bequest of income to a life tenant. It is not to be presumed that, because he added a power of disposition, he intended to narrow his gift of the

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income for the benefit of a more remote object of his bounty. *Lovering* v. *Minot*, 9 Cush. 151.

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It follows that the plaintiff is entitled to recover the income received on the legacy to him for the year succeeding the death of the testator, which the parties have agreed to be six thousand dollars. And as this ought to have been paid to him at the expiration of the year, he is entitled to interest thereon from that time. *Kent* v. *Dunham*, 106 Mass. 586.

Judgment for the plaintiff accordingly.

IRA CLEVELAND *vs.* BRIDGET QUILTY.

Norfolk. Jan. 30. — June 24, 1880. MORTON & SOULE, JJ., absent.

If an appeal from a decree of the Probate Court, appointing a person administrator of an estate, upon his petition alleging that he was next of kin, fails because the appellant does not prove that he is a party entitled to appeal, and is dismissed upon that ground only, the decree stands as if not appealed from; and it is within the power of the Probate Court, upon the petition of a public administrator, to revoke and annul that decree.

APPEAL from a decree of the Probate Court. Hearing before *Morton*, J., who reported for the determination of the full court the following case:

On December 13, 1876, Bridget Quilty was appointed by decree of the Probate Court administratrix of the estate of Mary Gerold, upon her petition stating that she was next of kin. John Long, claiming to be a creditor of the deceased, appealed from that decree, and at the hearing in this court failed to prove that he was such creditor, whereupon, and upon that ground only, his appeal was dismissed, and the decree affirmed.

On February 6, 1878, Ira Cleveland, as public administrator, presented a petition to the Probate Court, setting forth that the deceased left no heirs in this Commonwealth, that Bridget Quilty was not next of kin, and that he had no knowledge of these facts until after the time within which an appeal could have been taken from the decree appointing her administratrix,

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and praying that that decree might be revoked and annulled, and he be appointed in her stead. The Probate Court granted the prayer of this petition; and she appealed to this court, for the following reasons: 1st. Because the petitioner had not complied with the provisions of the Gen. Sts. *c.* 117, § 11, and other provisions of law. 2d. Because the former decree had been affirmed by the Supreme Court of Probate, on the appeal taken by John Long.

If the Probate Court had no power to pass the decree now appealed from, it was to be reversed; otherwise, the case was to stand for hearing.

A. French, for the appellee.

N. C. Berry, for the appellant.

GRAY, C. J. If an appeal from the original decree of the Probate Court, which appointed the present appellant administratrix, had been duly taken by a person entitled to appeal, the appeal would have vacated that decree; and if, upon such an appeal, the decree had been affirmed by this court, the final decree in the cause would have been the decree of this court as the Supreme Court of Probate, transmitted to the court below only to be carried into effect; and it would be doubtful, to say the least, whether it could have been revoked and annulled by the inferior court of probate, unless leave to apply to that court for the purpose had been reserved in the decree of this court. *Southard* v. *Russell*, 16 How. 547, 570, 571. *United States* v. *Knight*, 1 Black, 488, 489. *Durant* v. *Essex Co.* 101 U. S. 555. *Baylies* v. *Davis*, 1 Pick. 206. *Clayton* v. *Wardell*, 2 Bradf. 1. *Stafford* v. *Bryan*, 2 Paige, 45. *Lyon* v. *Merritt*, 6 Paige, 473. *Utica Ins. Co.* v. *Lynch*, 2 Barb. Ch. 573. *Jewett* v. *Dringer*, 4 Stew. (N. J.) 586. *Ryerson* v. *Eldred*, 18 Mich. 490. *Singleton* v. *Singleton*, 8 B. Mon. 340. *Bush* v. *Madeira*, 14 B. Mon. 212. *Shedden* v. *Patrick*, 1 Macq. 535.

But as it appears by the report that the person who undertook to appeal from the original decree did not prove that he was a person entitled to appeal, and for that reason only failed in his appeal, the decree of this court in legal effect merely dismissed that appeal, without passing upon the merits of the cause, and the decree below stood as if not appealed from. Gen. Sts. *c.* 117, §§ 15, 16. *Penniman* v. *French*, 2 Mass. 140. *Down-*

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ing v. *Porter*, 9 Mass. 386. *Palmer* v. *Stebbins*, 4 Pick. 41 note. *Swan* v. *Picquet*, 8 Pick. 443. *Campbell* v. *Howard*, 5 Mass. 376. *Commonwealth* v. *Richards*, 17 Pick. 295, 298. *Commonwealth* v. *Dunham*, 22 Pick. 11, 17.

It was therefore within the power of the Probate Court, upon the application of the person in law entitled to administration, and who had no notice of the original petition, to revoke and annul its former decree, upon allegation and proof that the person thereby appointed administratrix was not the next of kin. 1 Williams on Executors (7th ed.) 579. *Waters* v. *Stickney*, 12 Allen, 1, 6. *Richardson* v. *Hazelton*, 101 Mass. 108. *Carter* v. *Cutting*, 8 Cranch, 251. Gen. Sts. *c.* 94, § 5; *c.* 95, § 4. The limitation of one year, imposed by the Gen. Sts. *c.* 117, §§ 11, 12, upon a petition to this court for leave to appeal, does not apply to petitions to the Probate Court to revise its own decrees for mistake or fraud.

According to the terms of the report, this appeal from the decree of the Probate Court, revoking and annulling the original decree, and committing the administration to the public administrator, must therefore *Stand for hearing.*

WILLIAM ROONEY *vs.* INHABITANTS OF RANDOLPH.

Norfolk. Jan. 29. — June 30, 1880. MORTON & SOULE, JJ., absent.

In an action against a town for injuries caused to the plaintiff's carriage by being overturned by a snow-drift in a highway, since the St. of 1877, *c.* 234, the surveyor of highways testified that, after the storm which caused the drift, he broke out the street where the accident happened in the usual manner; and that, finding drifts badly driven across it, he cleared a track ten feet wide so as to be safe for travel, but, so far as possible, avoiding the drifts. The defendant then offered to show the actual cost of clearing the roads in that town after the storm, with the estimated cost of clearing them if a way for travel had been opened along the middle of the roadway regardless of drifts, together with the town valuation and the amount expended each year for the repair of roads. *Held*, that this evidence was admissible.

TORT for injuries to the plaintiff's carriage, alleged to have been caused, on February 17, 1878, by a defect in a highway in

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the defendant town. At the trial in the Superior Court, before *Bacon*, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions, which appear in the opinion.

B. Adams, for the defendant.

J. L. Eldridge, for the plaintiff.

COLT, J. Before the St. of 1877, *c.* 234, was passed, it was enough for the plaintiff, in actions to recover for injuries caused by defects in the highway, to prove that the injury complained of was caused by a defect which had existed for the requisite time, without reference to the question whether its existence or continuance could have been reasonably prevented. The statutes did not attempt to define what constituted a defect. The requirement was that all highways should be made safe and convenient for travellers at all times; and the question submitted to the jury was whether the defect in question made the way unsafe and inconvenient, with reference to the situation of the road and the nature and amount of travel to be accommodated by it. If it was a defect, and had existed for the required time, the town was held liable even if the defect was produced or continued by causes against which no human foresight could guard. The existence of the defect was sufficient, whether it arose from a want of reasonable care and diligence on the part of the town or not. Gen. Sts. *c.* 44, §§ 1, 22. In *Horton* v. *Ipswich*, 12 Cush. 488, it was decided to be no defence that the town used ordinary care and prudence in repairing the road, if by such care it was not made safe and convenient. See also *George* v. *Haverhill*, 110 Mass. 506; *Bodwell* v. *North Andover*, 110 Mass. 511, note.

It is now provided by the St. of 1877, *c.* 234, which repeals the provisions of the General Statutes, that towns shall be liable for personal injury or damage to property caused by defects in a highway "which might have been remedied, or which damage or injury might have been prevented by reasonable care and diligence on the part of the county, town, place or persons obliged by law to repair the same." § 2. This is a limitation on the former liability of towns, and it is now necessary, not only that a defect should have existed which was the sole cause of the plaintiff's injury, but that such defect be one which might have been remedied by reasonable care and diligence on the part of the town.

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In the case at bar, it appeared that, after a storm of unusual violence, the cross roads in the town of Randolph were much obstructed by snow-drifts, in passing one of which the plaintiff's carriage was overturned. The surveyer of highways testified that after the storm he broke out Cottage Street, where the accident happened, in the usual manner, and, finding drifts badly driven across it by the north wind, he cleared a track ten feet wide so as to be safe for travel, but so far as possible avoiding the drifts. In order to show that this manner of clearing the road was reasonable, and that permitting a partial obstruction of the roadway by snow-drifts did not, under the circumstances, create a defect, which the town could have remedied by reasonable care and diligence, the defendant offered to show the actual cost of clearing the roads in that town after the storm, with the estimated cost of clearing them if a way for travel had been opened along the middle of the roadway regardless of drifts, together with the town valuation, and the amount expended each year for the repair of roads. This evidence was improperly excluded.

It is the intention of the statute to protect towns from liability where there has been no lack of proper diligence on their part, and in determining that, it is important to know the cost of what was done, as well as the cost of what it is contended should have been done to keep the way in a suitable state of repair. Upon the question of what it is reasonably practicable to do, with reference to existing conditions and existing demands of travel, the element of expense is important. Towns are not required to incur disproportionate and unreasonable expense in the discharge of this public duty. The whole matter of alleged negligence on the part of the town is for the jury, and must necessarily be affected by the expense which has been incurred, or which would be required by the method proposed, with reference to the resources of the town to meet such expense by taxation.

Exceptions sustained.

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AZEL E. STEELE *vs.* CITY OF BOSTON.

Suffolk. March 22. — June 25, 1880.

The city of Boston is not liable for an injury caused to a person on Boston Common by coming into collision with a sled on one of the paths thereon, upon which the city has permitted boys and men to coast in the winter season, and which the city has fitted for that purpose by building a bridge across it at an intersecting path, and by turning water upon it to freeze and render it slippery.

TORT for personal injuries occasioned to the plaintiff by being struck by a sled on Boston Common. Answer, a general denial. At the trial in this court, before *Soule*, J., the plaintiff offered to prove the following facts:

The defendant, from time immemorial, has owned a tract of land enclosed by fences and used as a place of public resort for the recreation of the people, and known as Boston Common. This common is traversed by divers footpaths, leading in different directions, which have been made and kept in repair by the defendant, and to which access is gained from the streets through openings in the fence, in which posts are set so near together that only passengers on foot can pass between them. One of these paths extends from a point near the intersection of Park Street and Beacon Street to a point nearly opposite the intersection of Tremont Street and West Street, on a downward grade for a considerable part of its length. Before the plaintiff was injured, the defendant had permitted boys and young men to coast on and along this path on sleds, and had fitted the path for such coasting by building a bridge across it at an intersecting path, and by turning water from the defendant's water-pipes upon it to freeze and render it slippery. The defendant had also kept a police-officer at the lower end of the path to prevent people from walking on it up the hill toward Park Street. On February 15, 1875, the plaintiff, having occasion to go toward West Street, entered on this path, having first looked up and down it to see if any one was coming, and, seeing no one, for greater security stepped out of the path upon the gutter which runs beside it. As he was walking down the hill, a sled came down behind him, struck him behind the

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ankle, and knocked him down, and he received the injuries complained of.

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The judge ruled that the above facts, if proved, would not sustain the action; ordered a verdict for the defendant; and, at the request of both parties, reported the case for the consideration of the full court. If the ruling was correct, judgment was to be entered on the verdict; otherwise, a new trial to be had.

B. F. Butler, for the plaintiff.

J. P. Healy & J. Healy, for the defendant.

MORTON, J. The presiding justice rightly ruled that, upon the plaintiff's offer of proof, the action could not be maintained.

There was no evidence offered that the footpaths on the common have ever been laid out as highways or town ways. The city holds the common for the public benefit, and not for its emolument, or as a source of revenue, and has constructed and kept in repair these paths as a part of the common for the comfort and recreation of the public, and not as a part of its system of highways or streets. It is not liable under the statutes for any defect or want of repair in them. *Oliver* v. *Worcester*, 102 Mass. 489. *Clark* v. *Waltham*, *ante*, 567.

The plaintiff contends that, if there is no statute liability, the city is liable "as owner of the land and the maker and repairer of the way upon which the plaintiff was invited to go." If a private person owned a similar park to which he had given the public free access, we are at a loss to see how he could be held liable for an accident like that of the plaintiff. Such person might, if he saw fit, set apart and fit for use one of the paths for the recreation of youth in coasting, and if any one should, as was the case with the plaintiff, choose to enter upon the path, seeing that it was set apart for this purpose, he would do so at his own risk, and could not hold the owner responsible if he was injured by a passing sled. But even if a private owner would be liable, it does not follow that the city is. It maintains the common solely for the benefit of the public. If there is any legal duty to keep the paths in a safe condition, it is solely a public duty, for a breach of which no action lies by an individual who is injured, unless the statutes give such action. *Clark* v. *Waltham*, *ubi supra*, and cases cited. The city may legally set apart a portion of the common for the recreation of

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the young. The fact in this case that it did so, and that it used means to fit it for the purpose for which it was set apart, does not render it liable to the plaintiff for the injury which he sustained. *Judgment for the defendant.*

GEORGE H. JONES *vs.* MARY E. HOEY.

Suffolk. Feb. 24. — June 29, 1880. COLT & LORD, JJ., absent.

If goods in cases are sold by weight, without more specific agreement, evidence of a general usage is admissible to show that the weight is to be computed as previously ascertained at the time of packing and marked on the cases, and not by the actual weight at the time of the sale; and there is nothing in the Gen. Sts. *c.* 51, § 17, inconsistent with this.

A usage may be established by the testimony of one witness.

CONTRACT upon a promissory note, dated February 7, 1878, signed by William A. Hoey, payable to the order of, and indorsed by, the defendant. Trial in the Superior Court, before *Bacon*, J., who allowed a bill of exceptions, in substance as follows:

The note was given in payment of a quantity of leaf tobacco sold and delivered by the plaintiff to William A. Hoey at the date of the note. The answer contained a general denial, set up specially a partial failure of consideration, a sale by sample and warranty of quality and quantity, a breach of both, and claimed damages by way of recoupment. The sale was admitted to be by sample. The evidence as to the weight, quality and quantity of the tobacco was conflicting.

The plaintiff was permitted to testify, against the defendant's objection, that he had been engaged in the tobacco business in Boston for twenty years; that, during that time and before, there was a universal custom in the tobacco trade to buy and sell tobacco by the "marked weights," that is, the weight marked upon the box at the time the producer packed it, and before the tobacco passed through the process of sweating; that, when tobacco was sold by actual weight, a special price was always set; and that, in this case, the tobacco was sold in the usual course

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of trade. The plaintiff was the only witness who testified to the existence of the alleged usage or custom. William A. Hoey testified for the defendant that he purchased the tobacco of the plaintiff at the actual weight, and not by the weights marked on the cases; and that he did not know of the alleged usage.

The defendant asked the judge to instruct the jury as follows: "In a sale of leaf tobacco by sample by the pound, unless a sale by 'marked weights' is agreed to by the parties, in construing the contract of sale, the law implies actual weight as the weight understood by the parties; and a custom or usage among dealers in tobacco to sell by marked weights cannot be established by the testimony of one witness."

The judge refused so to rule; and, after instructing the jury in terms not excepted to as to the nature of the evidence required to establish the fact of a custom or usage, gave the following instruction: "If the jury believe there is a general and universal usage and custom among dealers in leaf tobacco in Boston and vicinity to buy and sell tobacco by marked weights, then if, when the sale as in this case is made by sample, nothing is said between the parties as to whether the weight marked on the cases or actual weight is intended, the weight marked on the cases will govern. A usage and custom in trade, like any other fact, can be established by the testimony of one witness."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

W. N. Mason & E. F. Dewing, for the defendant.

No counsel appeared for the plaintiff.

GRAY, C. J. The instruction given was correct. If the tobacco was sold by sample and by weight, without more specific agreement, evidence of a general usage was admissible to show that the weight was to be computed as previously ascertained at the time of packing and marked on the cases, and not by the actual weight at the time of the sale. *Bottomley* v. *Forbes*, 6 Scott, 866; *S. C.* 5 Bing. N. C. 121. *Barry* v. *Bennett*, 7 Met. 354. *Miller* v. *Stevens*, 100 Mass. 518. The Gen. Sts. *c.* 51, § 17, cited for the defendant, providing that sales of goods by the hundredweight shall be construed to mean by the net weight, or one hundred pounds, and not by the gross weight, or

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one hundred and twelve pounds, contain nothing inconsistent with this.

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Nothwithstanding the *dictum* in *Boardman* v. *Spooner*, 13 Allen, 353, 359, there can be no doubt, at the present day, that the circumstance that but one witness testifies to a usage is important only as bearing upon the credibility and satisfactoriness of his testimony in point of fact, and does not affect its competency or its sufficiency as matter of law. *Parrott* v. *Thacher*, 9 Pick. 426. *Vail* v. *Rice*, 1 Selden, 155. *Partridge* v. *Forsyth*, 29 Ala. 200. *Robinson* v. *United States*, 13 Wall. 363.

Exceptions overruled.

HERBERT L. HARDING *vs.* ARTHUR G. WELD & another.

Suffolk. March 19. — June 29, 1880. AMES & LORD, JJ., absent.

By the Gen. Sts. c. 109, § 1, every appointment by the Probate Court of a guardian of a person residing in this Commonwealth, and who is not now under guardianship, whether there has been a previous guardianship or not, must be made in the county in which the ward resides when the petition for such appointment is presented.

A guardian of a minor residing in the town of West Roxbury in the county of Norfolk was appointed by the Probate Court of that county before the annexation of that town to the city of Boston and county of Suffolk by the St. of 1873, c. 314, and after such annexation resigned his guardianship, and his resignation was accepted by that court, but he still held in his hands the property of the minor, and the minor continued to reside in the same territory. *Held*, that by § 3 of that statute the jurisdiction to appoint a new guardian of the minor was in the Probate Court of the county of Suffolk.

GRAY, C. J. This is an appeal from a decree of the Probate Court for the county of Suffolk, appointing the petitioner guardian of a minor who, as appears by the report of the justice of this court before whom the appeal was heard, was born and has ever since resided in the territory which is now a part of the city of Boston in this county, but was formerly the town of West Roxbury in the county of Norfolk, and who is merely described as of Boston in the petition of the appellee to the Probate Court, and in the decree of that court. The minor himself, appearing

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by next friend, is one of the appellants. The other appellant is his former guardian, who was duly appointed by the Probate Court for the county of Norfolk before the annexation of that territory to the city of Boston, who, since such annexation, has resigned his guardianship, and whose resignation has been accepted by that court, but who still has in his hands the property of the minor.

The question presented by the reasons of appeal of each appellant, and by the report before us, and argued at the bar, is whether, upon these facts, the jurisdiction to appoint a new guardian is in the Probate Court of this county or in the Probate Court of Norfolk. Whether the former guardian, having resigned and his resignation having been accepted, has such an interest in the cause as entitles him to appeal from the decree appointing his successor, need not be decided; because the ward has a clear right of appeal from that decree, and on his appeal the question argued must be considered and determined.

The St. of 1873, *c.* 314, to unite the city of Boston and the town of West Roxbury, enacts, in § 3, that "the several courts within the county of Suffolk," (except certain municipal courts,) "after this act takes effect, shall have the same jurisdiction over all causes of action and proceedings in civil causes, and over all matters in probate and insolvency, which shall have accrued within said territory hereby annexed, that said courts now have over like actions, proceedings and matters within the county of Suffolk; provided, that the several courts within the county of Norfolk shall have and retain jurisdiction of all actions, proceedings and matters, that shall have been rightfully commenced in said courts prior to the time when this act takes effect;" and further enacts that "all suits, actions, proceedings, complaints and prosecutions, and all matters of probate and insolvency, which shall be pending within said territory before any court or justice of the peace, when this act takes effect, shall be heard and determined as though this act had not passed."

The effect of this statute upon the jurisdiction of the Probate Courts may be best ascertained by first referring to the provisions of the General Statutes upon that subject.

By the Gen. Sts. *c.* 117, § 2, "the Probate Court for each county shall have jurisdiction of the probate of wills, granting

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administration of the estates of persons who at the time of their decease were inhabitants of or resident in the county, and of persons who die without the state leaving estate to be administered within such county; of the appointment of guardians to minors and others; and of all matters relating to the estates of such deceased persons and wards." This section defines the county in which the jurisdiction over estates of deceased persons shall be exercised, no rule in that regard having been prescribed, in chapters 93 and 94, concerning executors and administrators. But it does not define the county in which guardians may be appointed, because rules on this subject have been clearly laid down in chapter 109.

By the Gen. Sts. *c.* 109, § 1, "the Probate Court in each county, when it appears necessary or convenient, may appoint guardians to minors and others being inhabitants of or residents in the same county, and to such as reside out of this state and have any estate within the same;" and, by §§ 13, 14 of the same chapter, when any person liable to be put under guardianship resides out of the state, a guardian for him may be appointed by the Probate Court for any county in which there is any estate of his, and shall have the same powers and duties with respect to any estate of his found within the state, and also with respect to his person, if he comes to reside therein, as other guardians have. When a person under guardianship, having a guardian appointed in this state, has removed out of the state, or resides out of the state, provision has been made by successive statutes for a transfer of his property to a guardian appointed in the state in which the residence of the ward is. Gen. Sts. *c.* 109, § 23. Sts. 1862, *c.* 139; 1866, *c.* 122. See also Sts. 1875, *c.* 189; 1877, *c.* 127; 1880, *c.* 154.

Taking all these provisions of the General Statutes together, it clearly appears that original appointments of guardians, as well as of executors and administrators, must be made by the Probate Court of the county of the residence of the ward in the one case, and of the deceased in the other, if within the state; otherwise, in the county in which there is any property of the ward, or of the deceased.

By the Gen. Sts. *c.* 117, § 3, "when a case is within the jurisdiction of the Probate Court in two or more counties, the court

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which first takes cognizance thereof by the commencement of proceedings shall retain the same; and administration or guardianship first granted shall extend to all the estate of the deceased or ward in this state, and exclude the jurisdiction of the Probate Court of every other county." But this provision is clearly aimed only at the exercise of jurisdiction by another court while the administration or the guardianship first granted continues; and, being limited to cases within the jurisdiction of the Probate Court in two or more counties, applies only to cases where such jurisdiction attaches by reason of property, within the state, of a deceased person or ward residing out of the state; for when the residence of the deceased or of the ward is within the state, the Probate Court in the county of his residence being the only one which has jurisdiction, this section can have no application.

By the Gen. Sts. *c.* 101, §§ 1, 2, upon the death or removal of a sole or surviving executor or administrator, without having fully administered the estate, the Probate Court is directed to appoint an administrator *de bonis non*. And by *c.* 109, § 24, upon the death, resignation or removal of a guardian, another may be appointed in his stead. Neither of these sections specifies in what county the new appointment shall be made, but leaves that to be ascertained from other provisions of the statutes, or from general rules of law.

As the jurisdiction to grant administration of the estate of any inhabitant of this Commonwealth depends, by the Gen. Sts. *c.* 117, § 2, upon the county of his residence at the time of his death, administration *de bonis non* of such a person must of course be granted in the same county as the original administration. But the power conferred, by *c.* 109, § 1, upon the Probate Court in each county is to "appoint guardians to minors and others being inhabitants of or residents in the same county."

By the principles of international law, the jurisdiction to grant primary (as distinguished from ancillary) administration of personal property belongs to the courts of the owner's domicil at the time of his death, because, as a general rule, the law of that domicil governs the distribution of his personal property; but the jurisdiction to appoint a guardian of the person and of the movable property of a minor belongs to the courts of the domi-

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cil of the ward at the time when the occasion arises for judicial action, because the law of that domicil is the fundamental rule by which his status is governed; although the extent to which the authority of an administrator or a guardian, appointed by the courts of the domicil, shall be recognized in another state, depends upon the law or the comity of that state. Story Confl. §§ 497 and note, 499, 511–513. *Pinney* v. *McGregory*, 102 Mass. 186, 192, and cases cited. *Milliken* v. *Pratt*, 125 Mass. 374, 378, and cases cited. St. 1880, *c.* 220.

Administration is necessarily continuous; guardianship is not. The law requires that there shall always be an executor or administrator until the estate is finally settled; but it does not require that a minor shall always have a probate guardian so long as he is under age. A deceased person cannot change his place of residence, or hold property; the title of his real estate vests in his heirs, that of his personal estate in his executor or administrator; and if the latter dies without having fully administered, the administration cannot be said to be terminated But a guardian has the care and management only of the ward's estate, real or personal; the title of either never vests in the guardian, but remains in the ward; and by the death, removal or resignation of the guardian, the guardianship is as completely terminated as by the coming of age of the ward. Gen. Sts. *c.* 109, § 4. *Loring* v. *Alline*, 9 Cush. 68, 70. *Chapin* v. *Livermore*, 13 Gray, 561, 562. *Rollins* v. *Marsh*, *ante*, 116, 118. The residence of the ward may have been changed since the appointment, or even since the death or resignation, of his former guardian. *Holyoke* v. *Haskins*, 5 Pick. 20, 26. A petition for the appointment of another guardian is a new proceeding, requiring a new notice to the ward, and a new adjudication of infancy. *Allis* v. *Morton*, 4 Gray, 63. And if the ward has attained the age of fourteen years, he may nominate his own guardian. Gen. Sts. *c.* 109, §§ 2, 3.

Although a ward's change of residence from one county of the state to another does not terminate an existing guardianship, the letter and the reason of the Gen. Sts. *c.* 109, § 1, authorize and require every appointment of a guardian of a person residing in this Commonwealth, who is not now under guardianship, whether there has been a previous guardianship or not, to be

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made by the Probate Court of the county in which the ward resides when the petition for such appointment is presented.

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In this view of the law, the construction of the St. of 1873, *c.* 314, § 3, is not difficult. The only proceeding or matter of probate pending before the Probate Court for the county of Norfolk when the act of annexation took effect was the guardianship of the former guardian; and that has been terminated by his resignation. Neither the subsequent petition for the appointment of a new guardian, nor the inquiry where the former ward now resides, whether he is still a minor, and whether "it appears necessary or convenient," within the meaning of the Gen. Sts. *c.* 109, § 1, that a guardian should now be appointed, was a proceeding or matter which had been commenced or was pending in that court prior to the time when the act of annexation took effect; but this proceeding was commenced, and the cause of it accrued, since that time. It is therefore, by the express terms of the first clause of the St. of 1873, *c.* 314, § 3, within the jurisdiction of the Probate Court for the county of Suffolk, in which the residence of the minor now is; and the decree of that court must be *Affirmed.*

W. Minot, Jr., for the appellants.

H. L. Harding, pro se.

Mary Lawless *vs.* Ellen L. Reagan.

Suffolk. March 22. — June 29, 1880. Ames & Lord, JJ., absent.

The stepmother of minor children, whose parents are both dead, and whose grandmother has been appointed their guardian by the Probate Court, is not a person aggrieved by the decree, within the meaning of the Gen. Sts. *c.* 117, § 8, so as to entitle her to appeal therefrom.

Appeal by the stepmother of the children of Patrick Reagan, deceased, from a decree of the Probate Court, appointing their grandmother their guardian.

The petitioner moved that the appeal be dismissed, because the appellant was not a person aggrieved by the decree appealed

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from; and it was so ordered. The appellant appealed to the full court.

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A. Russ, for the appellant.

J. W. O'Brien, for the appellee.

COLT, J. The father and mother of minor children having died, the Probate Court appointed their grandmother guardian. The stepmother of the children appeals from this appointment; and it is objected that she has no right of appeal.

In probate cases, the right of appeal is given only to such persons as are aggrieved by the order, sentence, decree or denial appealed from. Gen. Sts. *c.* 117, § 8. The appellant claims to be a party aggrieved within the meaning of the statute, because the guardian of minors, whose parents are both dead, is entitled to their custody and tuition; Gen. Sts. *c.* 109, § 4; and the children in this case may be unjustly taken from her, although she has also filed a petition to be appointed guardian; and because the children, who have lived with and are greatly attached to her, will suffer wrong if now taken away and given to another. These are important considerations as affecting the action of the Probate Court in selecting a proper person for guardian, with reference to the welfare and best interest of the children; but they are not sufficient to give to the appellant a right to demand a revision of that action by this court. The interest which the appellant has in these children, however great, is simply a matter of affection and friendship on her part. There is no legal duty or responsibility imposed upon her for their custody or tuition; she is under no liability for their support; and has no present or prospective interest in their property. In order to give a right of appeal from the judgment of the court, it must appear that the party appealing has some pecuniary interest, or some personal right, which is immediately or remotely affected or concluded by the decree appealed from. Thus the heirs presumptive of an insane person are entitled to appeal from a decree allowing an account of his guardian. *Boynton* v. *Dyer*, 18 Pick. 1. Sureties on the bond of a deceased insolvent guardian may appeal from a decree settling the account of such guardian, and fixing the amount due from his estate to that of his ward. *Farrar* v. *Parker*, 3 Allen, 556. An administrator *de bonis non* may appeal from a decree allowing the

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account of the original administrator. *Wiggin* v. *Swett*, 6 Met. 194. The creditor of a deceased person may appeal from the granting of administration; *Stebbins* v. *Palmer*, 1 Pick. 71; while the debtor cannot appeal; *Swan* v. *Picquet*, 3 Pick. 448. And a ward may appeal from a decree granting or refusing the guardianship over him. *McDonald* v. *Morton*, 1 Mass. 543. On the other hand, a creditor of the heir at law is not entitled to appeal from the probate of a will. *Smith* v. *Bradstreet*, 16 Pick. 264. Nor is one claiming under a gift *causa mortis* entitled to appeal from a decree charging the administrator with the property, because such decree in no way affects or concludes the donee's rights. *Lewis* v. *Bolitho*, 6 Gray, 137. Nor can an uncle and next friend of a *non compos* sustain an appeal from an allowance of the account of the guardian, without showing himself to be heir or creditor. *Penniman* v. *French*, 2 Mass. 140.

It would greatly obstruct and delay the proceedings of the probate courts if persons having no legal interest in the result, and no motive except that of affection and friendship for those who have a legal interest, could be permitted to appeal from the decree of that court.

The order dismissing the appeal in this case must be

Affirmed.

CHARLES DAVIS *vs.* CITY OF SOMERVILLE.

Suffolk. March 3, 15. — June 30, 1880.

Although a person may lawfully travel on the Lord's day for the purpose of attending a funeral, and is not obliged to return by the shortest route, yet if, after the funeral is over, to enable a friend with him to make a social call, he departs from the ordinary return route, and, after such departure, is injured by a defect in a highway, he cannot maintain an action therefor against the town bound to keep the highway in repair.

TORT for personal injuries occasioned to the plaintiff while travelling upon a highway in the defendant city, which was alleged to be out of repair. Trial in the Superior Court, before

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Bacon, J., who allowed a bill of exceptions in substance as follows:

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It appeared in evidence that the plaintiff, in company with a lady friend, both living in Boston, drove from Boston to Cambridge in the afternoon of Sunday, October 28, 1877, to attend a funeral; that, upon leaving Mount Auburn cemetery, the lady asked him to take her back by way of Charlestown, so that she could call there upon her sister-in-law; and that he assented, and while so doing the accident happened. Neither the plaintiff nor the lady testified as to the purpose for which the call was to be made; nor did it appear that the plaintiff had any acquaintance with the sister-in-law.

The defendant requested the judge to instruct the jury as follows: "If the jury find that, upon leaving Mount Auburn cemetery, the plaintiff, at the request of his lady companion, undertook to drive her from Cambridge through Somerville to Charlestown, or from Cambridge to Charlestown, for the purpose of enabling her to call upon a sister-in-law residing in Charlestown, this, in the absence of any further testimony showing, or tending to show, the call to have been one of necessity or charity, would be a travelling within the prohibition of the statute relating to the Lord's day, and the plaintiff cannot recover."

The judge declined to rule as requested; explained to the jury the meaning of the words "charity" and "necessity," in the Lord's day act, to which no objection was taken; and instructed the jury as follows: "It must appear that the plaintiff was travelling lawfully at the time when the accident occurred. The plaintiff could lawfully travel for the purpose of going to or returning from a funeral on the Lord's day; and if, in fact, he was returning from a funeral, though by a different route, he was not travelling unlawfully, unless the route taken by him was so unreasonable and inconvenient as to show that his purpose was not to return, but to do something else not a work of necessity or charity. The fact that the plaintiff took a route back from Mount Auburn different from that by which he went, and that he took that route for the purpose of enabling the lady with him to make a call upon her sister-in-law, are facts to be considered by the jury, bearing upon the question whether he was travelling for any other purpose than that of going to

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and returning from the funeral, or for the purpose of doing anything not a work of charity or necessity. But these facts are not conclusive evidence, so that the court can say to the jury that, as matter of law, they ought to return a verdict for the defendant, on the ground that the plaintiff was travelling in violation of law, but only evidence proper to be submitted to the jury as bearing on the question to be determined by them, whether the plaintiff was at the time of the alleged injury travelling in violation of law."

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

The case was argued at the bar by *S. C. Darling*, for the defendant, and *N. B. Bryant*, for the plaintiff; and afterwards submitted on briefs to all the judges.

AMES, J. The statute making it unlawful and criminal to travel on the Lord's day, except from necessity or charity, has retained its place in our statute-book from the earliest times in the history of the state. Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time. Whatever inconveniences might result at the present day from the literal and general enforcement of the Lord's day act, and whatever hard cases may have arisen under it, it is still the law of the land, to be judicially interpreted and administered according to its true intent and meaning, and upon the same rules as would govern us in the interpretation of any other statute.

If the plaintiff in this case was travelling, on the Lord's day, without the excuse of necessity or charity, he cannot maintain an action against any town or city for any injury or damage sustained through a defect or want of repair upon a highway, for the reason that his own unlawful act concurs in causing such injury or damage. *Bosworth* v. *Swansey*, 10 Met. 363. *Jones* v. *Andover*, 10 Allen, 18. *Stanton* v. *Metropolitan Railroad*, 14 Allen, 485. We do not understand that any complaint was

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made as to the definition of the terms "necessity" and "charity" as given by the presiding judge. The necessity intended by the statute is not to be limited, on the one hand, to absolute physical necessity, nor, on the other hand, is it to be so enlarged as to include mere business convenience or advantage. *Smith* v. *Boston & Maine Railroad*, 120 Mass. 490. It is not easy to give a precise and strict definition which shall determine, as a matter of law, what facts constitute the necessity or charity intended by the statute. It was correctly ruled at the trial that the plaintiff could lawfully travel on the Lord's day for the purpose of going to or returning from the funeral, and also that it was not necessary that he should return by the same, or by the shortest route, unless the route taken by him was so unreasonable and inconvenient as to show a purpose outside of the alleged necessity or charity. But if, while in attendance at the funeral, or upon leaving the cemetery, it was proposed to him by his companion to go to another place, not upon the ordinary return route, in order, for her convenience or pleasure, to visit a friend, and if he acceded to this proposal, it would be the substitution of a new and different purpose of the journey in place of that which he had in view when he began it, and a purpose entirely outside of the necessity or charity which influenced him at the outset. If he had taken her from her residence and gone with her to Charlestown to make the intended visit, on the Lord's day, without attending the funeral at all, it would have been a clear violation of the statute. It is difficult to see why it would be any the less so, if, having attended the funeral, he, instead of returning directly from it, accepts an invitation to make a different journey, for a purpose having nothing whatever to do with the funeral. This would be perfectly obvious if the change of purpose were in order to go to some remote place beyond the cemetery, thereby occupying a greatly increased time, or if the additional journey were for the transaction of business manifestly secular in its nature. He had a right to travel to attend the funeral. But the journey to Charlestown for no other purpose than to enable his companion to make a social call was not within the exception of the statute. It makes no difference that the determination to make that journey was formed after he had attended the funeral, and was about to return. By the terms of

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the statute, he had no right to make that journey at all on that day and for that purpose.

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The majority of the court is, therefore, of the opinion, that the presiding judge fell into the error of submitting to the jury what was really a question of law; and that he should have instructed them that, upon the undisputed facts of the case, the plaintiff had not brought himself within the exception expressed in the statute, and was not entitled to maintain the action.

Exceptions sustained.

FRANCIS L. WHITE *vs.* JOHN P. LANG.

Suffolk. March 3. — June 30, 1880. ENDICOTT & SOULE, JJ., absent.

If a person, while unlawfully travelling on the Lord's day, is injured by the assault of a dog, the act of travelling is not a contributory cause of the injury, and he can maintain an action against the owner of the dog, under the Gen. Sts. c. 88, § 59, to recover double the amount of damage sustained.

TORT, under the Gen. Sts. *c.* 88, § 59, to recover double the amount of damage alleged to have been caused by the defendant's dog. Answer, a general denial.

At the trial in the Superior Court, before *Pitman*, J., without a jury, it appeared that the plaintiff, on Sunday, April 8, 1877, was driving his horse and buggy along a public highway in the city of Boston; that, while so driving, the defendant's dog jumped at the head of the plaintiff's horse and frightened him so that he became unmanageable, ran, and overturned the buggy, whereby the same and other property of the plaintiff was damaged; and that, before the accident, the defendant knew of no mischievous or vicious propensity in the dog to attack or harass persons or animals.

The defendant offered evidence to show that the plaintiff was unlawfully travelling on the Lord's day, and not from necessity or charity; but the judge ruled that these facts would constitute no defence, or prevent the plaintiff from recovering; and found for the plaintiff in double the amount of damage sustained by him. The defendant alleged exceptions.

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H. E. Ware, for the defendant.

E. T. Buss, for the plaintiff.

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MORTON, J. We must assume, for the purposes of this case, that the plaintiff was unlawfully travelling on the Lord's day. But this fact does not defeat his right to recover, unless his unlawful act was a contributory cause of the injury he sustained. *McGrath* v. *Merwin*, 112 Mass. 467. *Marble* v. *Ross*, 124 Mass. 44, and cases cited. It has been held in this Commonwealth that if a person, who is unlawfully travelling on the Lord's day, is injured by a defect in the highway, or by a collision with the vehicle of another traveller, he cannot recover for the injury. This is upon the ground that his illegal act aids in producing the injury, or, in other words, is a contributory cause. *Lyons* v. *Desotelle*, 124 Mass. 387. *Connolly* v. *Boston*, 117 Mass. 64.

On the other hand, it has been held in several cases that if a person, who is at the time acting in violation of law, receives an injury caused by the wrongful or negligent act of another, he may recover therefor if his own illegal act was merely a condition, and not a contributory cause of the injury. *Marble* v. *Ross*, *ubi supra*. *Steele* v. *Burkhardt*, 104 Mass. 59. *Kearns* v. *Sowden*, 104 Mass. 63 note. *Spofford* v. *Harlow*, 3 Allen, 176.

We are of opinion that the case at bar falls within the last-named class. If a man while travelling is injured by an assault, the act of travelling cannot in any just sense be said to be a cause of the injury. It is true that, if he were not travelling, he would not have received the injury, but the act of travelling is a condition and not a contributory cause of the injury. The plaintiff when travelling was assaulted and injured by a dog for whose acts the defendant is responsible. Gen. Sts. *c.* 88, § 59. *LeForest* v. *Tolman*, 117 Mass. 109. *Sherman* v. *Favour* 1 Allen, 191. The act of travelling had no tendency to produce the assault or the consequent injury; and therefore, though the plaintiff was travelling in violation of law, it does not defeat his right of recovery. *Exceptions overruled.*

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PATRICK O'LOUGHLIN *vs.* FRANK W. BIRD.

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Suffolk. March 19. — June 30, 1880. AMES & LORD, JJ., absent.

If a defendant answers in abatement and to the merits of the action in due time and in the proper order, the fact that both answers are filed together and upon the same paper does not operate as a waiver of the answer in abatement.

The provision of the St. of 1874, *c.* 271, § 11, relating to the municipal courts of Boston, that, "upon pleas in abatement, or motions to dismiss for defect of form in process, the decisions of said courts shall be final," applies to decisions upon questions of law only.

If, in a municipal court, in which no trial by jury can be had, an issue of fact is joined upon a plea in abatement, and judgment rendered for the plaintiff, and the defendant appeals to the Superior Court, he is entitled to a trial by jury in that court upon the same issue, but upon that only, unless that court orders or permits him to plead anew.

REPLEVIN of goods alleged to be $100 in value, and appearing by the appraisers' certificate to be $22 in value. Writ dated October 14, 1879, returnable to the Municipal Court of Boston.

On the third day after the entry of the action in that court, the defendant filed the following answer: "And the defendant comes and says that his name is Francis W. Bird, and not Frank W. Bird, and therefore he ought not to be held to answer to the plaintiff's writ; and further answering says that the actual value of the whole property described in the plaintiff's writ, at the suing out thereof, did not exceed $20, and that the appraisal of said property at $22 was procured by the fraud and collusion of the plaintiff and the constable who served the writ, and therefore he ought not to be held to answer to the plaintiff's writ.

"And still further answering, the defendant says that he denies each and every allegation contained in the plaintiff's writ and declaration, and alleges that the property replevied belonged to the defendant, and not to the plaintiff, at the time the plaintiff sued out the writ aforesaid."

The record of that court showed that issue was joined on the answer in abatement, and found for the plaintiff, and judgment rendered for him for one cent damages and costs, and the defendant appealed to the Superior Court.

Upon the entry of the action in the Superior Court, the defendant filed this answer: "And now comes the defendant and denies each and every allegation contained in the plaintiff's writ

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and declaration;" and claimed a trial by jury as follows: "And now comes the defendant and claims a jury trial in the above-entitled cause." The plaintiff moved that judgment be entered for him. The court allowed this motion, and entered judgment for the plaintiff for one cent damages and costs. The defendant appealed to this court.

Willard Howland, for the plaintiff.

P. H. Hutchinson, for the defendant.

GRAY, C. J. If a defendant pleads in abatement of the writ, and to the merits of the action, in the proper order, the fact that both pleas are filed at the same time, and even upon the same paper, does not, in this Commonwealth, operate as a waiver of the plea in abatement, if seasonably filed. This mode of pleading is often convenient to both parties; to the defendant by stating, and to the plaintiff by giving him notice of, all the defences on which the defendant intends successively to rely, if the trial and judgment upon the first shall not dispose of the whole case; and it is sanctioned by a usage of more than a century. *Province* v. *Paxton*, Quincy, 548. *Fletcher* v. *Vassal*, 5 Dane Ab. 691, 710. *Fisher* v. *Fraprie*, 125 Mass. 472. The remarks in *Pratt* v. *Sanger*, 4 Gray, 84, 88, in *Morton* v. *Sweetser*, 12 Allen, 134, 137, and in *Machinists' Bank* v. *Dean*, 124 Mass. 81, 83, so far as they tend to discountenance it, are *obiter dicta*, and are unsupported by the authorities there referred to.

In *Pratt* v. *Sanger*, and in *Machinists' Bank* v. *Dean*, the plea in abatement was filed too late. *Campbell* v. *Stiles*, 9 Mass. 217, and *Coffin* v. *Jones*, 5 Pick. 61, decided no more than that a plea of abatement could not be filed after an imparlance. In *Simonds* v. *Parker*, 1 Met. 508, the decision was that a motion to quash a writ, or to dismiss an action, like a plea in abatement, could not be filed after the first term, nor after a plea in bar; and in *Kittridge* v. *Bancroft*, reported with it, the only further decision as to a plea in abatement was, that when a fact, not appearing on the record, had been pleaded in abatement, and a replication to that plea filed, traversing the fact, but no issue had been joined, and no notice taken of that plea in the record, it must be understood to have been abandoned.

In *Morton* v. *Sweetser*, the answer began by stating defences on the merits, and ended with setting up matter of abatement,

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so that the defendant had, in the phrase of Lord Coke, "misordered" his pleas, and thereby lost the benefit of his plea in abatement. Co. Lit. 303 *a*. The statement in Com. Dig. Abatement I. 23, is only that, "after a plea to the action, the defendant shall not plead in abatement, except where he pleads it after the last continuance;" and such is doubtless the law. *Gerrish* v. *Gary*, 1 Allen, 213. *Hastings* v. *Bolton*, 1 Allen, 529.

In the case now before us, therefore, the plea in abatement was not waived by the answer to the merits filed with it in the Municipal Court; but it was properly tried first; and the issue joined thereon being a question of fact, and found for the plaintiff, a general judgment in the action might rightly be rendered for him in that court. Gen. Sts. *c.* 129, § 39. St. 1867, *c.* 355, § 2. *Young* v. *Gilles*, 113 Mass. 34.

But the proceedings in the Superior Court present a more serious difficulty. The subject of the action exceeding twenty dollars in value, the defendant, by the Constitution of the Commonwealth, had the right to a trial by jury on any issue of fact duly pleaded. Declaration of Rights, art. 15. That right is sufficiently secured by allowing him a trial by jury, either in the Municipal Court, or in the Superior Court on appeal. *Hapgood* v. *Doherty*, 8 Gray, 373. But the Legislature cannot wholly deny him such a trial.

The provision of the act relating to the municipal courts of Boston of 1874, *c.* 271, § 11, that "upon pleas in abatement, or motions to dismiss for defect of form in process, the decisions of said courts shall be final," applies to decisions upon questions of law only, as appears by referring to the Gen. Sts. *c.* 115, § 7, concerning decisions of a justice of the Superior Court or of this court, from which it was evidently copied. The St. of 1874, *c.* 271, further provides, in § 12, that "in all civil actions and proceedings in the Municipal Court of Boston appeals shall lie to the Superior Court;" and as that statute allows no trial by jury in the Municipal Court of Boston, (as distinguished from the courts for the Southern, the Dorchester and the Charlestown Districts,) it could not, in a case like this, without violating the Constitution, make the decision of that court upon a question of fact final, in the sense of precluding the defend-

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ant from demanding a trial by jury in the Superior Court on appeal.

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The defendant therefore had the right to claim a trial by jury in the Superior Court. But such trial must be had upon the answer in abatement filed in the Municipal Court, unless the Superior Court shall order or permit him to plead anew. Gen. Sts. *c.* 120, § 28. *Wilbur* v. *Taber*, 9 Gray, 361. *Lew* v. *Lowell*, 6 Allen, 25. *Judgment for the plaintiff set aside.*

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INDEX.

ABATEMENT.

See PLEADING, III.

ACCEPTANCE.

See CONTRACT, 9.

ACCORD AND SATISFACTION.

See PAYMENT, 1; PLEADING, 5.

ACCOUNT ANNEXED.

See PLEADING, 5.

ACTION.

1. If an ncorporated benevolent society, whose by-laws provide for the payment of a weekly allowance to a sick member, upon the performance of certain conditions by him, refuses to fulfil its contract, the member injured thereby may maintain an action at law against it, if the by-laws of the society make no provision for a tribunal to decide questions arising between the society and its members. *Dolan* v. *Court Good Samaritan*, 437.
2. In an action for personal injuries occasioned to the plaintiff by the negligence of the defendant's servant, it appeared that the plaintiff was a machinist in the employ of W., a builder of steam-engines; that the defendant, a teamster, was employed to transport an engine from W.'s shop to the railroad station, and went with his truck and servants to do this work; that, after the engine was loaded upon the truck, he falsely represented to the plaintiff that W. had agreed to send two of his men to the station to assist in loading the engine upon the car; and that the plaintiff was thereby induced to go to the station and assist the defendant, and, while putting the engine upon the car, was injured. *Held*, that the plaintiff did not become the servant of the defendant; and that the action could be maintained. *Kelly* v. *Johnson*, 530.

See BY-LAW, 3; CITY, 2, 3; CONTRACT, 1, 3, 6, 9; COVENANT; EXECUTOR AND ADMINISTRATOR; LORD'S DAY, 2, 3; MASTER AND SERVANT;

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PHYSICIAN AND SURGEON; RAILROAD, 2-4; SALE, 2; SURVEYOR OF HIGHWAYS; TOWN; TRUST AND TRUSTEE, 4; WAY, 10, 13; WORK AND LABOR.
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ADMINISTRATOR.

See EXECUTOR AND ADMINISTRATOR.

ADMISSION.

See EVIDENCE, 20

ADVERSE POSSESSION.

See CONTRACT, 7.

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

See CONTRACT.

AMENDMENT.

See PARTNERSHIP, 3; PLEADING, 1; TRUSTEE PROCESS, 2; WAIVER, 1.

ANIMAL.

See BIRDS; DOG; LORD'S DAY, 3.

ANNUITY.

See TRUST AND TRUSTEE, 8.

ANSWER.

See PLEADING, IV.

APPEAL.

1. A point which does not appear to have been intended to be raised, on an agreed statement of facts submitted to the Superior Court, will not be considered by this court on appeal. *Fitzsimmons* v. *Carroll*, 401.
2. The stepmother of minor children, whose parents are both dead, and whose grandmother has been appointed their guardian by the Probate Court, is not a person aggrieved by the decree within the meaning of the Gen. Sts. *c.* 117, § 8, so as to entitle her to appeal therefrom. *Lawless* v. *Reagan*, 592.
3. A. who had been appointed administrator of B., brought an action at law against C. to recover money entrusted to C. by A.'s intestate; and cited C. to appear in the Probate Court to be examined concerning B.'s property

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in his hands. C. set up in defence of both proceedings that A.'s appointment was procured by his fraud and false statements respecting the residence of his intestate, and that the Probate Court had no jurisdiction to appoint him. A justice of this court reported the facts in the action at law for the determination of the full court, and reversed an order of the Probate Court directing C. to answer, on the ground that that court had no jurisdiction to appoint A. on account of his fraud and false statements in procuring his appointment. A., relying on the report of the action at law, and supposing that C. would abide the determination of this court thereon, omitted to seasonably take an appeal from the order in the probate proceeding. *Held*, that a petition for leave to appeal, under the Gen. Sts. *c.* 113, § 13, on the ground of mistake, should be granted. *McFeely* v. *Scott*, 17.

See Complaint, 1; Costs, 2; Equity, 8; Guardian and Ward, 2; Juror and Jury, 3; Poor Debtor, 2; Probate Court 5· Supreme Judicial Court; Waiver, 2; Way, 5.

APPORTIONMENT.

See Landlord and Tenant, 2.

ARSON.

See Evidence, 10, 11, 13; Indictment, 1.

ASSENT.

See Married Woman, 2.

ASSESSMENT.

See Sewer.

ASSIGNEE IN BANKRUPTCY.

See Bankrupt, 2; Evidence, 1.

ASSIGNMENT.

See Bankrupt, 2; Deed, 2; Evidence, 1; Lease, 2, 3; Trust and Trustee, 7.

ASSUMPSIT.

See Contract; Work and Labor.

ATTACHMENT.

See Bankrupt, 4; Evidence, 6; Execution, 1, 5; Fixture; Mortgage, 3, 4, 5; Partnership, 3; Trustee Process, 2.

AUDITOR.

See Goods Sold and Delivered, 1; Waiver, 1.

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BAILMENT.

See TROVER, 1.

BANKRUPT.

1. The provisions of the U. S. Rev. Sts. § 5106, for staying, upon the application of a bankrupt, and to await the determination of the question of his discharge, suits upon claims provable in bankruptcy, are applicable to a suit pending before a referee, to whom it has been referred by consent of parties and rule of court. *Seavey* v. *Beckler*, 471.
2. An assignment in bankruptcy, proved to have been executed and delivered by the register to the assignee, is, under the U. S. Rev. Sts. § 5049, conclusive evidence of his right to sue; and any defects or irregularities in the previous proceedings cannot be set up in defence of an action brought by him. *Hersey* v. *Jones*, 473.
3. Proceedings of composition under the U. S. St. of June 22, 1874, § 17, followed by payment or tender of the sums due, bar the rendering of any judgment against the debtor personally in an action by a creditor, whose debt is described in the statement of the debtor, and would be barred by a certificate of discharge in bankruptcy. *Denny* v. *Merrifield*, 228.
4. The St. of 1875, *c.* 68, authorizing the entry of a special judgment for the purpose of charging the sureties on a bond given to dissolve an attachment, if the defendant is "adjudged a bankrupt," and the attachment is "not made within four months next preceding the commencement of proceedings in bankruptcy," does not warrant the entry of such a judgment when the attachment is made within the four months, and there is no assignment in bankruptcy, and the debtor is discharged by proceedings of composition under the U. S. St. of June 22, 1874, § 17, whether he is or is not adjudged a bankrupt. *Ib.* *Comstock* v. *Peck*, 231, note.

See EVIDENCE, 1; GOODS SOLD AND DELIVERED, 2; INSOLVENT DEBTOR, 1; PROMISSORY NOTE, 7; TRUSTEE PROCESS, 2.

BASTARD.

In an action against the sureties on a bond, given by a person adjudged to be the father of a bastard child, as security for the payment, according to the order of the court, of a certain sum for the maintenance of the child, judgment should be entered for the penal sum named in the bond, without deducting payments made by the principal under that order; but execution should issue for the amount due under the order which the principal has failed to pay. *Barnes* v. *Chase*, 211.

BENEVOLENT SOCIETY.

See ACTION, 1; BY-LAW, 2.

BIRDS.

Under the St. of 1879, *c.* 209, § 1, providing that "whoever in this Commonwealth takes or kills any woodcock," or other specified birds, between

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certain days of the year, "or within the respective times aforesaid sells, buys, has in possession, or offers for sale, any of said birds, shall upon conviction be punished," a person is not punishable for having in his possession, offering for sale and selling a woodcock lawfully taken or killed in another state. *Commonwealth* v. *Hall*, 410.

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BOND.

See BANKRUPT, 4; BASTARD.

BOUNDARY.

See CONTRACT, 7; LEASE, 1.

BREACH OF PROMISE OF MARRIAGE.

1. In an action by a woman for breach of a promise of marriage, alleged to have been made in 1875, rescinded by mutual consent in 1878, and renewed the same year, the answer admitted the making of the contract in 1875 and its rescission, but denied its renewal. *Held*, that the plaintiff had no ground of exception to the rejection of evidence, offered by her, that in 1839 and 1840 she and the defendant were attached to each other, but not engaged to be married; that each soon after married another person; and that, while so married, there were friendly relations between them. *Dean* v. *Skiff*, 174.
2. In an action for breach of a promise of marriage, the plaintiff's evidence tended to show a written contract, a subsequent rescission of it by mutual consent, and an oral renewal of it. The jury were instructed that evidence of an express promise of marriage was not necessary to prove a contract to marry; that the renewing of a contract to marry, which has been once released, must be proved by the same evidence, in kind and amount, required to prove an original and the same promise to marry by and between the same parties. *Held*, that the instruction was not open to the criticism that it required the new promise to be in writing. *Ib.*

BRIDGE.

See RAILROAD, 8.

BROKER.

See EVIDENCE, 18; PROMISSORY NOTE, 5.

BUILDING.

See TROVER, 2.

BY-LAW.

1. Under the Gen. Sts. *c.* 19, § 13, authorizing cities to "make such rules and regulations for the erection and maintenance of balustrades, or other projections upon the roofs or sides of buildings therein, as the safety of the

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public requires," a city has no power to pass an ordinance prohibiting the maintenance of door-steps within the limits of a highway, which are lawfully there; nor is such power conferred by its charter, which authorizes it to make "all such salutary and needful by-laws, as towns, by the laws of this Commonwealth, have power to make." *Cushing* v. *Boston*, 330.

2. The by-laws of an incorporated benevolent society provided that a sick member, upon sending to the society "every week during his sickness" a certificate signed by a qualified surgeon, stating his illness, "shall be entitled to a weekly allowance of five dollars." A member of the society was taken ill, in another state, and sent to the society a certificate, stating his illness, and signed by a person who was in fact a surgeon in attendance upon him, but who did not describe himself in the certificate as such. Accompanying the certificate was a letter from the member, in which he spoke of it as the doctor's certificate. No other certificate was furnished until after his return to this state, about three months later, when he furnished a certificate that he had been ill since the date named in his first certificate. *Held*, that the first certificate was a substantial compliance with the by-law, and entitled the member to receive an allowance for one week; and that he was not entitled to any further allowance. *Dolan* v. *Court Good Samaritan*, 437.

3. A by-law of a coöperative building association provided that, "if any member wishes to withdraw from the company, he shall give notice in writing to the clerk of such intention, when the company shall, within one year from the receipt of such notice, pay to said member the sum of money which he has paid as instalments and the one hundred dollars which he originally paid for stock, which certificate of stock he shall deliver to the treasurer." Another by-law provided that, "if any member wilfully neglects his payments, he shall, after one year, take what money he has paid to the company as instalments and for stock, the certificate of which stock he shall surrender to the treasurer." *Held*, that the two by-laws should be construed together; and that a member, who had not given notice of his intention to withdraw until within less than a year before bringing suit, could not maintain an action against the association for the amount of stock and instalments paid by him. *Hartford* v. *Coöperative Homestead Co.* 494.

See ACTION, 1; CITY, 1; OFFICER, 1, 3.

CARRIER.

1. The delivery, by a common carrier, to a consignee, of a part of goods transported by the former, without payment of freight and advances, does not discharge the lien of the carrier upon the remainder of the goods for the whole amount of charges, unless it was the intention of the parties to do so; and this is a question of fact for the jury. *New Haven & Northampton Co.* v. *Campbell*, 104.

2. In an action against a railroad corporation for the loss of property entrusted to it for carriage, statements made, orally or in letters, to the plaintiff by the defendant's freight agent, to whom the property was

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delivered, relating to the investigation of the loss, and showing that the property had been in the defendant's possession, are admissible in evidence against the defendant. *Green* v. *Boston & Lowell Railroad*, 221.

3. In an action against a railroad corporation for the loss of a case of goods entrusted to it for carriage, the defendant's freight agent, to whom the case was delivered, was called as a witness by the plaintiff, and on cross-examination was asked "if he had any authority to take such goods as this case contained." *Held*, that the question was rightly excluded. *Ib.*

4. This clause in a carrier's contract, "Specie, drafts, bank-bills, and other articles of great intrinsic or representative value, will only be taken upon a representation of their value, and by a special agreement assented to by the superintendent," does not apply to a family portrait, contained in a wooden case. *Ib.*

5. In an action against a railroad corporation for the loss of a case of goods entrusted to it for carriage, there was evidence that the case, together with other goods filling two cars, was delivered to the defendant at L., to be transported to P., whence it was to be carried by a line of steamers to A.; that the two cars were received by the agents of the steamer from the defendant "unopened, and just as they were received," and were kept on their wharf carefully watched and guarded until the goods were transferred to the steamer; and that, on unloading the cars, it was found that the case was not in either car. The defendant asked the judge to rule that there was no evidence of the loss of the case between L. and the depot at P. *Held*, that this ruling was rightly refused. *Ib.*

See DAMAGES, 1; PLEADING, 3.

CASE STATED.

See APPEAL, 1; OFFICER, 4.

CERTIORARI.

See SEWER.

CHALLENGE.

See JUROR AND JURY, 2.

CHARITY.

A testator devised an interest in land "to the missionary case of the Methodist Episcopal Church." On a petition for partition by the Missionary Society of the Methodist Episcopal Church, a corporation, organized under the laws of New York, claiming to be the devisee, it appeared that the testator was a member of the Methodist Episcopal Church in a town in this Commonwealth; that, by the rules of that denomination, all money collected for missions was required to be sent to the petitioner, and there was no incorporated society nor organization of any kind in New England which took charge of the missionary work of the denomination, although the rules of the denomination provided, in certain contingencies, for the establishment

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of missionary societies in the several conferences; that the testator, who was accustomed to contribute to the various charities of the denomination, did not know the name of the petitioner, nor of its existence, although he knew that the money collected for missions in the church in his town was sent to and managed and expended by an organization in New York, acting in the interest of the denomination. *Held*, assuming that the word "case" meant "cause," and that the devise was valid, that it did not appear that the petitioner was the devisee; and that the petition must be dismissed. *Missionary Society* v. *Chapman*, 265.

See COMPROMISE.

CITY.

1. An ordinance of a city, by whose charter all powers vested in the mayor and aldermen and common council jointly are "to be exercised by concurrent vote, each board to have a negative upon the other," the passage of which is shown, as to the board of mayor and aldermen, by the certificate of the mayor, being the chairman of that board, and, as to the common council, by the certificate of its president, is not invalidated by a departure from a provision of the joint rules and orders of the city council, directing that every ordinance shall be passed first in the common council. *Chandler* v. *Lawrence*, 213.
2. A city, having the legal right to construct sewers in its streets, is not liable in tort for all damages that may be caused by the blasting of rocks, necessary in such construction, but only for such damages as are occasioned by the carelessness or unskilfulness of its agents in doing the work. *Murphy* v. *Lowell*, 396.
3. The city of Boston is not liable for an injury caused to a person on Boston Common by coming into collision with a sled on one of the paths thereon, upon which the city has permitted boys and men to coast in the winter season, and which the city has fitted for that purpose by building a bridge across it at an intersecting path, and by turning water upon it to freeze and render it slippery. *Steele* v. *Boston*, 583.

See BY-LAW, 1; DOG; MANDAMUS; OFFICER; RAILROAD, 8; SEWER; TOWN; WAY, 7, 11, 13, 14.

CITY COUNCIL.

See CITY, 1.

COLLATERAL SECURITY.

See PROMISSORY NOTE, 1.

COMMISSIONS.

See GUARDIAN AND WARD, 4.

COMMONWEALTH.

See INFORMATION.

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COMPLAINT.

1. A complaint, which does not set forth the facts necessary to constitute an offence, except by reference to a statute, the year of which is wrongly given, will not support a conviction; and the objection may be taken for the first time at the trial in the Superior Court on appeal. *Commonwealth* v. *Washburn*, 421.
2. A complaint under the St. of 1875, *c.* 99, averred that the defendant, at a place and on a day named, "that day being the Lord's day, unlawfully did sell intoxicating liquors to a person, whose name is to the complainant unknown, the said defendant not having then and there any license, appointment or authority according to law, to make such sale of intoxicating liquors on the said Lord's day." *Held*, that the complaint was in due form, and was supported by proof of any sale that was unlawful under the statute. *Commonwealth* v. *McKiernan*, 414.
3. A complaint alleged that, on September 24, 1878, intoxicating liquors were kept and deposited by A. in a certain building for sale in violation of law. The search-warrant issued under the complaint recited that the complaint was made on September 24, 1878. The jurat affixed to the complaint was dated "this twenty-fourth day of September in the year one thousand eight hundred and seventy- ." The court, to a special justice of which the complaint was addressed, was established in 1874. *Held*, that the jurat was not the only evidence of the time of making oath to the complaint; and that the record showed that the complaint was sworn to on September 24, 1878. *Commonwealth* v. *Intoxicating Liquors*, 72.
4. A. built four houses upon a lot of land owned by him. No cellars were built under the houses, but there was a vacant space under them below the basement floors. The foundation walls ran across this space so that it was substantially enclosed by the walls, and the houses were drained by a line of cement pipe running through the space underneath the floors of all the houses and terminating in a cesspool. Stagnant water was found under the several houses, caused by a leakage or leakages in the above pipe. Four complaints were brought against A., each charging him with permitting waste and stagnant water to stand upon a distinct lot of land. At the trial, the judge declined to rule, as requested by the defendant, that there was only one lot of land and but one offence committed, but instructed the jury that it was a question of fact for them, upon the evidence, whether there was more than one lot of land. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Colby*, 91.

See Intoxicating Liquors, 1.

COMPOSITION.

See Bankrupt, 3, 4.

COMPROMISE.

Pending an appeal from the probate of a will, by which the entire estate of the testator was devised to a charity, the person named as executor and

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the heirs at law and next of kin of the testator made an agreement of compromise, which was afterwards ratified by this court, in November 1874, on a petition in equity, under the St. of 1864, *c.* 173, by the terms of which the executor was to pay immediately to the counsel employed in the case a certain sum as counsel fees; to trustees, to be appointed by the Probate Court to carry out the charity created by the will, a certain sum; after payment of debts and charges of administration, to pay the residue, not exceeding a certain sum, to the next of kin; and, if anything remained after such payment, to divide the same between the trustees of the charity and the next of kin, in a certain proportion. The executor subsequently declined the trust, and administrators with the will annexed were appointed in March 1875, who in July of that year paid the trustees of the charity, who were appointed in the preceding April, the amount named in the agreement. After the payment of debts and charges of administration, the residue in the hands of the administrators was less than the sum which by the agreement was to be paid to the next of kin. *Held*, that the trustees of the charity were not entitled out of this fund to any interest on the sum paid to them. *Lincoln* v. *Wood*, 203.

CONSIDERATION.

See CONTRACT, II.

CONSIGNOR AND CONSIGNEE.

See EVIDENCE, 20.

CONSTITUTIONAL LAW.

See JUROR AND JURY, 3; WAY, 7.

CONTRACT.

I. *Making.*

1. If a contract in writing, purporting to be between two persons, and containing mutual and dependent stipulations to be by them severally performed, is signed by them, and also by a third person, in such a manner as not to indicate the capacity in which he is a party to the contract, no action can be maintained thereon by one of the parties named in the body of the contract against him and the other party jointly; and parol evidence is inadmissible to show that he signed it intending to be bound, and as surety for the other defendant. *Blackmer* v. *Davis*, 538.

See BREACH OF PROMISE OF MARRIAGE; GUARDIAN AND WARD, 1.

II. *Consideration.*

2. If two persons enter into a written contract, which one refuses to fulfil, and the other makes a new contract with him, which operates as a rescission of the original contract, the new contract is founded upon a sufficient consideration. *Rollins* v. *Marsh*, 116.

See EVIDENCE, 6; PROMISSORY NOTE, 3, 4.

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III. *Validity.*

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See Lord's Day, 1; Sale, 2.

IV. *Construction.*

3. A written agreement recited that A. had bought of B. a fractional part of a vessel, with the understanding that B. was "to take her back at the end of the voyage" at a certain rate; and that A. agreed that B. should "have her at that rate." In an action for breach of this agreement, by A. against B., it appeared that, after the vessel had ended that voyage and started on another, A. tendered a bill of sale of his share in the vessel to the defendant, but the vessel had then become a wreck, and had been abandoned and sunk in the ocean. *Held*, that the action could not be maintained. *Thomas* v. *Knowles*, 22.

4. A. proposed by letter to B. to put the gutter of a mill "in proper shape." B.'s letter of acceptance stated A.'s proposal to be to "repair and renew so far as necessary the gutter." *Held*, that the contract contained in the letters required A. only to make such repairs and renewals that the gutter should do all that it was capable of doing, when in good condition, according to its original plan of construction, and not to build a new gutter of a different construction, even if the original plan was defective. *Dwight* v. *Ludlow Manuf. Co.* 280.

5. A. and B., owners of mills on a small stream, and of a dam and reservoir built for the purpose of supplying water to the mills, entered into an agreement, by the terms of which B. conveyed to A. all his interest in the dam and reservoir, together with the right of passing over B.'s land to the dam for the purpose of drawing water from the reservoir, during working hours, at the rate of fifty cubic feet per second for the operation of A.'s mill; and A. conveyed to B. the right of using said dam for the purpose of drawing water from the reservoir at the rate of fifty cubic feet of water per second, "at any and all times during working hours," for the purpose of running B.'s mill, "or such other mill or mills as may be erected on his privilege." The agreement further provided that, if A. should waste the water in the reservoir, or draw therefrom at other times than working hours, so that B. should fail to have the supply of water required for his mill, the agreement should be void. At the time the agreement was made, the mills on the stream were cotton-mills, the working hours of which were eleven hours a day. B. subsequently changed his mill to a paper-mill, which ran day and night. *Held*, that the term "working hours" meant the working hours of the mills at the date of the agreement; and that B. could not maintain an action against A. for preventing him from using the water at night. *Binney* v. *Phœnix Cotton Manuf. Co.* 496.

See Carrier, 4; Evidence, 21; Principal and Agent, 1.

V. *Performance and Breach.*

6. B. agreed in writing to build a sea-wall for A. The contract did not define the exact location of the proposed wall, and said nothing about a pile foundation being required. B. built the wall on the lines pointed out by

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A., and it proved to be defective for want of a pile foundation. *Held*, that an action would lie against A. for the price agreed to be paid for the wall. *Burke* v. *Dunbar*, 499.

7. A misdescription of the courses of the boundary lines in a deed of land to the grantor of a vendor, will not justify a purchaser in refusing to accept a deed, and enable him to recover back the part of the purchase money already paid, if the monuments referred to so clearly identify the land that the courses may be rejected as erroneous, or where the vendor's grantor had been in exclusive possession of the land for more than twenty years. *Galvin* v. *Collins*, 525.

8. A mortgage on the estate of a vendor of land will not justify the purchaser in refusing to accept the deed, and enable him to recover back the part of the purchase money already paid, if the vendor at the time is able and willing to have the mortgage discharged. *Ib.*

9. A sub-contractor for building a church drew an order on the person with whom he made the contract, payable to A. "from percentage retained on work." The order was accepted, "payable when the work is accepted by the church." Before the order was accepted, the tower of the church was found to be defective, and was taken down, and its completion had been abandoned by the mutual consent of the church society and the contractor; but the society then contended that the defect was owing to the fault of the contractor, and retained a large sum of money which, by the terms of the contract, would have been payable on the completion of the work. *Held*, in an action on the order by A. against the acceptor, that, if the defect was owing to this cause, and not to a defect in the plan, the action could not be maintained, although the society, before the action was brought, occupied and used the building. *Gray* v. *James*, 110.

VI. *Rescinding.*

10. A man signed and delivered a promissory note, by which he agreed to pay a woman a certain sum on the day he was married. On the same day both signed an agreement, by which they agreed to live together, and to take care of each other as long as they should live, and to marry as soon as they should think it safe on account of an old engagement of the man. Subsequently, after a full conference, the following papers, written by a magistrate at the dictation of the woman, were signed: 1st, a receipt by the man in full of all services rendered by him to the woman; 2d, a release of the man by the woman from the promise of marriage, and an agreement not to interfere with his marrying any one else, by bringing suit against him; 3d, a receipt by the woman of the man, in full to date, for her services as housekeeper. *Held*, in an action by the woman against the man for breach of the two agreements first made, that she had no ground of exception to the submission of the question to the jury, whether these agreements were not intended by the parties to be annulled by those subsequently made. *Dean* v. *Skiff*, 174.

11. If the parties to an executory contract of marriage mutually release each other from its performance, and subsequently enter into a new contract of

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marriage, this does not annul the release of the former contract. *Dean* v. *Skiff*, 174.

12. A man and a woman executed a written agreement, by the terms of which they agreed to live with each other as long as they both should live, to take care of each other, and to marry as soon as they should think it safe on account of an old engagement. Subsequently the woman released the man from the promise of marriage, and agreed not to interfere with his marrying any one else. The man thereupon married another woman. *Held*, that the release was necessarily an abrogation of the former contract. *Ib.*

See CONTRACT, 2; INFANT; WORK AND LABOR.

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CONVERSION.

See DAMAGES, 2; TRESPASS, 2; TROVER.

COÖPERATIVE ASSOCIATION.

See BY-LAW, 3; DEED, 2.

CORPORATION.

At the trial of a writ of entry brought by a corporation, a witness testified that he was clerk of the demandant, and that two books which he produced were the records of the corporation kept by him, but these books were not otherwise offered in evidence. The demandant also put in evidence a mortgage deed of the demanded premises from a third person to itself, in which it was described as a corporation, and a subsequent deed executed by the tenant, which recited that the demandant was the holder of that mortgage, and in which he agreed to pay the mortgage debt to "said corporation." *Held*, that there was evidence of the corporate existence of the demandant. *Provident Institution for Savings* v. *Burnham*, 458.

See ACTION, 1; BY-LAW, 2, 3; DEED, 2; EQUITY, 6; FRAUDS, STATUTE OF, 2; PARTNERSHIP, 1; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 7.

COSTS.

1. If a person summoned as trustee files an answer at the first term, upon which he is entitled to be discharged, and no interrogatories or further allegations are filed, he is not entitled to costs at subsequent terms, while the case is pending on the docket, although the principal defendant does not appear. *Hawkins* v. *Graham*, 20.

2. Under the Gen. Sts. *c.* 142, § 60, a person summoned as trustee is not entitled to an attorney's fee, nor to any allowance for counsel fees, except at the discretion of the court; and the exercise of such discretion by the Superior Court cannot be revised by this court on appeal by the trustee from the taxation of costs. *Ib.*

See JUDGMENT, 3; MORTGAGE, 3; PLEADING, 1; PRINCIPAL AND AGENT, 2

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COURTS.

See DISTRICT COURT; MUNICIPAL COURT; PROBATE COURT; SUPREME JUDICIAL COURT.

COVENANT.

An agreement, by the grantee in a deed poll, to keep in repair a building on adjoining land of the grantor, is not a covenant, and will not sustain an action by a subsequent grantee of the adjoining land. *Martin* v. *Drinan*, 515.

See DEED, 1; DOWER.

CUSTOM.

A usage may be established by the testimony of one witness. *Jones* v. *Hoey*, 585.

See EVIDENCE, 3.

DAMAGES.

1. In an action against a railroad corporation for the loss of a case containing a portrait of the plaintiff's father, entrusted to the corporation for carriage, the measure of damages is the actual value of the portrait to the plaintiff, and not the market value; and evidence that he had no other portrait of his father is admissible. *Green* v. *Boston & Lowell Railroad*, 221.

2. Where the owner of a chattel, who has transferred the possession thereof to another person, with the agreement that it should become his property on the payment of a certain sum in weekly instalments, brings an action against a third person for a conversion of the chattel after payment of some of the instalments and a failure to pay the remainder, the measure of damages is the whole value of the property, with interest from the time of the conversion. *Colcord* v. *McDonald*, 470.

See WAY, 4–6.

DEED.

1. A deed of land from A. to B. recited that the consideration had been paid to C., A. holding only the record title; and that C. agreed to release the premises from a certain mortgage. The final clause of the deed stated that C. joined to release an equitable interest in the premises. The deed was signed and sealed by C. as well as by A. *Held*, that B. could maintain an action against C. for breach of the covenant contained in the deed. *Palmer* v. *Wall*, 475.

2. An assignment of a mortgage of land from a loan and fund association, concluding, "In witness whereof the said association, by J. S., its president, duly authorized for this purpose, has hereunto set its seal, and the said J. S., president as aforesaid, has hereunto set his hand," signed "J. S., President of" (giving the name of the association), and sealed, is in form executed by the association. *Murphy* v. *Welsh*, 489.

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3. A. and B. were in partnership. B. died, and A. was appointed his administrator. Subsequently, to secure his debt to the firm, a debtor of the firm executed a mortgage of land, in which the consideration was stated to be paid by "A. and the estate of B.;" the same form was used in designating the grantees; and a power of sale was given to "said grantees." *Held*, that A., as administrator, was sufficiently designated as one of the grantees; that the whole legal title was vested in him, one half to his own use, and the other as administrator; and that his omission to describe himself as administrator, in a deed given in execution of the power to sell, did not invalidate the deed. *Look* v. *Kenney*, 284.

4. If the owner of two lots of land conveys one of them, which fronts on a street, by deed excepting and reserving to himself a passageway four feet wide from the street to his remaining lot, evidence that, when the deed was made, the whole of the lot granted was covered by a building, except along a strip on the northerly side nine feet in width, part of which strip was covered by outside stairs attached to the building, four feet and a half in width, and that the grantor was accustomed to pass and repass along the remaining space, is a location of the passageway mentioned in the deed along this strip; the grantee cannot obstruct it by building a wall along his northerly boundary line sixteen inches in thickness; and evidence that the grantor's tenants had a flower-garden a foot wide along the northerly line, maintained a plank walk twenty inches wide outside of this, and did not invariably walk within four feet of the northerly boundary, is immaterial. *Gerrish* v. *Shattuck*, 571.

See CONTRACT, 7; COVENANT; EXECUTION, 4; HOMESTEAD; MARRIED WOMAN, 2; MECHANIC'S LIEN, 2; MORTGAGE, 3; PLEADING, 1; TENANT IN COMMON; WAY, 16; WRIT OF ENTRY, 5.

DEFAULT.

See INTERROGATORIES, 2, 3.

DELIVERY.

See MECHANIC'S LIEN, 2.

DEMAND.

See LANDLORD AND TENANT, 1; SALE, 2.

DEVISE AND LEGACY.

1. A testator, by his will, gave to his brother a fund which he was to set apart and invest, with power to use and expend the principal, the income to go to him during his life, and, at his death, the principal to go to his children, or, in default of children, to the testator's heirs at law. *Held*, that the legatee was entitled to the income of the fund from the death of the testator, and to interest thereon from the expiration of a year after the testator's death. *Ayer* v. *Ayer*, 575.

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2. A testator, after devising the residue of his real estate to his daughters and the survivor of them until death or marriage, provided that, "after the marriage or death of my surviving daughter taking under this item, the estate herein devised shall descend to those persons who may then be entitled to take the same as my heirs." *Held*, that the devise over was to those who were the heirs of the testator at the time of his death. *Dove* v. *Torr*, 38.

3. A testator, by his will, provided as follows: "I give, devise, and dispose of all my estate, real and personal, together with any and all estate, right or interest in lands which I may acquire after the date of this will, in the following manner;" and after authorizing his executor to sell any of his real estate "not herein specifically bequeathed or appropriated," he devised his "mansion-house and the other buildings thereon, and the privileges thereto belonging," to A. for life, and upon his death to B. After the date of his will, the testator purchased an estate adjoining his mansion-house estate, removed the building standing thereon, tore down the fences, and made one garden with walks running through both estates, and erected a greenhouse on the purchased estate which was used in connection with the mansion-house; and the whole was thus used and occupied at the time of his death. *Held*, that the purchased estate passed by the specific devise of the mansion-house estate. *Kimball* v. *Ellison*, 41.

4. A testator, by his will, directed that a house be purchased at a cost not exceeding one thousand dollars, to be held in trust for the benefit of his servant D. during his life, and "to revert to his family on his decease." D. died in the lifetime of the testator, leaving a widow, one child, and a stepson who had lived in D.'s family and been supported by him since his marriage. *Held*, that the question whether the legacy lapsed could not be determined on a bill in equity by the trustees under the will to determine the distribution or disposition of the legacy, without making the residuary devisees parties. *Held*, *also*, after they had been made parties, that the bequest did not lapse at D.'s death; that, in the absence of words manifesting a different intention, D.'s "family" meant his widow and child, and did not include his stepson; and that the sum of one thousand dollars should be paid to the widow and child in equal shares. *Bates* v. *Dewson*, 334.

5. A testator, owning a large number of shares of stock in a certain railroad company, bequeathed to several persons shares of stock in that company, amounting in the aggregate to a less number than he owned at the time of making his will and at his death; and to some of these persons he also gave pecuniary legacies. To one person he directed that a legacy should be paid in the bonds of another railroad corporation at par, if he should possess them at his death. The will concluded with a residuary devise and bequest of "all the rest, residue, and remainder of my estate" to his nephews and nieces, with a like direction for the payment in railroad bonds of the portions of the children of a brother; and a clause empowering his executors to sell all real estate and personal property, "excepting what I have hereinbefore disposed of." *Held*, that the bequests of the shares of stock were specific. *Metcalf* v. *Framingham Parish*, 370.

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6. Where the reading of a whole will produces a conviction that the testator must necessarily have intended an interest to be given which is not bequeathed by express and formal words, the court will supply the defect by implication, and so mould the language of the testator as to carry into effect, as far as possible, the intention which it is of opinion that he has on the whole will sufficiently declared. *Metcalf* v. *Framingham Parish*, 370.

7 A testator bequeathed personal property in trust for the benefit of his wife's sister and her husband during their lives, as follows: During her life, to pay the net income to her semiannually; in case she should die before him, to transfer one half of the principal to a charitable institution, and to pay the income of the remainder to him during his life; in case he should die before her, then at her death to transfer the whole of the principal to the same institution. She died before her husband, and one half of the principal was paid to the institution and the other half kept in trust for him. *Held*, that on his death the institution was entitled to this part of the principal also, and that it did not pass to the residuary devisees; although a similar bequest for the benefit of another husband and wife contained an express direction for a transfer of the second half of the principal to the charitable institution upon the death of the survivor. *Ib.*

8. A testator bequeathed to his wife "all my personal property, my household effects, horse and carriages, my life insurance" in a certain company, three mortgages of real estate, and certain bank stock, and to other persons large portions of his productive personal property. *Held*, that the bequest of "all my personal property" was not a residuary bequest, but covered only property of personal use and convenience. *Johnson* v. *Gross*, 433.

9. A testator, who at the time he made his will, and at the time of his decease, owned two mortgages of real estate in C. executed by W., and a mortgage executed by the wife of W., in which the latter joined, releasing his right as tenant by the curtesy, bequeathed to his wife "two mortgages on real estate by W. in C." *Held*, that this bequest covered only the two mortgages executed by W. and the debts secured thereby, and not the mortgage executed by the wife of W. *Ib.*

10. A testator bequeathed to his wife "one mortgage on H. B. of L." He in fact owned two mortgages executed by H. B. *Held*, that the bequest gave to the widow one of the mortgages; and that she might elect which she would take. *Ib.*

11. A testator bequeathed to his wife "the bank stock I hold in the First National Bank of C." *Held*, that this was a specific bequest; and that the widow was entitled to the stock, exonerated from incumbrances put upon it by the testator. *Ib.*

12. Under a bequest of personal property by a testator to his widow, "to hold for her own benefit as long as she lives, in a manner that shall be divided equally among the heirs at her decease," the widow is entitled to the management of it, in the absence of evidence of danger that the property will be wasted or secreted by her. *Ib.*

13. A testator, at the time he made his will, owned one hundred and eighty shares of stock in the C. bank. By his will, he bequeathed to each of his

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two daughters "sixty shares of bank stock in the C. bank;" and, after the will was made, he sold all his stock in that bank. *Held*, that these bequests were general, and that each daughter was entitled to sixty shares of stock in the bank named, or their equivalent in money. *Johnson* v. *Gross*, 433.

14. A testator bequeathed to his son and his son-in-law each "one half of my interest in lands and machinery and effects in the sash and blind factory in C." The testator owned a large number of shares in a corporation in C. for the manufacture of sashes and blinds; and the corporation was indebted to him in a large amount. *Held*, that each legatee was entitled to one half of the number of shares in the corporation owned by the testator at his decease; and that they were not entitled to the debt due from the corporation to the testator. *Ib.*

15. A testator bequeathed the residue and remainder of his property, at the death of his widow, to trustees, who, after the payment of certain legacies, were to divide the net rents and profits of the remainder, in equal shares, among his then surviving children during their lives, and to pay "the whole of each child's share of said rents and profits" to such child on its arriving at the age of twenty-one years; and "at the decease of any of my children, to transfer and convey to the heirs at law of such child the same aliquot part of the said residue and remainder of my estate, to which such child was entitled at the time of his or her decease, in the rents and profits thereof," in equal shares, free from the trusts. By a subsequent provision of the will, the testator directed that "in case of the death of my children, before the age of twenty-one years or without lawful issue," then the trustees, "all the above-named legacies being paid," should pay certain other legacies, and should also pay the residue and remainder of his property to a legatee named. The testator left a son and a daughter, both of whom survived their mother, and also left grandchildren, children of other daughters who died before him. The son, after the daughter became of age, died under age and unmarried. *Held*, that the legatees named in the subsequent clause were entitled to one half of the estate of the testator, including the income which had accumulated thereon since the death of the son. *Claflin* v. *Ashton*, 441.

16. A testator gave the residue and remainder of his estate to trustees in trust to keep the same, "with so much of its accumulations as may be added thereto," at interest, and to pay to his wife "such part of the interest or income of the same as in her opinion she may need, or as she may from time to time signify to them a desire to receive, for her use or benefit during her natural life, it being my will that she shall always have at her command, so long as she shall live, as much of said interest or income as may seem to her desirable." He then provided that the trustees should pay $500 to each of his two children semiannually, and that "such part of said interest or income as may not be needed to pay said sum to each of my said children semiannually, and to supply the wants of my said wife during her life, shall, from time to time, when received, or when on hand, be added to said residue and remainder of my estate here given in trust," with remainder in fee to the children, after the death of the wife. The will also

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contained this clause: "Having provided as above that my said wife shall receive, or have at her command, at all times, so much of the interest or income of the estate here given in trust as she may need to meet all her wants of whatever nature that may at any time during her life arise, and so much thereof as may seem desirable to her for her own personal benefit, and for all other purposes to which she may be disposed or have occasion to apply the same; it is my will that my said son and daughter remain with their mother in her family so long as may be agreeable to them, and that no charge be made against either of them for board." *Held*, that the widow was entitled to call for and receive the entire income of the estate, at least after deducting the annuities to the children, although her entire personal and household expenditures did not exceed one fourth part of the income. *Weston* v. *Jenkins*, 563.

See CHARITY; COMPROMISE; ELECTION; TRUST AND TRUSTEE, 6-8.

DISCOVERY.

See INTERROGATORIES.

DISSEISIN.

See TRESPASS, 1; WRIT OF ENTRY, 5.

DISTRICT COURT.

1. The Gen. Sts. *c.* 120, § 13, do not authorize a District Court to grant a motion for the removal to the Superior Court of a petition to enforce a mechanic's lien, on the ground that the title to real estate is involved; and if such a petition is removed to the Superior Court, the petition should not be dismissed, but remanded to the District Court. *Dion* v. *Powers*, 192.
2. A warrant issued by a special justice of the First District Court of Bristol at a session thereof at Attleborough, held under the St. of 1877, *c.* 189, may be returned to that court sitting at Taunton. *Commonwealth* v. *Intoxicating Liquors*, 72.

DIVORCE.

See HOMESTEAD.

DOG.

The facts that a dog, owned by and licensed in the name of the superintendent of a poor-farm of a city, is kept at the farm, with the knowledge of one of the overseers of the poor of the city, and, without objection by him, is fed with food furnished by the city for common use at the farm, and, during a portion of the time, is allowed the run of the farm, do not, as matter of law, show that the city is a keeper of the dog, within the Gen. Sts. *c.* 88, § 59. *Collingill* v. *Haverhill*, 218.

See LORD'S DAY, 3.

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DOMICIL.

1. A person may change his domicil while in the military service. *Moear* v. *Harvey*, 219.
2. Upon the issue of a change of domicil, the question of the party's intent, when his testimony is contradicted by other evidence, is one of fact for the jury. *Ib.*
3. In an action by one town against another for the support of W., a pauper, the issue was whether W. had left the defendant town in 1856, with the intention of acquiring a domicil in the town of A. It appeared that W. went from the defendant town to A. in May 1856, taking with him his tools for shoemaking, some household furniture, and one of his two children, and, after living there two weeks in the house of a relative, returned to the defendant town. The defendant offered to show by a witness that, in the spring of 1856, he met W. at a stable in the defendant town, and W. said to him that he had his goods loaded and was going to A. to live; that he was going to work on a farm some of the time and at shoemaking the rest; and that he did not see W. again until he returned to the defendant town. *Held*, that it did not appear that the declaration accompanied the act of removal; and that it was properly excluded. *Brookfield* v. *Warren*, 287.

DOWER.

A widow, who has received personal property under her father's will, admitted to probate in another state, is not barred from recovering her dower in land in this Commonwealth, of which her husband was seised during coverture, from a tenant holding under a warranty deed from her father, to whom her husband conveyed by a deed in which she did not join. *Julian* v. *Boston, Clinton, &c. Railroad*, 555.

See HUSBAND AND WIFE, 2.

DRAIN.

See SEWER.

EASEMENT.

1. While two parcels of land are owned by the same person, there can be no use of one of them in favor of the other which will create an easement. *Murphy* v. *Welch*, 489.
2. If the owner of a parcel of land mortgages it, he cannot subsequently by grant create an easement in the land to the prejudice of the rights of the mortgagee. *Ib.*
3. If two tenants in common of an estate, part of which is a mill privilege, make partition thereof, and execute mutual deeds of release, which stipulate that neither the grantor, nor his heirs, nor any other person claiming under him or them, shall "claim or demand any right or title to the aforesaid premises or their appurtenances, or to any part or parcel thereof forever," this is an extinguishment of the privilege, which cannot be revived

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by a grantee of one of the cotenants as against the other. *Hamilton* v. *Farrar*, 492.

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See PRESCRIPTION; WAY, 16; WRIT OF ENTRY, 1.

ELECTION.

A person accepting and holding a beneficial interest under a will cannot, either in equity or at law, assert an independent title in other property against the will. But if, after having received a legacy in ignorance of this rule, he, immediately upon being informed of the rule, and before any other person's rights have been affected, returns the legacy to the executor, and gives him notice that he elects not to take it, the rule does not apply. *Watson* v. *Watson*, 152.

See DEVISE AND LEGACY, 10.

EMINENT DOMAIN.

See SUPREME JUDICIAL COURT.

EQUITY.

I. *Jurisdiction.*

1 This court will not take jurisdiction in equity, under the Gen. Sts. *c.* 113, § 2, *cl.* 11, of a claim for less than one hundred dollars, the amount and validity of which are not disputed; and two plaintiffs cannot, by improperly joining in one bill two such claims, which are in their nature several and distinct, both at law and in equity, compel the court to take jurisdiction thereof. *Chapman* v. *Banker & Tradesman Publishing Co.* 478.

2. A. conveyed to B. a parcel of land, an undivided half of which was then owned by C., to whom it had been conveyed in trust for D. during his life. The consideration of this deed was paid by D., the purchase was made for his benefit, and he had the control of the premises. Before the conveyance to B., D. agreed to sell this half to A., and a deed of it was drawn, signed and acknowledged by C., but it was not signed by D., and remained in his possession. D., about the same time, accepted the note of A. for the amount of the consideration named in the deed, but this note has never been paid; and D. refused to deliver the deed. *Held*, that a bill in equity would not lie by B. against D. to compel him to deliver this deed to B., to assign and convey to him all D.'s interest in the estate, and secure to him a perfect title, or, if it was not in D.'s power to do so, to make compensation in damages. *Wass* v. *Mugridge*, 394.

See ESTATES OF DECEASED PERSONS, 4; TRADE-MARK.

II. *Pleading and Practice.*

3. Debts due to different persons severally cannot be joined in one bill in equity under the Gen. Sts. *c.* 113, § 2, *cl.* 11. *Chapman* v. *Banker & Tradesman Publishing Co.* 478.

4. If a bill in equity purports at the beginning thereof to be brought by ten persons, who are named therein as plaintiffs, but is in fact signed by only

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two of them, without any signature, either of themselves or of counsel, in behalf of the others, it is the bill of those two only. *Chapman* v. *Banker & Tradesman Publishing Co.* 478.

5. Under the statutes of this Commonwealth, rulings in matter of law at the trial of issues of fact in equity may be brought before the full court by bill of exceptions. *Dorr* v. *Tremont National Bank*, 349.
6. In a suit in equity against a corporation to compel a certificate of stock to be issued to the plaintiff, the answer admitted that the plaintiff had been the owner of the certificate, but alleged that she had executed a power of attorney, authorizing its transfer, and that it had been transferred accordingly; and a justice of this court passed this order: "The defendant alleges that the plaintiff signed and executed an instrument purporting to be a power of attorney; and the plaintiff denies that she ever signed or executed said instrument; and it is ordered by the court, on motion of the plaintiff, that an issue be tried by a jury of this court whether the plaintiff signed and executed said instrument." *Held*, that the issue was not only directed, but framed, and that no more formal issue was necessary. *Held*, *also*, that on the trial of this issue, the plaintiff had the right to open and close. *Ib.*
7. A court of equity will not compel an innocent plaintiff, whose right in a passageway has been encroached upon by the building of a wall therein to his substantial injury, to sell his right at a valuation; but will compel the wrongdoer to restore the premises, as nearly as may be, to their original condition, and to pay the damages sustained by the plaintiff pending the suit. *Tucker* v. *Howard*, 361.
8. Under the Gen. Sts. *c.* 113, § 8, an appeal claimed from the final decree of a single justice of this court in equity, and entered upon the docket for the county, is at once pending before the full court, and should be entered by the clerk upon its docket; and if the appellant omits seasonably to furnish the proper copies, the appellee may have the decree affirmed, not by petition for neglect to enter the appeal in the full court, but by motion for failure to prosecute the appeal. *Cobb* v. *Rice*, 11.

See DEVISE AND LEGACY, 4.

ESTATES OF DECEASED PERSONS.

1. A testator by his will bequeathed to A. and B. a certain fund in trust. They accepted the trust, and, in 1861, gave bonds with C. as surety. C. died testate in 1876, an administrator with the will annexed gave bond and published notice of his appointment in that year, and his estate had not been fully administered, when, in 1879, A. and B. were removed from the office of trustee, and D. was appointed in their stead and made a written demand upon them to deliver to him all the trust property in their hands, which they refused to do. *Held*, that their refusal constituted a breach of their bond, and a claim thereupon arose against the estate of C. as a surety on that bond; and that D. could maintain a petition to the Probate Court, under the Gen. Sts. *c.* 97, § 8, to order C.'s administrator to retain in his hands sufficient funds to satisfy D.'s claim against the estate. *Hammond* v. *Granger*, 272.

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2. If the existence of a claim against the estate of a deceased person depends upon a future contingency, it is not a debt "justly due" from the estate, within the Gen. Sts. *c.* 97, § 8. *Ames* v. *Ames*, 277.
3. A promissory note, which matures more than two years after the giving of bond by the executor of the will of the deceased maker, is a debt for which provision is made in the Gen. Sts. *c.* 97, § 8; and, if the holder does not present his claim to the Probate Court under that section, he cannot maintain an action thereon against the legatees of the deceased under the Gen. Sts. *c.* 101, § 31. *Pratt* v. *Lamson*, 528.
4. A bill in equity, against the heirs of a deceased person, to recover a debt due from his estate, cannot be maintained under the Gen Sts. *c.* 101, §§ 31–34, in the absence of allegation or proof that the estate had been settled. *Grow* v. *Dobbins*, 271.

See APPEAL, 2; GUARDIAN AND WARD, 2; PROBATE COURT, 5; SALE, 2; TRUST AND TRUSTEE, 6.

ESTOPPEL.

See MARRIED WOMAN, 3; TRESPASS, 2.

EVIDENCE.

1. In an action by the assignee of a bankrupt, if the original assignment has not been recorded, and has been lost, secondary evidence of its contents is admissible. *Hersey* v. *Jones*, 473.
2. In an action for rent, on the issue whether the plaintiff had waived an informality in a notice to terminate a written lease, the plaintiff offered to prove that, on receipt of the notice, he notified the defendant in writing that the notice was insufficient, and that he should hold him as tenant; and put in evidence tending to show that he wrote a letter to the defendant which was sent by a third person to the defendant's place of business and left with his clerk, who promised to deliver it. Notice was given to the defendant to produce the letter; but he declined to do so, and testified that he had not received it. The judge ruled, as matter of law, that sufficient proof of delivery of the letter to the defendant had not been shown, and refused to admit secondary evidence of the contents of the letter. *Held*, that the plaintiff's evidence would warrant the inference of fact that the defendant had received the letter; and that the plaintiff was entitled to a new trial. *Dix* v. *Atkins*, 43.
3. If goods in cases are sold by weight, without more specific agreement, evidence of a general usage is admissible to show that the weight is to be computed as previously ascertained at the time of packing and marked on the cases, and not by the actual weight at the time of the sale; and there is nothing in the Gen. Sts. *c.* 51, § 17, inconsistent with this. *Jones* v. *Hoey*, 585.
4. In an action against a railroad corporation for personal injuries occasioned to the plaintiff, a boy nine years old, by being struck by a train of cars run by the defendant along a highway, evidence that, prior to the accident, the plaintiff had been seen on the tracks, and had been warned not to go there,

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is admissible upon the question whether he was using due care. *Fitzpatrick* v. *Fitchburg Railroad*, 13.

5. On the issue whether a note secured by a mortgage of land had been paid by the plaintiff, who had bought the equity of redemption and had agreed to pay the note, the plaintiff testified that he sent a draft for the amount to A. to pay the note, A. testified that he received and deposited it in a bank to his own credit. He was then permitted to testify, against the defendant's objection, that he inquired of the maker of the note where the mortgagee was, and told him that he had the money to pay the note. The maker of the note subsequently testified that he notified the mortgagee of this communication. *Held*, that the evidence objected to was made competent by the fact that it was communicated to the mortgagee; and that the order in which the evidence was put in afforded the defendant no ground of exception. *Baker* v. *Gavitt*, 93.

6. Upon the issue of the validity of a mortgage to A. upon personal property of B., in whose possession it was attached by a creditor, and A. summoned as trustee, under the Gen. Sts. *c.* 123, § 67, an instrument signed by A. and B. when the mortgage was made, and as part of the same transaction, reciting that A. held the mortgage for himself and in trust for others, to secure them severally from loss on account of their indorsements of B.'s notes, a schedule of which was annexed, is admissible to show the consideration for the mortgage, and that the transaction was not fraudulent and void as against creditors. *Rogers* v. *Abbott*, 102.

7. In an action for the price of a lot of frozen fish, the defendant contended that they were worthless, and had been thawed and frozen several times while in the plaintiff's possession, and put in evidence of the state of the thermometer during this time. *Held*, that the plaintiff might in rebuttal put in evidence that other fish of a similar description stored in the same place for the same time did not thaw, and were taken out afterwards in good condition. *Hodgkins* v. *Chappell*, 197.

8. In an action for the price of a loom attachment, sold under an agreement that it should work successfully, the evidence was conflicting on the point whether it did so work; and the plaintiff was permitted, against the defendant's objection, after introducing evidence that the defendant's loom and another loom were substantially alike in their mechanical arrangements, though differing somewhat in details, to put in evidence that the attachment had worked successfully on the latter loom; but the evidence as to the similarity of the two looms was conflicting. *Held*, that the evidence objected to was rightly admitted; and that the question of the similarity of the two looms was properly submitted to the jury. *Brierly* v. *Davol Mills*, 291.

9. In action for goods sold and delivered, the plaintiff's evidence tended to show that his agent offered to sell to the defendant goods to be used in rigging his vessel; that the defendant agreed to take the goods, if a third person, who was doing the work on the vessel, approved of the order; that he did approve; that the agent thereupon wrote the name of the third person on the order; and the goods were delivered and used on the vessel. *Held*, that the agent might be asked whether he wrote the name of the

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third person on the order at his request and direction. *Newhall* v. *Hamilton*, 463.

10. At the trial of an indictment for burning a building in L., it appeared that the fire was discovered at about half-past six o'clock in the morning; and the defendant contended that he left L. at ten o'clock on the previous night, and returned there about eleven o'clock on the day of the fire. A witness for the government testified that he saw the defendant at the fire about eight o'clock; and, against the defendant's objection, was allowed to testify to a conversation which he then had with him. *Held*, that the defendant had no ground of exception to the admission of the conversation. *Commonwealth* v. *Allen*, 46.

11. At the trial of an indictment for burning a building, two witnesses, who owned a part of the property burned, testified for the government that, prior to the fire, there had been difficulties between them and the defendant. For the purpose of showing bias on their part, the defendant offered in evidence their several affidavits given in a case of the assignee in bankruptcy of the defendant against the latter's wife and others, tending to show that the witnesses, when they gave the affidavits, sought to injure the defendant and his wife by voluntarily and maliciously aiding the plaintiff in that case. *Held*, that the defendant had no ground of exception to the exclusion of the affidavits. *Ib.*

12. In a criminal case, the judge may properly exclude a paper writing, offered by the defendant, containing certain words written by him during the trial, for the purpose of being compared with the same words alleged to have been written by him at another time, the genuineness of which is in controversy. *Ib.*

13. At the trial of an indictment for burning a building, a witness, who owned part of the property burned, testified for the government that, prior to the fire, he and the defendant had been connected in business; that difficulties had arisen between them; and that the defendant had told him that he would "be even with him," and would "make it hot for him." On cross-examination, it appeared that the witness had made a complaint in a criminal court against the defendant for a forgery; that the complaint had been dismissed for want of probable cause; and that the defendant had afterwards brought an action against the witness for a malicious prosecution, which action was still pending. For the purpose of showing bias and interest in the witness, and that the above words used by the defendant were not used as a menace of injury to the witness's property by burning, the defendant offered in evidence the original writ and declaration in his action for malicious prosecution, with the docket entries relating to it, and the record of the proceedings in the criminal court upon the complaint against him for forgery. *Held*, that it was in the discretion of the presiding judge to exclude the evidence offered. *Ib.*

14. The provision made by the St. of 1877, *c.* 200, for an autopsy by a medical examiner in cases of death by violence, does not, at the trial of an indictment for manslaughter, render inadmissible other competent evidence as to the condition of the deceased. *Commonwealth* v. *Dunan*, 422.

15. At the trial of an indictment for manslaughter, the sister of the person

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killed testified for the government, and, on cross-examination, testified where she and the deceased had lived. *Held*, that the defendant had no ground of exception to the exclusion of evidence tending to show that the witness had falsely stated the residence of the deceased and of herself. *Commonwealth* v. *Dunan*, 422.

16. At the trial of an indictment for manslaughter, evidence that the person injured, soon after the alleged injuries were inflicted, said that the defendant was not to blame, and that the injuries were the result of an accident, are not admissible in defence, in the absence of evidence that the statement was made as a dying declaration. *Ib.*

17. In an action for personal injuries occasioned to the plaintiff by the caving in of earth on the side of a trench, upon which he was employed by the defendant, who was performing the work under a written contract with a city, such contract is *res inter alios*, and inadmissible to prove that it was the duty of the defendant to brace the trench. *Gilhooley* v. *Sanborn*, 485.

18. A real-estate broker and auctioneer, who has been accustomed for five years to value and sell real estate in various parts of a city in which a parcel of land is situated, and who has appraised land on the street where the land lies, is qualified to testify to the value of the land, although he has not sold land on that street. *Bristol County Savings Bank* v. *Keavy*, 298.

19. The statements of a patient to his physician as to his symptoms and complaints, for the purpose of medical treatment and advice, and the indications of suffering on the part of the patient observed by the physician in his attendance upon him, are admissible in his favor in an action for a personal injury. *Fay* v. *Harlan*, 244.

20. A. sent goods to B., to be purchased by him or sold on A.'s account, as B. should elect. In an action of replevin by A. against B. for the goods, A. put in evidence tending to show admissions on the part of B. that he received the goods on consignment merely. *Held*, that B. was properly allowed to testify that, when he received A.'s letter, he decided to purchase the goods. *Yaeger Milling Co.* v. *Brown*, 171.

21. On the issue whether an oral contract, made by A. with B. acting for a firm of which he was a member, was one of sale or of consignment for sale, a letter written by B. to his partner, in which, after the contract was made, he stated its terms, is inadmissible in behalf of the firm. *Hodgkins* v. *Chappell*, 197.

22. In an action against the members of an unincorporated association, for work and materials furnished in fitting up the room in which the association held its meetings, oral evidence that the defendants, at one of the meetings of the association, passed a vote authorizing the act of the defendant, who ordered the work and materials of the plaintiff, is competent to show that the other defendants were jointly liable with him; and the fact that one of the defendants, who acted as clerk of the meeting at which such vote was passed, has since destroyed the informal minutes which he had taken for the purpose of preparing a record, does not preclude the plaintiff from showing that such a vote was passed. *Newell* v. *Borden*, 31.

See BANKRUPT, 2; BREACH OF PROMISE OF MARRIAGE; CARRIER, 2, 3, 5; COMPLAINT, 2–4; CONTRACT, 1; CORPORATION; CUSTOM; DAMAGES, 1;

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DEED, 4; DOMICIL, 2, 3; EXCEPTIONS, 7, 8; FRAUDS, STATUTE OF; FRAUDULENT CONVEYANCE, 1; GOODS SOLD AND DELIVERED; JUDGMENT, 2; LAW AND FACT; LEWDNESS; MECHANIC'S LIEN, 2; PARTNERSHIP, 2; PAYMENT, 1; PROMISSORY NOTE, 1, 5; TRUST AND TRUSTEE, 3, 9; WAY, 15; WITNESS.

EXCEPTIONS.

1. A question not raised at the trial is not open upon a bill of exceptions. *New Haven & Northampton Co.* v. *Campbell*, 104.
2. No exception lies to the refusal to receive further evidence upon a point expressly admitted by the adverse party. *Dorr* v. *Tremont National Bank*, 349.
3. No exception lies to the order in which evidence at the trial of a case is allowed to be put in. *Hodgkins* v. *Chappell*, 197.
4. If a bill of exceptions states that the excepting party offered certain evidence, and does not state that the judge excluded it, no ground of exception is shown. *Lyons* v. *Ricker*, 452.
5. No exception lies to a refusal to give instructions which are not shown by the bill of exceptions to be applicable to the case. *Commonwealth* v. *Gilson*, 425.
6. No exception lies to the refusal of a judge to instruct the jury as to what might be the effect of one fact taken separately, when it is accompanied and connected with other facts tending to establish the main issue. *Green* v. *Boston & Lowell Railroad*, 221.
7. If a bill of exceptions does not show that evidence, admitted without objection, was contended to be competent on more than one issue, it is no ground of exception that the jury were instructed to consider it only as bearing upon that issue. *Baker* v. *Gavitt*, 93.
8. If the evidence in a case is conflicting, the presiding justice is not obliged to rule that evidence, which merely tends to show fraud on the part of a witness, is competent as affecting his credit. *Ib.*
9. On the defendant's exception to the refusal of the judge to rule that the plaintiff's evidence was insufficient to support a verdict for him, it is not open to the defendant to object in this court that the action was prematurely brought, or to the form of the declaration, or to contend that the proofs did not correspond with the allegations. *Clarke* v. *Charter*, 483.

See BREACH OF PROMISE OF MARRIAGE; COMPLAINT, 4; CONTRACT, 10; EQUITY, 5; EVIDENCE, 5, 10–13, 15; FRAUDULENT CONVEYANCE, 2; GOODS SOLD AND DELIVERED, 2; JUROR AND JURY, 2; MANDAMUS; PARTNERSHIP, 3; PHYSICIAN AND SURGEON; PRINCIPAL AND AGENT, 2; PROMISSORY NOTE, 3; SALE, 2; THREATENING TO ACCUSE OF CRIME; WRIT OF ENTRY, 2.

EXECUTION.

1. Although the St. of 1874, *c.* 188, authorizes an estate not subject to a mortgage to be levied upon by sale instead of by extent, it does not authorize an estate, which is subject to a mortgage when attached, and which, at

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the time of the levy, is free from mortgage, to be levied upon and sold as an equity of redemption. *Hackett* v. *Buck*, 369.

2. An officer's return on a sale of the right of a debtor of redeeming mortgaged land, which sets forth that he sent a notice of the time and place of sale, by mail, to the debtor, directed to a certain town in another county, as "I could not find the debtor in my precinct," is a sufficient return that the debtor was not "found within his precinct," within the Gen. Sts. *c.* 103, § 41. *Owen* v. *Neveau*, 427.
3. Section 16 of the Gen. Sts. *c.* 103, applies only to a levy on land by extent, and not to a levy, under §§ 39 and 40, on land subject to a mortgage. *Ib.*
4. The provision in the Gen. Sts. *c.* 103, § 40, that the deed of an officer, of the right of a debtor to redeem mortgaged land, sold on execution, being recorded "within three months after the sale, shall give to the purchaser all the debtor's right of redemption," is intended for the protection of *bona fide* purchasers and attaching creditors, and it is not a prerequisite to the vesting of the title in the purchaser that the deed should be recorded within that time. *Ib.*
5. Although, under the Gen. Sts. *c.* 123, § 55, a general attachment of real estate, which has been fraudulently conveyed by a debtor to a third person, is not valid against a creditor making a subsequent special attachment, yet, where the land is sold on an execution obtained by the creditor making the general attachment, and the proceeds are applied first in satisfaction of his judgment, and then in satisfaction of the judgment obtained by the creditor making the special attachment, with his consent, and both judgments are fully satisfied, the statute is no defence to a writ of entry brought by the purchaser at such sale to recover possession of the land. *Ib.*

See BASTARD; MORTGAGE, 3;

EXECUTOR AND ADMINISTRATOR.

Under the Gen. Sts. *c.* 117, § 4, it is no defence to an action by an administrator, that his appointment as administrator was procured by his fraud and false statements respecting the place of residence of his intestate, unless the want of jurisdiction in the Probate Court to appoint appears of record. *McFeely* v. *Scott*, 16.

See DEED, 3; ESTATES OF DECEASED PERSONS, 1, 3; REVIEW; TRUST AND TRUSTEE, 6.

EXPERT.

See EVIDENCE, 18.

EXPOSURE OF PERSON.

See LEWDNESS.

FALSE PRETENCES.

A person, who by false and fraudulent representations obtains the consent of a city to the entry of a judgment in his favor against it in an action then

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pending, and the payment of a sum of money by the city in satisfaction of that judgment, cannot be convicted of obtaining money by false pretences, under the Gen. Sts. *c.* 161, § 54. GRAY, C. J., AMES & SOULE, JJ., dissenting. *Commonwealth* v. *Harkins*, 79.

FIXTURE.

A., who was in possession of a parcel of land under a bond for a deed, erected a barn upon the land, the sills of which rested in part on large stones imbedded in the soil, and in part upon the soil itself. There was no agreement between A. and the owner of the land as to whose property the barn should be in case A. did not fulfil the obligations of the bond. After a breach of the bond, but while A. was in possession of the land, the barn was attached by a creditor of A., and removed from the land. *Held*, in an action of tort in the nature of trover, by the owner of the land against the attaching officer, after a demand, that the barn was part of the realty, and was not subject to attachment; and that the action could be maintained. *Westgate* v. *Wixon*, 304.

See RAILROAD, 1; TROVER, 2.

FRAUD.

See EXCEPTIONS, 8; EXECUTOR AND ADMINISTRATOR; FRAUDULENT CONVEYANCE, 2; PAYMENT, 2; POOR DEBTOR, 2.

FRAUDS, STATUTE OF.

1. In an action by A. against B. for goods sold and delivered, it appeared that the goods were delivered to C., and were charged to C. on A.'s books of account. A.'s evidence was to the effect that B. said he would be responsible for and pay C.'s bills; that, after the goods were delivered, B. said it would be all right; that, after suit was brought, B. said he considered himself responsible to a certain time, but not afterwards. A witness for the plaintiff testified that the plaintiff said B. promised to pay the bill if C. did not. The defendant testified that he only promised to pay if C. did not. *Held*, that the evidence would warrant the finding that B. was liable as an original promisor. *Barrett* v. *McHugh*, 165.
2. A contract for the sale of shares of stock in a corporation is a contract for the sale of "goods, wares or merchandise," within the statute of frauds, Gen. Sts. *c.* 105, § 5; and the fact that the plaintiff, in an action for the refusal to take the shares in pursuance of an oral agreement to that effect, has been induced to become a stockholder by the defendant's promise that he would buy the stock of the plaintiff when he wished to sell, is immaterial. *Boardman* v. *Cutter*, 388.

FRAUDULENT CONVEYANCE.

1. On the issue whether a conveyance of real estate is fraudulent as to creditors, evidence of the register of deeds for the district in which the estate lies, that he has searched the records of the registry, and found that there

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was no other property standing in the name of the grantor, is admissible *Bristol County Savings Bank* v. *Keavy*, 298.

2. At the trial of a writ of entry to recover possession of a parcel of land, set off to a creditor of A. on execution, and alleged to have been previously fraudulently conveyed to the tenant by A., with the intent to hinder, delay and defraud his creditors, the tenant asked the judge to rule that, if he bought the property from A. knowing that the effect of it would be to deprive the creditors of the power of reaching the property of A. by legal process, it was not fraud at common law. The judge declined so to rule, and ruled that, if such was the fact, it was not of itself fraud at common law, but had some tendency to prove fraud; and also ruled that the demandant must satisfy the jury either that there was no real sale to the tenant, or that, if there was a real sale, it was made by A. for the purpose of hindering, delaying and defrauding his creditors, and that the tenant knew of and assisted in such fraudulent purpose. *Held*, that the tenant had no ground of exception. *Ib.*

See EVIDENCE, 6; EXECUTION, 5; INSOLVENT DEBTOR.

GAME.

See BIRDS.

GOODS SOLD AND DELIVERED.

1. In an action for stone sold and delivered, the report of an auditor stated that the defendant, who had a contract with A. to furnish stone, asked the plaintiff to furnish a part, which he did, relying on the defendant for his pay; that nothing was said at the time as to who was to pay the plaintiff, and the plaintiff did not present a bill to the defendant until after the failure of A.; and found for the plaintiff, subject to the opinion of the court on the facts stated. The judge ruled that the report was *prima facie* evidence of the facts found, and that, on these facts, in the absence of other evidence, the plaintiff was entitled to recover. *Held*, that the rulings were correct. *Lyons* v. *Ricker*, 452.
2. In an action for goods sold and delivered, the defendant contended that the goods were furnished to A., and put in evidence a proof of debt by the plaintiff against the estate of A. in bankruptcy, which he contended included the claim in question. Annexed to the proof were certain promissory notes. The plaintiff testified that there was a mistake in the amount of his debt against A., and that these notes were a percentage of the amount due from A. according to a resolution of composition in bankruptcy; and put in the composition. A. was asked by the defendant if he knew what the amount of the debt due from him to the plaintiff was, but the judge ruled that this was immaterial. *Held*, that the resolution in bankruptcy was admissible; that it was not open to the defendant to contend, for the first time in this court, that it had not been recorded; and that the question to A. was immaterial. *Ib.*

See EVIDENCE, 3, 7–9, 20, 21; FRAUDS, STATUTE OF, 1; SALE.

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GUARDIAN AND WARD.

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1. A contract by a guardian for the support and care of his ward binds the guardian personally, and not the ward. *Rollins* v. *Marsh*, 116.

2. A. died intestate, leaving personal property, which was divided in equal shares between his widow and two minor children, a boy and a girl. The boy died under age and unmarried, and his estate, under the Gen. Sts. *c.* 91, § 1, *cl.* 6, descended to his sister, of whom the mother, who had married again, and who had two children by her second husband, was appointed guardian. The administrator of the boy's estate presented a petition to the Probate Court having jurisdiction of the parties, for a decree of distribution among his next of kin, representing that they were the mother, the sister and the two children of the half blood, and praying that the balance in his hands might be decreed among said persons, or such others as might be proved to be entitled thereto. On this petition, after due notice, the court ordered the balance to be distributed among the persons named in the petition, which was accordingly done. Subsequently, the Probate Court ordered the guardian, in her final account with her ward, to charge herself with the amount thus received by her from her son's estate. *Held*, on appeal to this court, that the decree of distribution could not be impeached in this proceeding, nor except on a direct petition to review it; but that it was open to the ward to contend that the guardian, having full knowledge that the son's estate was derived by inheritance from his father, although she had no actual knowledge of the provisions of the statute of distributions, was guilty of negligence in allowing the decree of distribution to be made, and in not appealing therefrom, and should therefore be charged, not only with the amount personally received by her, but also with the amounts paid to the children of the half blood. *Pierce* v. *Prescott*, 140.

3. A guardian charged in her account the price of a piano purchased for her ward, a minor daughter. It appeared that the piano was purchased with the ward's money, and was a suitable thing for her to have; that, after the ward was married, the guardian refused to let her have the piano, and, at the hearing before the judge of probate, when told that the item would not be allowed, unless she would state that she would give up the piano, refused to answer. *Held*, that the item was properly disallowed. *Ib.*

4. Whether a guardian should be allowed a general commission in addition to a charge for special services depends largely upon how he has managed the estate, and whether it has been kept invested by itself. *Ib.*

See Appeal, 2; Probate Court, 2-4; Writ.

HARVARD COLLEGE.

See Trust and Trustee, 10.

HEIR.

See Devise and Legacy, 2, 15; Estates of Deceased Persons, 4.

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HOMESTEAD.

Under a deed of land to "S. D., wife of A. D.," "to be held by said D. as a homestead," *habendum* "to the said S. D. and her heirs and assigns, to her and their use and behoof forever," the wife acquires a homestead; and if, after she has ceased to live with her husband, and has obtained an absolute divorce from him, he continues to occupy the premises, no order having been made in regard to the land in the divorce proceedings, she may recover possession of them from him by a writ of entry. *Dunham* v. *Dunham*, 34.

HOMICIDE.

See EVIDENCE, 14–16; INDICTMENT, 3.

HORSE RAILROAD.

See PRINCIPAL AND AGENT, 2.

HOUSE.

See DEVISE AND LEGACY, 3; TROVER, 2.

HUSBAND AND WIFE.

1. If a husband buys a chattel for his wife as her property at a certain price, part of which he agrees to pay by releasing a debt due him from the seller, and the balance of which his wife pays, receiving at the same time from the seller a bill of parcels stating a sale from the seller to her for the price agreed, the title to the chattel is in the wife; and she may maintain an action of replevin for it. *McCowan* v. *Donaldson*, 169.
2. A man and a woman entered into an antenuptial contract by which they were to retain their respective estates, with power to each to manage and dispose of them as they should see fit, and at their decease to have the same descend to their respective heirs, or otherwise disposed of as they might respectively order and appoint, with the proviso that in case of his death, she surviving, there should, within one year from the time of his death, be paid to her the sum of $1500 as a debt against his estate. He further covenanted that his representatives should pay her, if she survived him, the above sum within one year after his decease; and she covenanted that upon his death, she surviving, she would by deed release all interest in his estate, excepting the claim of $1500. The parties subsequently married, and the man died. The woman was never paid the sum of $1500, and there were no assets of her husband's estate. *Held*, that she was barred of dower in his estate. *Freeland* v. *Freeland*, 509.

See MARRIED WOMAN; PLEADING, 1; SALE, 2.

IMPROVEMENTS.

See WRIT OF ENTRY, 6

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INDICTMENT.

1. The first count of an indictment alleged that the defendant, at a time and place named, "a certain building, to wit, an elevator building there situate, and then and there the property of one A., feloniously, wilfully and maliciously did set fire to, burn and consume." The second count alleged that the defendant, at the same time and place, "a certain building there situate, to wit, a building then and there used for shops, mechanics' work-shops, and for an elevator, and then and there called the elevator building, and then and there the property of one A., feloniously, wilfully and maliciously did set fire to, burn and consume." *Held*, that the two counts did not appear to describe different offences; and that the St. of 1861, *c.* 181, did not apply. *Commonwealth* v. *Allen*, 46.
2. An indictment on the St. of 1875, *c.* 211, alleging that the defendant "by force and intimidation did seek to prevent one A. from continuing in the employment of" a certain corporation, follows the words of the statute, and sufficiently sets out the offence intended to be charged; and allegations in the indictment, that the defendant "did unlawfully and wilfully intimidate, and did seek to intimidate" A., may be rejected as surplusage. *Commonwealth* v. *Dyer*, 70.
3. An indictment for manslaughter alleged that the defendant was a conductor, in the employ of a certain railroad corporation, in charge of a freight train, which had been run over the outward track of the corporation to a certain place, under his direction; that the corporation had established certain rules in regard to the crossing of the inward track by trains on the outward track, which rules were then in force and known to the defendant; that it was the defendant's duty not to conduct his train from the outward track across the inward track, without first sending forward the proper signal to warn the driver of any approaching train on the inward track that he could not safely pass without stopping; that the defendant, knowing that a train on the inward track was then due and approaching, wilfully, and in a wanton, negligent and improper manner, and while the train on the inward track was then approaching and due, drove his own engine across the inward track to a side track, and attached to it certain cars, and again crossed the inward track to the outward track, leaving the switch out of line so as to disconnect the rails upon the inward track, without first sending forward any signal to warn the driver of the approaching train, in accordance with the rules of the corporation; that, by means of the premises and the felonious neglect and omission of the defendant, the driver of the approaching train did not stop, but continued on his course, and by reason of the misplacement of the switch the train was thrown from the track and a passenger killed. *Held*, that the allegation of the defendant's knowledge of the approach of the train on the inward track was a material allegation, and must be proved as laid. *Commonwealth* v. *Hartwell*, 415.

See LEWDNESS; VERDICT, 3; WAY, 2.

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INFANT.

If an infant becomes a partner with another, puts a sum of money into the business under an agreement to share in the profits, and does work for the partnership, he cannot afterwards, by rescinding the contract, recover of his partner the money so paid, or for the labor performed, in the absence of an express promise to pay him therefor. *Page* v. *Morse*, 99.

INFORMATION.

1. The attorney general has the right, in the name and behalf of the Commonwealth, at his own discreton, to file an information against one usurping a public office; the court has no authority to grant or to withhold leave to file it; and the mention of relators in the information is mere surplusage, which does not affect the validity of the information, or the form of the judgment to be rendered thereon. *Commonwealth* v. *Allen*, 308.
2. An information by the attorney general in the name and behalf of the Commonwealth is the proper process to oust a person who holds *de facto*, and not *de jure*, a public office which is vacated only by death, resignation or removal of the incumbent. *Ib.*
3. The lapse of four months and a half after the usurpation of a public office does not bar an information in the nature of a quo warranto, by the attorney general, in the name of the Commonwealth, against the intruder. *Ib.*

INJUNCTION.

See EQUITY, 7.

INSOLVENT DEBTOR.

1. A conveyance by way of preference, made by an insolvent debtor, in contravention of the provisions of the insolvent law of the Commonwealth, while the United States bankrupt act of 1867 was in force, is a sufficient cause for instituting proceedings in insolvency against the debtor after the repeal of the bankrupt act. *Lothrop* v. *Highland Foundry Co.* 120.
2. A petition for a warrant to seize the estate of an insolvent debtor, under the Gen. Sts. *c.* 118, § 103, which alleges that he has made a mortgage of his personal property to secure the payment of a preëxisting debt to the mortgagee, with intent to secure to the latter a preference, and to defraud his creditors, the debtor being at the time insolvent and having reasonable cause to believe himself insolvent, need not allege that the mortgagee knew or had reasonable cause to believe that the debtor was insolvent. *Ib.*

INSURANCE.

A policy of insurance against fire contained the following provisions: "If the property be sold or transferred, or upon the passing or entry of a decree of

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foreclosure, or if any change takes place in title or possession, or if the interest of the assured, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in the policy, the policy is void." "If the interest of the assured be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, it must be so represented to the company, and so expressed in the written part of this policy, otherwise the policy shall be void." The assured at the time the policy was issued was the owner in fee of the property insured, but had mortgaged it, and also leased it for a term of years. The policy contained no statement of these incumbrances. *Held*, that the policy was not thereby avoided. *Dolliver* v. *St. Joseph Ins. Co.* 315.

See TRUSTEE PROCESS, 1.

INTERROGATORIES.

1. Under the Gen. Sts. *c.* 129, § 46, a defendant is bound to answer interrogatories as to such matters only as tend to support the plaintiff's claim, and not as to matters which relate exclusively to his own defence. *Wetherbee* v. *Winchester*, 293.
2. If matters which a defendant is not, as well as matters which he is, bound to answer, are included in a single interrogatory, under the Gen. Sts. *c.* 129, § 46, he is not required to take the risk of separating the two; and cannot, under a general order to make further answers, with which he has complied in apparent good faith, be defaulted for imperfections in such answers, without a specific order of the court as to the particulars in which they are insufficient, and opportunity to amend them. *Ib.*
3. If, after interrogatories to a defendant, under the Gen. Sts. *c.* 129, § 46, have been filed and answered, an additional interrogatory is filed without leave of court, the defendant cannot be defaulted for not answering it. *Ib.*

INTEREST.

See COMPROMISE; DEVISE AND LEGACY, 1; TRUST AND TRUSTEE, 2.

INTOXICATING LIQUORS.

1. A complaint, alleging that the defendant "did keep intoxicating liquors with intent to sell the same in this Commonwealth," he not being authorized to sell the same, sets forth an offence within the St. of 1875, *c.* 99. *Commonwealth* v. *Sprague*, 75.
2. An employee of a seller of intoxicating liquors in another state, who there receives an order for such liquors, and, under authority from his employer to receive or reject orders, accepts the order, may be indicted for an unlawful sale in this Commonwealth, if the liquors are, in pursuance of his direction, delivered to the buyer in this Commonwealth. *Commonwealth* v. *Eggleston*, 408.
3. Under the St. of 1875, *c.* 99, § 12, authorizing the mayor and aldermen of a city, by whom a license to sell intoxicating liquors has been issued, to

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declare a license forfeited upon proof satisfactory to them of a violation of its conditions, after notice to the licensee and reasonable opportunity for him to be heard by them, a licensee can be convicted of keeping intoxicating liquors for sale in violation of law upon the production of the record of the mayor and aldermen, showing that, before the day named in the complaint, the board declared his license forfeited, after a hearing on a verbal complaint made to the board, the licensee being present with counsel, and after a finding that he had violated the provisions of nis license. *Commonwealth* v. *Hamer*, 76.

4. If any notice is necessary to a licensee, that his license to sell intoxicating liquors has been revoked by the mayor and aldermen of a city, verbal notice is enough. *Ib.*

5. A master is liable to the penalty imposed by the St. of 1875, *c.* 99, § 16, if his servant, in the course of his master's business, sells intoxicating liquor, after notice requesting the master not to do so, to a person who has the habit of drinking intoxicating liquor to excess, although the master has instructed the servant not to make a sale to such person, and the sale is without the knowledge and consent of the master. *George* v. *Gobey*, 289.

6. A recital, in a notice to all persons claiming any interest in intoxicating liquors seized under the St. 1876, *c.* 162, that the seizure was made under a warrant issued by a district court, when in fact it was made under a warrant issued by a special justice thereof, does not invalidate the proceedings. *Commonwealth* v. *Intoxicating Liquors*, 72.

See COMPLAINT, 2, 3; PLEADING, 2; SALE, 1.

JOINT DEBTOR.

See TENANT IN COMMON.

JOINT-STOCK COMPANY.

See PARTNERSHIP, 1, 2.

JUDGMENT.

1. The Gen. Sts. *c.* 133, § 7, and *c.* 115, § 14, authorizing "the court," upon overruling a motion for a new trial, to enter judgment as of a former term, confer no authority upon a judge in vacation to enter judgment, where the case has not been continued *nisi*. *Greenwood* v. *Bradford*, 296.

2. The record of a judgment in an action of trespass *quare clausum fregit*, if the question of title was put in issue, tried and passed upon, is admissible in a subsequent writ of entry between the same parties to recover the same land; and, if the pleadings in the former action do not alone show upon what ground the judgment was based, this may be shown by parol evidence. *White* v. *Chase*, 158.

3. After judgment and execution for damages and costs have been obtained and satisfied in an action against one wrongdoer, while an action is pending against a joint wrongdoer, the plaintiff is not entitled to a judgment for

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nominal damages in the latter action, so as to enable him to recover the costs thereof also; and the judgment and satisfaction in the first action, having been pleaded by the defendant in the second action and admitted by the plaintiff, is a bar to the latter action, and the defendant is entitled to judgment for his costs. *Savage* v. *Stevens*, 254.

See BANKRUPT, 4; EXECUTOR AND ADMINISTRATOR; FALSE PRETENCES; MARRIED WOMAN, 3; PROBATE COURT, 4, 5; WRIT OF ENTRY, 4.

JURISDICTION.

See DISTRICT COURT, 1; EXECUTOR AND ADMINISTRATOR; PROBATE COURT, 2, 3.

JUROR AND JURY.

1. Under the St. of 1873, *c.* 44, providing that "no person shall serve as a traverse juror in the county of Suffolk more than thirty days at any term of court," it is no ground for a challenge to the array that, at the time it was made, more than thirty days had elapsed since the jurors had begun to serve, if during that time the court had been in session less than thirty days. *Provident Institution for Savings* v. *Burnham*, 458.
2. If a challenge to the array is made without legal ground, the fact that it is overruled without a replication thereto being filed affords no ground of exception. *Ib.*
3. If, in a municipal court, in which no trial by jury can be had, an issue of fact is joined upon a plea in abatement, and judgment rendered for the plaintiff, and the defendant appeals to the Superior Court, he is entitled to a trial by jury in that court upon the same issue, but upon that only, unless that court orders or permits him to plead anew. *O'Loughlin* v. *Bird*, 600.

See SUPREME JUDICIAL COURT; VERDICT, 1, 2; WAY, 5.

LACHES.

See INFORMATION, 3.

LAND DAMAGES.

See SUPREME JUDICIAL COURT; WAY, 4–6.

LANDLORD AND TENANT.

1. If rent is payable in advance on the first day of the month, no demand of the rent on the day it falls due is necessary to entitle the landlord to maintain an action therefor. *Clarke* v. *Charter*, 483.
2. The owner of land subject to a mortgage given by his grantor, and which he had not assumed, leased the land. A few days before an instalment of rent became due, the mortgagee entered and foreclosed the mortgage, and demanded rent of the tenant, and the latter attorned to him. *Held*, that the owner of the land could not maintain an action against the tenant for the whole or any part of this instalment; and that the St. of 1869, *c.* 368, § 1, did not apply. *Adams* v. *Bigelow*, 365.

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LAW AND FACT.

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On the issue whether a person authorized by a mortgagee to sell a mortgaged estate had authority to purchase the estate for the mortgagee, there were several letters between the parties, before and after the sale, put in evidence, and there was conflicting testimony of witnesses. *Held*, that the question was properly submitted to the jury. *Hood* v. *Adams*, 207.

See CARRIER, 1, 5; COMPLAINT, 4; CONTRACT, 10; DOMICIL, 2; EVIDENCE, 2; WAY, 9.

LEASE.

1. A lease of a "store" includes the land under it and to the middle of a private way in the rear, the fee of which is in the lessor. *Hooper* v. *Farnsworth*, 487.
2. Where a lessee of a lot of land makes a lease, for the remainder of his term, of a building standing on a portion of the leasehold premises, and by the terms of the lease grants easements, appurtenant to the building, of light and air, and of passing and repassing, over other portions of the leasehold premises, in common with him and those claiming under him, such lease is an underlease and not an assignment of his whole term in a portion of the leasehold premises. *McNeil* v. *Kendall*, 245.
3. The owner of two parcels of land in a city, one on S. Street, and the other on L. Street, bounded in part by the rear line of the first parcel, demised the two parcels, on the same day, by separate indentures of lease, each for the term of twenty years, to A. These indentures were duly recorded. The city then took, by the right of eminent domain, a portion of each parcel. A. then took down the buildings on each parcel, as he had a right to do under the leases, and erected a warehouse fronting on S. Street, covering all the land included in the first lease, except that taken by the city, and also covering a portion of the land included in the second lease. He also erected a building fronting on L. Street, which covered a portion of the land included in the second lease. An area was left open between the two buildings, and a passageway constructed, leading from L. Street, under the building fronting thereon, across the area to a door in the rear of the building on S. Street. Each building had windows opening into the area, and the building on S. Street, which was higher than the other, had windows overlooking it. Subsequently A., by an indenture duly recorded and in the form of a lease, demised to K. for the remainder of the term "the warehouse on S. Street," giving no other description of the premises, and making no allusion to the area or the passageway, except that the instrument contained a provision that the building on L. Street should not be carried higher so as to obstruct the light, and that the occupant of the building on L. Street should have a right through the passageway. Before giving this instrument, and while the original leases had more than seven years to run, A. demised to B., for the remainder of the term, by an instrument not recorded, the building on L. Street, expressly excluding the passageway. Subsequently, the

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right, title and interest of A. under the leases to him were duly sold on an execution against him. The rights under the first lease were conveyed to M., and those under the second lease to a third person, who conveyed them to M. *Held*, in an action by M., after an entry upon the land, against K., for the rent subsequently accruing under the indenture from A. to K., that this instrument was an underlease and not an assignment; and that the action could be maintained. *McNeil* v. *Kendall*, 245.

See Evidence, 2; Insurance; Landlord and Tenant, 2; Trespass, 2; Trover, 1.

LEGACY.

See Devise and Legacy.

LEWDNESS.

An indictment on the Gen. Sts. *c.* 165, § 6, for "open and gross lewdness and lascivious behavior," is supported by proof that a man intentionally and indecently exposed his person, without necessity or reasonable excuse therefor, in the house of another, to a girl eleven years old. *Commonwealth* v. *Wardell*, 52.

LICENSE.

See Intoxicating Liquors, 3, 4.

LIEN.

See Carrier, 1; Mechanic's Lien.

LIMITATIONS, STATUTE OF.

The statute of limitations does not begin to run in favor of a trustee against his *cestui que trust* until the trustee has repudiated the trust, and knowledge of the repudiation has come home to the *cestui que trust*. *Davis* v. *Coburn*, 377.

LORD'S DAY.

1. A contract made on the Lord's day by the overseers of a town for the relief of a sick pauper is not in violation of the Gen. Sts. *c.* 84, § 1. *Aldrich* v. *Blackstone*, 148.
2. Although a person may lawfully travel on the Lord's day for the purpose of attending a funeral, and is not obliged to return by the shortest route, yet if, after the funeral is over, to enable a friend with him to make a social call, he departs from the ordinary return route, and, after such departure, is injured by a defect in a highway, he cannot maintain an action therefor against the town bound to keep the highway in repair. *Davis* v. *Somerville*, 594.
3. If a person, while unlawfully travelling on the Lord's day, is injured by the assault of a dog, the act of travelling is not a contributory cause of the

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injury, and he can maintain an action against the owner of the dog, under the Gen. Sts. c. 88, § 59, to recover double the amount of damage sustained. *White* v. *Lang*, 598.

See COMPLAINT, 2.

MALPRACTICE.

See PHYSICIAN AND SURGEON.

MANDAMUS.

No exception lies to a refusal to grant a writ of mandamus to the mayor of a city to compel him to make a nomination to the board of aldermen for the office of chief of police, while a person is holding that office *de facto*, and no one but the incumbent is claiming it; and while an information, in the nature of a quo warranto, is pending to try his title to the office. *Attorney General* v. *Mayor of New Bedford*, 312.

MANSLAUGHTER.

See EVIDENCE, 14–16; INDICTMENT, 8.

MARRIAGE.

See BREACH OF PROMISE OF MARRIAGE; CONTRACT, 10–12; PROMISSORY NOTE, 3.

MARRIAGE SETTLEMENT.

See HUSBAND AND WIFE, 2.

MARRIED WOMAN.

1. The power given to a married woman by the St. of 1857, c. 249, § 2, to convey, with the assent of her husband, any real or personal property which might thereafter come to her by "gift of any person except her husband," includes land conveyed to her by a third person for a pecuniary consideration. *Chapman* v. *Miller*, 269.
2. The assent in writing, required by the St. of 1857, c. 249, § 2, of a husband to his wife's deed of her real estate, is sufficiently shown by the insertion of his name in the attestation clause, "in token of relinquishment of his right in the above-named premises," with his signature and seal. *Ib.*
3. A married woman, against whom a conditional judgment has been rendered, after she has appeared and pleaded, since the St. of 1874, c. 184, § 3, on a writ of entry to foreclose a mortgage made by her under the Gen. Sts. c. 108, § 3, is estopped, on a writ of entry by her against the mortgagee or his grantee, to show that her deed was void for want of her husband's assent or a judge's approval. *Freison* v. *Bates College*, 464.

See HUSBAND AND WIFE.

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MASTER AND SERVANT.

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1. A master is not liable to a servant for an injury sustained by him from the fall of an elevator caused by the negligence of a fellow-servant. *Kelley* v. *Boston Lead Co.* 456.
2. Through the negligence of a competent road-master of a railroad corporation, a switch was misplaced, and a locomotive engine and a train of cars were turned upon a side track, the sleepers of which were rotten; the engine and train were thrown from the track, and the engineer and fireman of the engine were injured. *Held*, that they were fellow-servants with the road-master, and could not maintain an action against the corporation. *Walker* v. *Boston & Maine Railroad*, 8.

See Action, 2; Evidence, 17; Intoxicating Liquors, 2, 5.

MECHANIC'S LIEN.

1. C. performed labor and furnished materials under a contract with B., for an entire price, in the erection of four buildings, one of which was on land owned by B., one on land owned by A., and the others on land the ownership of which did not appear. He then filed a petition, under the Gen. Sts. *c.* 150, as amended by the St. of 1872, *c.* 318, to enforce a lien on the house and land of A. for the labor performed by him on that house, and at the trial showed what such labor was worth. *Held*, that the petition could not be maintained. *Childs* v. *Anderson*, 108.
2. At the trial of a petition to enforce a mechanic's lien upon land, under the Gen. Sts. *c.* 150, it appeared that in the certificate of lien the respondent was alleged to be the owner of the land; that, before the contract with the petitioner was made, the respondent, who had then merely a bond for a deed of the land, borrowed a sum of money from his daughter, and told her he would give her a deed when he got one, and secure her on the place; that, after he got his deed, without her knowledge, he caused a deed, conveying the land to her absolutely, to be executed and recorded, and subsequently told her that a deed had been made; but there was no evidence that she ever had possession of the deed or of the land, or knew of the form or contents of the deed; and that the petitioner had knowledge of the deed when he filed his certificate of lien. *Held*, that this evidence would warrant a finding for the respondent. *Amidon* v. *Benjamin*, 584.

See District Court, 1.

MILL.

See Contract, 5; Easement, 8.

MONEY HAD AND RECEIVED.

1. A. owed a debt to B. which B. had assigned to C. D., who had attached the debt, agreed that the amount thereof might be paid by A. to C. C., by mistake, demanded and received of A. part only of the debt, and A.

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thereupon paid the balance to D. *Held*, that C. could not maintain an action of money had and received against D. for this balance. *Butler* v. *Frank*, 29.

2. If two tenants in common of land mortgage it, and the mortgagee sells the land, under a power of sale contained in the mortgage, for more than the mortgage debt, and pays the surplus proceeds to one of the mortgagors, who has paid out, in interest, insurance and taxes, not only his own part of these expenses, but, on account of his cotenant, a sum greater than the latter's proportion of the surplus proceeds, the mortgagee is not liable to an action for money had and received by the other for his share of such proceeds. *Roche* v. *Hampden Savings Bank*, 115.

See TOWN, 2.

MORTGAGE.

I. *Real Property.*

1. After breach of the condition of a mortgage of land, the mortgagor paid the amount due and received a discharge of the mortgage not under seal. After this the mortgagee entered for the purpose of foreclosing the mortgage, and notified a tenant of the mortgagor not to pay rent to the mortgagor. In an action by the mortgagor on the Gen. Sts. *c.* 137, § 5, to recover possession of the land from the tenant, the latter set up the title of the mortgagee. *Held*, that the action could be maintained. *Baker* v. *Gavitt*, 93.
2. If A. conveys to B. land which is subject to a mortgage to C., which B. agrees to assume and pay, and the land is sold, under a power contained in the mortgage, for breach of condition, and A. becomes the purchaser for a sum less than the amount of the mortgage debt, this does not satisfy or extinguish the whole of that debt; and, if A. refuses to complete his purchase, B. is still liable to him upon the promise to pay the mortgage, at least for the surplus remaining after deducting the amount which A. agreed to pay at the sale. *Fenton* v. *Lord*, 466.
3. At the trial of a writ of entry, it appeared that, in August 1877, the demanded premises were attached by A., who obtained judgment, and execution issued in July 1878. The premises were duly levied upon and sold, in August 1878, to B., who at once conveyed them to the demandant. The tenant offered in evidence a mortgage of the premises made to him in June 1877, but not recorded until after A.'s attachment. In September 1877, the tenant assigned this mortgage to C., who, in October 1877, discharged it on the record, acknowledging full payment of the debt secured by it. Before taking his deed, the demandant examined the record and found the mortgage thus discharged. In January 1878, the tenant, under the power contained in the mortgage, sold and conveyed the premises to D., who, on the same day, conveyed them back to the tenant. A few days before the trial, and nearly two years after the demandant's deed, C. recorded a paper, stating that he made a mistake in discharging the mortgage, and intended to assign it to the tenant. *Held*, that the tenant's

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exception to a refusal to rule that, upon the above facts, the demandant was charged with notice of the unrecorded mortgage, must be overruled, with double costs. *Gallagher* v. *Galletley*, 367.

See CONTRACT, 8; DEED, 2, 3; EVIDENCE, 5; EXECUTION, 1; LANDLORD AND TENANT, 2; LAW AND FACT; MARRIED WOMAN, 3; PAYMENT, 2, 3; PLEADING, 1; PRINCIPAL AND AGENT, 1; RAILROAD, 1; TENANT IN COMMON; WRIT OF ENTRY, 4.

II. *Personal Property.*

4. A mortgage of personal property, given to secure the mortgagee against liability as indorser for the mortgagor, is valid as against an attaching creditor of the mortgagor, although the liability of the mortgagee does not become absolute, and has not been paid until after the attachment. *Rogers* v. *Abbott*, 102.

5. At the trial of the question of the validity of a mortgage on personal property, attached in the hands of the mortgagor, in which the mortgagee is summoned as trustee, under the Gen. Sts. *c.* 123, § 67, the sum "justly due" upon the mortgage, to be ascertained by the court, is that sum which will fully secure the mortgagee against all contingent future liabilities covered by the mortgage. *Ib.*

See EVIDENCE, 6; INSURANCE.

MUNICIPAL COURT.

The provision of the St. of 1874, *c.* 271, § 11, relating to the municipal courts of Boston, that "upon pleas in abatement, or motions to dismiss for defect of form in process, the decisions of said courts shall be final," applies to decisions upon questions of law only. *O'Loughlin* v. *Bird*, 600.

See JUROR AND JURY, 3.

NEGLIGENCE.

See CITY, 2; EVIDENCE, 4; GUARDIAN AND WARD, 2; MASTER AND SERVANT; RAILROAD, 2; WAY, 9.

NEW TRIAL.

See JUDGMENT, 1; REVIEW.

NOLLE PROSEQUI.

See VERDICT, 3.

NOTICE.

See INTOXICATING LIQUORS, 4; MORTGAGE, 3; POOR DEBTOR, 1; PROMISSORY NOTE, 6; WAY, 11–14.

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NUISANCE.

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See COMPLAINT, 4.

OFFICER.

1. Under the St. of 1876, *c.* 80, providing that, "in all cases in which appointments are directed to be made by the mayor and aldermen in any city of the Commonwealth, the mayor shall have the exclusive power of nomination, being subject however to confirmation or rejection by the board of aldermen," a person nominated can only be confirmed by receiving the votes of a majority of the aldermen voting upon the question; the authority to appoint police officers, conferred by the St. of 1876, *c.* 92, upon the mayor and aldermen of the city of New Bedford, must be exercised in the manner prescribed by the former statute; and if there is anything repugnant to this in an ordinance of the city, it is void. *Commonwealth* v. *Allen*, 308.
2. If a person nominated for an office by the mayor of a city is not duly confirmed in the manner prescribed by the St. of 1876, *c.* 80, the facts, that the mayor announces that he is confirmed, without objection by the aldermen, that they approve his bond after he has taken the oath of office, and that he performs the duties of the office, do not supply the want of the proper vote of confirmation. *Ib.*
3. If an ordinance of a city creating a certain office provides that the incumbent may be removed at the pleasure of the city council, the subsequent repeal of the ordinance by the city council, and notice to the incumbent of such repeal, operates as a removal from the office. *Chandler* v. *Lawrence*, 213.
4. In an action by a police officer against a city for services rendered in 1877, at the rate of $2.25 a day and 25 cents for each hour of extra service, the case was submitted on agreed facts, which stated that by the charter of the city the mayor and aldermen had full power to appoint police officers and to remove them at pleasure; that all other municipal powers were vested in the mayor and aldermen and in the common council, to be exercised by concurrent vote; that in 1865 both boards passed a resolution fixing the pay of police officers at $2.25 a day; that in 1875 the rate for the year 1876 was fixed at $2.25 a day, and extra work at 25 cents an hour, and the police were paid at this rate until February 1877, when the mayor and aldermen adopted an order making the pay $2.00 a day, and extra work 20 cents an hour, at which rates the plaintiff had been paid for the rest of the year 1877. If the plaintiff was entitled to recover $2.25 a day, and 25 cents an hour for extra work, from February 12, 1877, judgment was to be entered for him for a certain sum; otherwise, for the defendant. *Held*, that, whether the order of 1877 was valid or not, the defendant was entitled to judgment. *Libbey* v. *Lawrence*, 215.

See EXECUTION, 2, 4; INFORMATION, 2; PARTNERSHIP, 3.

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ORDER.

See CONTRACT, 9.

PARENT AND CHILD.

See PAUPER, 2, 3.

PARTITION.

See CHARITY.

PARTNERSHIP.

1. A joint-stock company formed under the N. Y. Sts. of 1849, *c.* 258, 1851, *c.* 455, and 1853, *c.* 153, is not a corporation, and members of it may be sued here as partners. *Boston & Albany Railroad* v. *Pearson*, 445.
2. Under the laws of New York certain persons met, and resolved that "we organize ourselves and such others as shall join hereafter into a joint-stock association, and that we adopt" certain articles of association. They then signed the articles of association and adopted a form of subscription, which stated the name of the association and the names of the officers, and that the capital stock was $2,500,000, and by which the signers purported to subscribe for the number of shares set opposite their names in the capital stock of the association, agreed to pay a certain percentage on every share within ten days, and to pay such further calls as might be made by the company in pursuance of its articles of association, whereupon the company was to issue its stock for the amount so subscribed, and authorized the secretary of the company to sign their names to the articles of association. The prospectus stated that the company "is organized with a capital stock of $2,500,000;" that "a relatively small cash capital, and a percentage only of the subscriptions, will be required to put the company in working order;" and that subsequent calls will be made as the business of the company requires. Subscriptions were obtained to the amount of $450,000. *Held*, that the subscription paper contained an absolute contract to take stock in an association already formed; that a person signing it, and paying the percentage required, became a partner in the enterprise, and was liable as such for a debt of the company, although he did not sign the articles of association, and never attended any meeting of the association, had no knowledge of the amount of the subscriptions or of the business of the association, and was not known to the creditor to be a partner when the debt was incurred: and although no certificates of stock were issued to any one. *Held*, *also*, that if it was necessary to prove that a subscriber's percentage had been paid to the association, in order to hold him as a partner, evidence that he paid it to the executive committee of the association was sufficient; and that the admission in evidence of an entry in the cash-book of the association, put in to show that the treasurer had received the money, was immaterial. *Ib.*

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3. A. bought goods of B., informing him that the business was his, and that it would be carried on by C. in A.'s name. Subsequently C. formed a partnership with another person, and A. revoked C.'s agency, and directed him not to use his name, and had no more connection with or knowledge of the business or the name in which it was carried on by C. and his partner. A. gave no notice of any change to B., who, without notice or knowledge of the change, continued in good faith to sell goods to the firm on the credit of A. The firm also bought goods of D., who gave credit to A. B. brought an action against A. and attached goods as his property. D. afterwards brought an action against C. and his partner, doing business under the name of A., and attached the same goods. B. was then allowed, without notice to D., to amend his writ by adding the names of C. and his partner as defendants, and declaring against all three as doing business under the name of A. Both B. and D. recovered judgments. As between C. and his partner, and A., the latter had no interest in the attached goods. D. requested the attaching officer to apply the proceeds of the property in satisfaction of the execution obtained on his judgment. This the officer declined to do except in part, but first applied the same in satisfaction of the execution obtained by B. on his judgment. D. then brought an action against the officer; and, at the trial, asked the judge to rule that the relation of A. to C. and his partner, as to B., was that of principal and agent, and not that of partnership; that, if A. was liable at all, he was liable individually as principal, and C. and his partner, if liable at all, were liable as agents, but that B. must elect to hold either the principal or the agents, and could not hold both; and that the attached property, being the property of the agents, could not be levied upon to satisfy B.'s execution. The judge declined so to rule, and found for the defendant. *Held*, that D. had no ground of exception. *Wright* v. *Herrick*, 240.

See DEED, 3; EVIDENCE, 21; INFANT.

PAUPER.

1. Under the Gen. Sts. *c.* 70, the overseers of the poor of a town have authority to bind the town by a contract for support to be furnished in another town to a pauper whose settlement is in the former town, but who, at the time the contract for his support is made, is too ill to be removed to the town of his settlement. *Aldrich* v. *Blackstone*, 148.

2. On a complaint, under the Gen. Sts. *c.* 70, § 5, by a town against a father for the support of his adult pauper daughter, it may properly be found that he is of "sufficient ability" to contribute to such support, where the value of his entire property, above his debts, is between $5000 and $6000, notwithstanding he is in poor health, unable to do hard work, has a wife and infant child dependent upon him, and his income, although he has lived in a prudent manner, is, and has been for some years, less than his expenses. *Templeton* v. *Stratton*, 137.

3. A man is under no legal obligation to support his stepchild; and the fact that such child receives aid from a town as a pauper, upon the applica-

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tion of the stepfather, will not make the latter a pauper. *Brookfield* v *Warren*, 287.

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See DOMICIL, 3; LORD'S DAY, 1.

PAYMENT.

1. The giving by a creditor of a receipt, not under seal, for a certain sum "in full" of a claim for a larger sum, is not of itself conclusive evidence of payment; and the payment by the debtor of the sum acknowledged in the receipt does not operate as a discharge, unless it is received in accord and satisfaction of a disputed claim. *Grinnell* v. *Spink*, 25.
2. A., a person who had assumed to pay a note secured by a mortgage of land, sent the money to B. with directions to pay it to the mortgagee. B. communicated the fact to C., who persuaded the mortgagee to discharge the mortgage and give up the note, and take his note and that of B. in lieu thereof. *Held*, on the issue whether the mortgage had been duly discharged and the note secured by it paid, that A. was not affected by the fraud of C. *Baker* v. *Gavitt*, 93.
3. The right of a person, who has assumed to pay a mortgage note, to pay it to the mortgagee, does not depend upon the mortgagee's agreement to receive payment from him and to release the maker. *Ib.*

See EVIDENCE, 5; MORTGAGE, 2; PLEADING, 5; PROMISSORY NOTE, 1.

PHYSICIAN AND SURGEON.

In an action against a physician and surgeon for not properly treating a wound on the plaintiff's wrist, there was evidence that the wound was a very severe one, and required a considerable degree of skill in its treatment; that the defendant lived in a small country town, and had no experience in surgery beyond that usually had by country surgeons; that an eminent surgeon lived within four miles of the defendant, and the plaintiff was physically able to have visited any other surgeon than the defendant, if so directed, but no such direction was given him. At the request of the plaintiff, the judge instructed the jury that, if the defendant had not the requisite skill and experience to treat the wound, he should have temporarily dressed it, and recommended the plaintiff to a more skilful surgeon; and also instructed the jury, against the plaintiff's objection, that the implied contract of a physician or surgeon was that he possessed that reasonable degree of learning, skill and experience which is ordinarily possessed by others of his profession, having regard to the advanced state of the science of surgery; that the defendant was bound to possess that skill only which physicians and surgeons of ordinary ability and skill, practising in similar localities, with opportunities for no larger experience, ordinarily possess; and he was not bound to possess that high degree of art and skill possessed by eminent surgeons in large cities, and making a specialty of the practice of surgery; that the rule applicable to the case was not applicable to physicians and surgeons alone, and was not confined to other mem-

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bers of the learned professions; but it was equally applicable to all persons holding themselves out as possessing special skill in the business in which they were engaged; that a civil engineer, watchmaker, mechanic, or blacksmith was subject to the same rule of law. The judge declined to instruct the jury, as requested by the plaintiff, that it was incumbent on the defendant to possess the degree of skill and learning possessed by well-educated surgeons; and that the average degree of skill and learning possessed by the surgeons of this Commonwealth was not necessarily all the skill and learning which it was incumbent on the defendant to possess. *Held*, that the plaintiff had no ground of exception. *Small* v. *Howard*, 131.

See EVIDENCE, 19.

PLEADING.

I. *Parties to Action.*

1. If a deed of land, subject to a mortgage which the grantee assumes and agrees to pay, is executed by a husband and wife as grantors, the promise implied by law from the acceptance of the deed is to both, and an action for breach of the promise should be brought in the name of both, although the wife alone signed the mortgage note, and the husband joined "to give validity" thereto. But if, in an action by the wife alone, the merits of the case have been fully tried, she will be allowed to amend, after verdict in her favor, by joining her husband, taking no costs since the trial. *Fenton* v. *Lord*, 466.

See BANKRUPT; 2; HUSBAND AND WIFE, 1; TENANT IN COMMON.

II. *Declaration.*

2. In an action to recover the penalty provided by the St. of 1875, *c.* 99, § 15, for the sale of intoxicating liquor to a minor, an allegation in the declaration that the defendant was licensed may be rejected as surplusage. *McNeil* v. *Collinson*, 313.

3. A declaration contained two counts, alleged to be for the same cause of action. The first count was in tort in the nature of trover, for the conversion of ten barrels of flour. The second count was in contract, alleging that the plaintiff had in his possession as a common carrier fifteen barrels of flour transported by him and consigned to the defendant; that he permitted the defendant to take five barrels, claiming and notifying him that the plaintiff would hold the remaining ten barrels until the freight and advances due to him were paid; and that the defendant afterwards took and carried away the ten barrels, thereby becoming liable to pay the plaintiff the amount due him for such freight and advances. *Held*, that the two counts were properly joined; and that it was within the discretion of the court to determine whether the plaintiff should elect upon which count he would go to the jury. *New Haven & Northampton Co.* v. *Campbell*, 104.

See WAIVER, 1.

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III. *Plea in Abatement.*

1. If a defendant answers in abatement and to the merits of the action in due time and in the proper order, the fact that both answers are filed together and upon the same paper does not operate as a waiver of the answer in abatement. *O'Loughlin* v. *Bird*, 600.

See JUROR AND JURY, 3; MUNICIPAL COURT.

IV. *Answer.*

5. In an action upon an account annexed, the defence of accord and satisfaction is not open under an answer containing a general denial, and alleging payment. *Grinnell* v. *Spink*, 25.

See WAIVER, 2.

V. *Replication.*

6. By the Gen. Sts. *c.* 129, § 28, and *c.* 134, § 8, a real action is at issue when the plea is filed, and no formal joinder of issue by the demandant is necessary. *Provident Institution for Savings* v. *Burnham*, 458.

POLICE OFFICER.

See OFFICER, 1, 4.

POOR DEBTOR.

1. If a poor debtor directs an officer to obtain from a magistrate a notice to the creditor of the desire of the debtor to take the oath for the relief of poor debtors, and to have a time appointed for the hearing not later than a certain day, and the magistrate issues a notice in due form, appointing a later day, which notice is duly served upon the creditor, the debtor may repudiate the notice, and give a new notice immediately, notwithstanding the Gen. Sts. *c.* 124, § 14. *Burt* v. *Geary*, 404.
2. The omission of a debtor, at the trial of an appeal by him from the judgment of a magistrate upon charges of fraud under the Gen Sts. *c.* 124, to file in court copies of the charges and the plea thereto, and of his examination before the magistrate, does not entitle the creditor, after proceeding to trial without raising any objection on this ground, to have the debtor defaulted. *Morse* v. *Dayton*, 451.

POWER.

See MORTGAGE, 2, 3.

PRACTICE.

See PLEADING, 3.

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PRESCRIPTION.

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The use by the grantee of an easement, in land previously mortgaged by the grantor, does not begin to be adverse until possession is taken by the mortgagee. *Murphy* v. *Welch*, 489.

See WAY, 1, 2.

PRINCIPAL AND AGENT.

1 In an action on a promissory note secured by a mortgage of real estate, it appeared that, at a sale by auction, under a power contained in the mortgage, the auctioneer purchased the estate for the plaintiff; and the only question for the jury was whether the auctioneer had authority to buy for the plaintiff. Two letters, written by the plaintiff to the auctioneer, were put in evidence, the first saying, "Please foreclose the mortgage as soon as convenient;" and the other, "I have been waiting for that money to pay the remainder of my taxes, and the interest is accumulating there too. So, if you will advertise the property as soon as possible, you will greatly oblige me." *Held*, that the two letters, construed together, contained no authority to the auctioneer to purchase the estate for the plaintiff. *Hood* v. *Adams*, 207.

2. A person, who witnessed an accident on a street railway, was asked, by an agent employed by the superintendent of the railroad corporation, to look up the case, to give a statement of what he knew. He replied that he must first go to the place of the accident and verify the facts, and the agent said "all right." The statement was made and was used by the corporation, and the superintendent agreed that his bill should be paid. In an action against the corporation for his services in going to the place of the accident and in making the statement, the defendant requested the judge to rule that the agent had no authority to employ the plaintiff; and that, if the plaintiff knew that there was no necessity for him to go to the place of the accident, in order to make his statement, he could not recover. The judge declined to give this ruling, left the question of the agent's authority to the jury, and instructed the jury that, if the plaintiff was authorized to go to the place of the accident, and honestly believed at the time that it was necessary to go there, in order to make a correct statement, he could recover, although, in fact, it was not actually necessary. *Held*, that the defendant's exceptions to the rulings given, and to the refusal to rule as requested, must be overruled, with double costs. *Lovejoy* v. *Middlesex Railroad*, 480.

See DEED, 2; EVIDENCE, 9; LAW AND FACT; PARTNERSHIP, 3; PROMISSORY NOTE, 5; SAVINGS BANK, 2.

PRINCIPAL AND SURETY.

See BASTARD; CONTRACT, 1; PROMISSORY NOTE, 6.

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PROBATE COURT.

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1. Where this court, by a rule under the Gen. Sts. *c.* 117, § 19, establishing forms to be used in all the Probate Courts, has required the last publication of a notice in probate proceedings to be two days at least before the return day, a Probate Court has no authority to order such publication to be one day at least before such day; and all proceedings based upon such a notice are invalid. *Baker* v. *Blood*, 543.
2. By the Gen. Sts. *c.* 109, § 1, every appointment by the Probate Court of a guardian of a person residing in this Commonwealth, and who is not now under guardianship, whether there has been a previous guardianship or not, must be made in the county in which the ward resides when the petition for such appointment is presented. *Harding* v. *Weld*, 587.
3. A guardian of a minor residing in the town of West Roxbury in the county of Norfolk was appointed by the Probate Court of that county before the annexation of that town to the city of Boston and county of Suffolk by the St. of 1873, *c.* 314, and after such annexation resigned his guardianship, and his resignation was accepted by that court, but he still held in his hands the property of the minor, and the minor continued to reside in the same territory. *Held*, that by § 3 of that statute the jurisdiction to appoint a new guardian of the minor was in the Probate Court of the county of Suffolk. *Ib.*
4. On a petition to the Probate Court to have the final account of a guardian reopened, it appeared that the matter in controversy was tried and determined by that court after hearing the same parties at the allowance of the account, which was more than two years before the application to reopen it, from which no appeal was taken; and that the balance of that account was the basis of the inventory filed by the guardian as administrator of his ward, and of his account as administrator, which was allowed by the Probate Court and by this court on an appeal taken by the present petitioner. *Held*, that, under these circumstances, the Probate Court was not authorized to reopen the account, upon the mere ground that its decision of a question of fact, fully heard and determined at the hearing upon the allowance of the account, was erroneous. *Cummings* v. *Cummings*, 532.
5. If an appeal from a decree of the Probate Court, appointing a person administrator of an estate, upon his petition alleging that he was next of kin, fails because the appellant does not prove that he is a party entitled to appeal, and is dismissed upon that ground only, the decree stands as if not appealed from; and it is within the power of the Probate Court, upon the petition of a public administrator, to revoke and annul that decree. *Cleveland* v. *Quilty*, 578.

See Appeal, 2, 3; Estates of Deceased Persons, 1, 8; Executor and Administrator; Guardian and Ward, 2, 3; Trust and Trustee, 6.

PROMISSORY NOTE.

1. In an action on a promissory note payable at a time certain, parol evidence is inadmissible to show that it was not intended as a note, but merely as a

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memorandum, or that certain certificates of stock, described in the note as collateral security, should operate as payment of the note at maturity, if not paid before. *Perry* v. *Bigelow*, 129.

2. It is a good defence to a promissory note, that the plaintiff, although in possession of the note, has no interest in it, and is prosecuting the action, not for the benefit of the person beneficially interested, but against his objection. *Towne* v. *Wason*, 517.

3. In an action on a promissory note, by which the defendant agreed to pay the plaintiff a certain sum the day he was married, it appeared that the parties, on the day of the date of the note, signed another paper by which they agreed to live together so long as they should live, and to marry as soon as they should think it safe on account of an old engagement of the defendant; and there was evidence that the agreements were afterwards rescinded by mutual consent, and the defendant married the person to whom he had been formerly engaged. The plaintiff asked the judge to rule, that, if a valuable consideration was shown, this was sufficient, however inadequate; that this with the consideration of love and affection would be a valid consideration. The judge declined so to rule, and instructed the jury that, if the note was made and delivered in consideration of an existing promise of marriage, and an agreement that he would pay the amount stated, as a penalty for not fulfilling that promise on his marriage to another, there was a legal consideration for the note, and the plaintiff might recover, if it was not subsequently released. *Held*, that the plaintiff had no ground of exception. *Dean* v. *Skiff*, 174.

4. A person, who, before the St. of 1874, *c.* 404, put his name on the back of a promissory note, before delivery to the payee, is liable as joint promisor; and it is immaterial that he indorsed the note without consideration, at the request of the maker, for the accommodation of the payee, if the payee did not authorize such a request, or know of its being made. *Spaulding* v. *Putnam*, 363.

5. The maker of a promissory note payable to the order of F. applied to a broker to negotiate a loan of money on the note and on other security. The broker applied to B., who agreed to lend the money if the security was all right, and requested the broker to make inquiries and report particulars as to the sufficiency of the security. The broker procured F.'s indorsement on the note, and B. lent the money. *Held*, in an action on the note by B. against F., that there was no evidence that the broker acted as the agent of B. in procuring F.'s indorsement; and that evidence of the conversation between F. and the broker, at the time F.'s indorsement was procured, was inadmissible in defence. *Burlingame* v. *Foster*, 125.

6. Where the indorser of a promissory note resides in a town in which there are two post-offices, of which fact the holder of the note is ignorant, a notice of the dishonor of the note, addressed to the indorser at the town generally, is sufficient, unless he proves that he is accustomed to receive his letters at one of the offices only, and that the holder of the note might have ascertained that fact by reasonable inquiry. *Ib.*

7. It is no ground for postponing judgment in an action on a promissory note, signed by a corporation as principal and an individual as surety, that the

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plaintiff has proved the note against the estate of the principal in bankruptcy, and that the amount of the dividend thereon has not been determined. *New Bedford Savings Bank* v. *Union Mill Co.* 27.

See CONTRACT, 10; ESTATES OF DECEASED PERSONS, 3; EVIDENCE, 5.

QUO WARRANTO.

See INFORMATION.

RAILROAD.

1. A railroad corporation, which has constructed its track upon a person's land, without filing a written location or presenting a plan thereof, or paying or tendering to the landowner any damages for the land so taken, cannot enter upon the land for the purpose of removing the rails laid upon the road-bed and structures placed upon the land; such property becomes a part of the realty; and the fact that the original entry and construction were made without objection by a mortgagor in possession cannot avail against the title acquired by the mortgagee by the subsequent foreclosure of his mortgage. *Meriam* v. *Brown*, 391.

2. In an action against a railroad corporation for personal injuries sustained by the plaintiff by being struck by a train of cars at a place where the railroad crossed a highway at grade, the plaintiff's evidence showed that he was employed by a corporation other than the defendant to watch the track and give notice when any cars or locomotive engines of either corporation were about to pass over the highway; that he saw the smoke of the locomotive engine when it first came in sight, went to the crossing and gave the usual signal; that after the locomotive engine passed he looked up and down the track, and saw nothing, and started to recross the track and was struck by the train of cars which was making a flying switch, and which came upon him from behind; that the usual signal for cars making a flying switch was not given, but one was given indicating that only a locomotive engine or a train of cars was coming, and there was no brakeman on the cars; that a person could see up the track from where he stood nearly seven hundred feet; that he could not tell whether any smoke prevented his seeing the cars coming, but if it did he should have waited until it passed away. *Held*, that the action could not be maintained. *Clark* v. *Boston & Albany Railroad*, 1.

3. A city made a contract with a person to take down and rebuild a bridge used as a highway over the tracks of a railroad corporation. In taking down and rebuilding the abutments of the bridge, if more men were needed temporarily on one side than were there at work, they were called to that side from the other; and were in the habit of crossing the track for that purpose. If a larger force had been employed, there would have been no necessity for crossing. *Held*, that an action would not lie against the railroad corporation for an injury sustained by a workman by being struck by a locomotive engine while so crossing the track. *Sweeney* v. *Boston & Albany Railroad*, 5.

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4. A., who was a student over twenty years of age, paid to a railroad corporation the regular price of a season ticket entitling him to transportation over its road, between two stations, for three months. The directors of the corporation had authorized its president, upon special application, and in his discretion, to allow season tickets to be sold to students over twenty years of age, for the same term, between the same stations, for one half the price A. paid, and such tickets had been sold. *Held*, in an action by A. to recover of the corporation one half of the amount paid by him, that there was no violation of the St. of 1874, c. 372, § 138; and that the action could not be maintained. *Spofford* v. *Boston & Maine Railroad*, 326.

See Carrier; Damages, 1; Evidence, 4; Indictment, 3; Master and Servant, 2; Principal and Agent, 2; Supreme Judicial Court.

RECEIPT.

See Payment, 1.

RECOGNIZANCE.

See Waiver, 2.

RECORD.

See Witness.

RELEASE.

See Contract, 10–12.

RENT.

See Evidence, 2; Landlord and Tenant; Mortgage, 1.

REPLEVIN.

See Husband and Wife, 1.

REPLICATION.

See Pleading, V.

RETURN.

See Execution, 2.

REVIEW.

An administrator, acting under letters of administration issued in another state, brought an action in this Commonwealth to recover a debt due his intestate, and obtained a verdict. After verdict, the defendant moved for

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a new trial on the ground that he had discovered since the verdict that letters of administration had not been taken out in this Commonwealth. This motion was overruled, and, after the plaintiff had taken out letters of administration here, judgment was entered on the verdict. *Held*, that a petition for a writ of review was rightly refused. *Dearborn* v. *Mathes*, 194.

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RIGHT TO OPEN AND CLOSE.

See EQUITY, 6.

ROAD COMMISSIONER.

See WAY, 3, 4.

RULES OF COURT.

See PROBATE COURT, 1.

SALE.

1. If an order for intoxicating liquors is given by a person in A. to an agent of a dealer, who has a license to sell such liquors in B., and received by the agent subject to his principal's approval, and the liquors, which were sold on credit, are put up by the seller, marked with the buyer's name, directed to him at A. and delivered to the carrier in B., it is a sale of the liquors in B. *Frank* v. *Hoey*, 263.
2. In an action of replevin of household furniture, the plaintiff claimed the property under a bill of sale from A.; the defendant also claimed under a bill of sale, dated a month later, from A., whom she subsequently married; the property remained in the possession of A. until his death two years afterwards; the defendant took her bill of sale without notice of the sale to the plaintiff. The jury returned a verdict for the plaintiff. *Held*, that the verdict showed that the jury must have found that the plaintiff was entitled to the property under a valid bill of sale, and had not waived or lost any of his rights under it; that the plaintiff could maintain the action without a previous demand; and that the defendant's exceptions to a ruling that her bill of sale became inoperative and void by her marriage with A., and to a refusal to rule that, the action having been brought within forty days after the death of A., it was prematurely brought, became immaterial. *Freelove* v. *Freelove*, 190.

See EVIDENCE, 3, 7–9, 20, 21; FRAUDS, STATUTE OF; GOODS SOLD AND DELIVERED; INTOXICATING LIQUORS, 2.

SAVINGS BANK.

1. In an action by a savings bank, against two persons, upon a joint and several promissory note, the defendants cannot set off, either under the Gen. Sts. *c.* 130, § 8, or under the St. of 1878, *c.* 261, the amounts severally due them from the bank. *Barnstable Savings Bank* v. *Snow*, 512.

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2. A treasurer of a savings bank may direct a suit to be brought on an overdue note; and if, judgment being obtained, and land taken on execution set off to the bank, the attorney of the bank, acting under the direction of the treasurer and of a trustee, to whom such matters have been entrusted, accepts seisin, and brings a writ of entry to recover possession of the land, it is no objection to the proceedings that a previous vote of the trustees authorizing them has not been passed. *Bristol County Savings Bank* v. *Keavy*, 298.

See TRUST AND TRUSTEE, 9.

SET-OFF.

See SAVINGS BANK, 1; WAIVER, 2.

SETTLEMENT.

See PAUPER, 1.

SEWER.

The mayor and aldermen of a city have no authority, under the Gen. Sts. c. 48, or the St. of 1869, c. 111, to include in the assessment of the cost of a sewer in one street a part of the cost of a sewer in another street, with which it connects, built several years before, and for the cost of which, at the time of its construction, no assessment was made upon the owners of estates benefited thereby; and an assessment so made may be quashed upon a writ of *certiorari*. *Brown* v. *Mayor & Aldermen of Fitchburg*, 282.

See CITY, 2.

SHIP.

See CONTRACT, 3.

SPECIFIC PERFORMANCE.

See EQUITY, 2.

STATUTE.

See BANKRUPT, 4; BIRDS; COMPLAINT, 1.

STATUTE OF FRAUDS.

See FRAUDS, STATUTE OF.

STATUTE OF LIMITATIONS.

See LIMITATIONS, STATUTE OF.

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STATUTES CITED, EXPOUNDED, ETC.

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English Statutes.

8 & 9 Vict. c. 109, § 19.	Issues in Equity	358
39 & 40 Vict. c. 29, § 2.	Wild Fowl	413

Statutes of the United States.

August 19, 1841, § 17.	Bankrupt	121
June 22, 1874, § 17.	"	228
June 7, 1878.	"	123

Revised Statutes of the United States.

§ 4986.	Bankrupt	475
§§ 5034, 5044.	"	474
§ 5049.	"	473
§ 5070.	"	28
§ 5106.	"	471
§ 5108.	"	472

Statutes of New York.

1849, c. 258.	Joint-Stock Company	445
1851, c. 455.	" "	445
1853, c. 153.	" "	445
1871, c. 721.	Birds	413

Statutes of the Commonwealth.

1782, c. 14, § 1.	Court of Sessions	37
1783, c. 42, § 6.	Appeal	37
1786, c. 67, § 4.	Way	38
1792, c. 41.	Pleading	359
1795, c. 62.	Improvement of Low Lands	349
1799, c. 31.	Bow Window	333
1824, c. 16, § 3.	Sidewalk	330
1836, c. 273.	Pleading	359
1838, c. 163, § 26.	Insolvent	121
1840, c. 87, §§ 4, 5.	Appeal	21
1842, c. 71.	Insolvent	121
1843, c. 54.	Norfolk & Bristol Turnpike	68
1846, c. 203.	Way	63
1847, c. 29, § 20.	Charlestown	331
1848, c. 278.	Balustrade	331
1851, c. 206.	Equity	479
1852, c. 312, §§ 12, 14, 18, 37.	Answer	359
1853, c. 70, §§ 6–8.	Lawrence	215
—— c. 371.	Equity	355
1854, c. 448, §§ 35, 47.	Boston	215
1855, c. 194.	Equity	355
—— c. 197, § 1.	Birds	411
1856, c. 88.	Equity	355
—— c. 284, § 29.	Insolvent	124
1857, c. 214.	Equity	155
—— c. 249, §§ 1, 2.	Married Woman	270
1858, c. 34.	Equity	479
1859, c. 196, §§ 6, 27, 37, 50–52.	Superior Court	355
—— c. 237.	Equity	355
—— —— § 12.	"	356

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1861, c. 91. Habeas Corpus 297
—— c. 174, § 2. Estates of Deceased Persons 275
—— c. 181. Indictment 46
1862, c. 68. Probate Court 142
—— c. 90. Divorce 297
—— c. 139. Guardian and Ward 589
—— c. 177. Hingham & Quincy Turnpike 349
1864, c. 111. Supreme Judicial Court 12, 382
—— c. 121. License 79
—— c. 173, § 4. Estates of Deceased Persons 205
—— c. 250, § 2. Indictment 422
1865, c. 132. Lynn Aqueduct 349
1866, c. 122. Guardian and Ward 589
—— c. 148. Divorce 297
1867, c. 130. Dog 421
—— c. 308. Nuisance 349
—— c. 339. Railroad 328
—— c. 355, § 2. Municipal Court of Boston 602
1868, c. 309. Toll Bridge 349
1869, c. 111. Sewer 282
—— ——— § 1. " 396
—— c. 142. Toll Bridge 348
—— c. 161. Cambridge & Brookline Bridge 348
—— c. 291. Railroad 348
—— c. 368, § 1. Rent 365
—— c. 433, § 2. Indictment 297
—— c. 462. Lynn 349
1870, c. 75. Way 36, 360
—— c. 119. Injunction 297
—— c. 304, § 1. Birds 411
—— c. 393, § 3. Witness 244
1871 c. 158. Road Commissioners 550
—— c. 177. Northampton Bridge 349
—— c. 238. Executor and Administrator 275, 279
1872, c. 318. Lien 108
—— c. 356. Eastern Railroad 348
1873, c. 44. Juror 458
—— c. 51. Road Commissioners 550
1873, c. 189, § 2. Post-Office 360
—— c. 261. Superior Court 36, 347
—— c. 314. West Roxbury 587
—— ——— § 3. " " 588
—— c. 360, §§ 2, 3. Eastern Railroad 346
—— c. 371, § 7. Divorce 36
1874, c. 184, §§ 1, 3. Married Woman 170
—— ——— § 3. " 464
—— c. 188. Execution 369
—— c. 271, § 11. Municipal Courts 600
—— ——— § 12. " 602
—— c. 293. District Courts 193
—— ——— § 5. " " 74
—— c. 339. Probate Appeal 297
—— c. 341. Way 38
—— c. 372, § 58. Railroad 393
—— c. 372, § 67. " 360
—— c. 372, §§ 135, 138, 179 " 328
—— c. 404. Indorser 363
1875, c. 68. Bond to dissolve Attachment 228, 231 *n.*
—— c. 99, § 1. Intoxicating Liquors 75, 414
—— —— § 12. " " 76
—— —— § 15. " " 313
—— —— § 16. " " 289
—— c. 175. Sunderland Bridge 349
—— c. 189. Guardian and Ward 589
—— c. 209. Municipal Debt 503
—— —— § 2. " " 504
—— —— §§ 3, 10. " " 505
—— c. 211, § 2. Intimidating Workmen 71
1876, c. 80. Cities 308
—— c. 92. New Bedford 308
—— c. 162, § 1. Intoxicating Liquors 73
—— c. 167. Attachment 235
—— c. 203, §§ 19, 20. Savings Bank 160
1877, c. 95, §§ 1, 7. Birds 411
—— c. 127. Guardian and Ward 589
—— c. 189. District Court 72

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1877, c. 200. Autopsy 422
—— c. 234. Way 321, 387, 580
—— —— § 2. " 581
—— —— §§ 3, 4. Way 318, 521
1878, c. 145. Superior Court 297
—— c. 261. Savings Bank 512
—— —— § 1. " " 513 n.
1879, c. 71. Estates of Deceased Persons 280
1879, c. 209, § 1. Birds 410
—— —— § 9. " 411
—— —— § 10. " 412
—— c. 243. Estates of Deceased Persons 280
1880, c. 154. Guardian and Ward 589
—— c. 220. Executor and Administrator 591

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Revised Statutes.

c. 2, § 5. Statute 122
c. 24, § 13. Way 38
c. 39, § 83. Railroad 329
c. 53, § 1. Birds 411
c. 59, § 2. Husband and Wife 270
c. 73, § 38. Execution 429
c. 81, §§ 26–30. Supreme Judicial Court 354
c. 82, § 6. Appeal 21, 38
c. 83, § 12. Probate Court 17
c. 85, § 13. Appeal 38
c. 87, §§ 15, 35. " 38

General Statutes.

c. 18. Town 506
c. 19, § 13. Balustrade 330
c. 43, §§ 13, 14. Way 98
—— § 19. " 38, 347
—— § 22. " 97
—— § 82 " 63
c. 44, §§ 1, 22. " 581
—— § 8. " 548
—— § 19. " 551
—— §§ 19, 20. " 548
c. 46, § 1. Fence 69
c. 48. Sewer 282, 396
c. 51, § 17. Sale 585
c. 63, §§ 21, 22. Railroad 347
c. 70, §§ 1, 2, 12, 14. Pauper 150
—— § 4. " 288
—— §§ 4–6, 11. " 139
c. 82, § 1. Birds 411
c. 84, § 1. Lord's day 148
c. 87, § 6. Nuisance 54
c. 88, § 59. Dog 218, 598
c. 89, § 14. Joint Tenancy 286
c. 91, § 1, cl. 6. Descent 140
c. 92, § 4. Will 42
c. 94, § 5. Administration 580
c. 95, § 4. Public Administrator 580
c. 96, §§ 9, 10. Estates of Deceased Persons 286
c. 97, §§ 5–12. " " 275
—— § 8. " " 272, 528
—— §§ 8–10. " " 279
—— § 23. Annuity 577
c. 98, § 12. Executor and Administrator 533
c. 100, § 1. Trust 276
—— §§ 1–4 " 400
c. 101, §§ 1, 2. Executor 590
—— §§ 31, 32. Estates of Deceased Persons 529, 556
—— §§ 31–34. Estates of Deceased Persons 271, 276, 279
c. 103, §§ 16, 39–41. Execution 427
—— § 44. " 432
c. 105, § 5. Statute of Frauds 388
c. 107, § 40. Divorce 36
c. 108, §§ 1, 3. Married Woman 169
—— § 3. " " 464
—— §§ 1, 3, 10. " " 270
—— §§ 27, 28. Marriage Contract 510
c. 109, § 1. Guardian 587
—— §§ 2, 3. " 591

Digitized by Google

c. 109, § 4. Guardian 591, 593
——— §§ 13, 14, 23. " 589
——— § 24. " 546, 590
c. 112, §§ 10, 11, 16, 17. Appeal 12
——— §§ 18, 26–28, 31, 32, 38. Supreme Judicial Court 297
c. 113. " " " 355
——— § 2, *cl.* 11. Equity 478
——— §§ 6, 7, 16, 18, 24. Supreme Judicial Court 297
——— § 8. Appeal 11
——— §§ 8–10, 13, 14, 15, 21. Appeal 12
——— § 10. " 356
——— § 13. " 17
——— §§ 13, 14. " 19
c. 114, §§ 2, 10, 16. Superior Court 297
——— § 10. Appeal 21
——— § 14. " 12
c. 115, § 7. Exceptions 355, 602
——— § 12. Appeal 12, 382
——— §§ 13, 14, 16, 20. Courts 297
c. 116, § 32. Appeal 38
c. 117, § 2. Probate Court 588
——— § 3. " " 589
——— § 4. " " 16
——— § 8. Probate Appeal 592
——— §§ 11, 12. " " 580
——— § 14. Appeal 356
——— §§ 15, 16. " 579
——— § 19. Probate Court 543
——— § 20. " " 545
c. 118, §§ 87, 89. Insolvent 124
——— § 103. " 120
c. 120, §§ 1, 2. Justice of the Peace 193
——— § 13. " " 192
——— § 25. Appeal 38
——— § 28. " 603
c. 122, §§ 2, 3. Courts 297
c. 123, § 55. Attachment 427
——— §§ 67–71. " 102
c. 124. Poor Debtor 451
c. 124, § 14. Poor Debtor 404
c. 129, § 2. Declaration 105
——— § 4. " 256
——— §§ 15, 17, 20. Answer 359
——— §§ 15, 20, 25, 41. " 257
——— § 20. " 26
——— § 28. Issue 458
——— § 39. Abatement 602
——— § 41. Amendment 237, 469
——— § 46. Interrogatories 293
——— § 56. " 295
——— § 59. Interlocutory Order 297
——— § 64. Demurrer 297
c. 130, § 8. Set-off 512
——— § 16. " 359
——— §§ 16, 17. " 513
c. 131, § 13. Witness 245
c. 133, §§ 1, 7. Judgment 297
——— §§ 41, 50, 51. Execution 481
c. 134, § 7. Writ of Entry 462
——— § 8. " " 458
——— §§ 13, 14 " " 459
——— § 19. " " 167
c. 137, § 5. Forcible Entry and Detainer 93
c 140, §§ 3–5. Mortgage 466
——— § 4. " 459
c. 142, § 29. Trustee Process 402
——— § 60. " " 20
c. 144, §§ 3, 5. Habeas Corpus 297
c. 150. Lien 108, 534
——— § 5. " 537
——— §§ 8, 9. " 193
c. 155, § 9. Statute of Limitations 220
c. 156, §§ 1–3. Costs 257
c. 160, § 28. Threatening Letter 55
c. 161, § 54. False Pretences 79
c. 163, § 11. Rescuing Prisoner 89
c. 165, § 3. Adultery 89
——— § 6. Lewdness 52
——— § 13. House of Ill Fame 54
c. 168, § 1. Felony 89

STREET.

See WAY.

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STREET RAILWAY.

See PRINCIPAL AND AGENT, 2.

SUPREME JUDICIAL COURT.

Under the St. of 1873, *c.* 360, authorizing the Eastern Railroad Company to take land for a freight station, and providing that the general railroad acts shall be applicable to and govern the proceedings, except that, instead of the county commissioners, three commissioners shall be appointed by this court to adjudicate the damages, from whose decision "an appeal to a jury shall lie" in behalf of any owner of land taken, "as is provided in case of lands taken for railroad purposes," the award of commissioners so appointed is to be returned to this court; and the application for a jury, by way of appeal from their decision, is to be made, and the trial by jury had, at the bar of this court. *Wyman* v. *Eastern Railroad*, 346.

See EQUITY, 8; PROBATE COURT, 1.

SURPLUSAGE.

See INDICTMENT, 2, 3; INFORMATION, 1; PLEADING, 2; WRIT

SURVEYOR OF HIGHWAYS.

If a surveyor of highways judges it to be for the interest of the town to dispose of soil, taken from land within the limits of a highway for the purpose of lowering the highway, by depositing it on his own land as the best way of clearing the road of useless material, rather than to use it elsewhere on the road, he is not liable to an action by the person who owns the fee of the road at the place where the soil was taken. *Upham* v. *Marsh*, 546.

TENANT IN COMMON.

A deed conveyed land to A., B. and C. in the following proportions, namely, one half to A. and the other half to B. and C., and the habendum was in the same form. The deed also stated that the land was subject to a mortgage which "the said grantees are to assume and pay." *Held*, that the grantees were tenants in common, and were jointly liable for breach of this agreement. *Fenton* v. *Lord*, 466.

See EASEMENT, 2; MONEY HAD AND RECEIVED; WAY, 16.

THREATENING TO ACCUSE OF CRIME.

At the trial of an indictment on the Gen. Sts. *c.* 160, § 28, for maliciously sending a threatening letter to A. with intent to extort money from him, the defendant requested the judge to instruct the jury, that they must find that the defendant must have maliciously intended to obtain what he knew

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he had no right to receive; and that, if he believed that A. actually owed him the sum demanded, he was not guilty of the offence charged. The judge declined to give these instructions, and instructed the jury that, to maintain the indictment, it was not essential that the defendant was endeavoring to obtain money that was not due him; that, if he endeavored to obtain money that was justly his due in this way, he would be guilty; that a man had no right to use this way to collect his debts; that a threat made by one whose goods had been stolen that he would prosecute the supposed thief for the offence, if there were grounds to suspect him to be guilty, could not be considered as made maliciously, unless there were other proofs of malice; and the jury were further instructed what would constitute a malicious threatening, and as to the weight to be given to the fact whether the defendant was or was not claiming more than he believed to be due, upon the question of malice, in a manner not excepted to. *Held*, that the defendant had no ground of exception. *Commonwealth* v. *Coolidge*, 55.

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TIME.

See COMPLAINT, 3.

TOWN.

1. Since the St. of 1875, *c.* 209, an action cannot be maintained against a town on a promissory note given by its treasurer for borrowed money, unless the vote of the town authorizing the treasurer to borrow money shows either that the debt was in anticipation of the taxes of the year in which the debt was incurred, and of the year next ensuing, and expressly made payable therefrom, or that the vote was passed by two thirds of the legal voters present and voting at a legal meeting. *Agawam Bank* v. *South Hadley*, 503.
2. If a town treasurer borrows money in a manner unauthorized by the St. of 1875, *c.* 209, the lender cannot maintain an action against the town to recover it back, although the money is used by the treasurer in payment of debts of the town. *Ib.*
3. A town is not liable to a person, who has been visiting a public building of the town for the purpose of attending an entertainment of a society, to which the free use of the building had been given, for an injury received by falling into a trench near the building and outside of the highway; and the fact that, before the accident, the town had occasionally let the building for meetings and entertainments, is immaterial. *Larrabee* v. *Peabody*, 561.
4. A town is not liable for an injury occasioned to a traveller by a defect in a public common, which has been conveyed to the town upon the condition that it should "forever after be kept open as and for a common for the use of the inhabitants of the town," and across which the town has constructed footpaths; and the fact that a portion of the land originally conveyed to the town is occupied by a building used in part for the pecuniary benefit of the town, but which portion is by the conveyance excepted from the

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condition, and is separated from the common by a fence, does not operate to make the town liable, the accident having happened in a part of the common remote from the building. *Clark* v. *Waltham*, 567.

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See CITY, 2, 3; LORD'S DAY, 2; PAUPER, 1, 2; WAY, 3, 4, 7–10, 12–15.

TRADE-MARK.

If a person can have a trade-mark in the words "East Indian" in connection with the word "remedy" upon bottles of medicine, (which is at least doubtful,) yet if he has falsely adopted and used these words to denote, and to indicate to the public, that the medicines were used in the East Indies, and that the formula for them was obtained there, he cannot maintain a bill in equity to restrain an infringement of such trade-mark. *Connell* v. *Reed*, 477.

TRESPASS.

1. A disseisee who enters upon the land of which he is disseised and removes a fence therefrom, against the wishes of the disseisor, is liable to an action of trespass by the latter, although the entry is made without a breach of the peace, and the effect of it, followed by abandonment of possession by the disseisor, is to give to the disseisee a good title to the land. *Rawson* v. *Ward*, 552.
2. A., the owner of a parcel of land, leased it to a religious corporation, which, pursuant to the terms of the lease, erected a wooden building on the land, the sills of which were fastened to posts driven in the ground, and used it as a church. Afterwards some of the members of the corporation withdrew therefrom, and formed an unincorporated religious society, two of whom and A., without authority of the corporation, signed a cancellation on the back of the lease. After this, the unincorporated society made a verbal agreement with A., by which, on payment of a sum of money and delivery of certain notes, he agreed to sell them the church building. They then paid him the money and delivered the notes, and he went with a committee of the society to the building, and, putting his hand upon it, said it was theirs. Subsequently certain members of the corporation to which the land was leased broke the lock upon the building, and entered the same, A. being present at the time, but not entering the building. *Held*, in an action by the members of the unincorporated society against A., containing a count in trespass and a count for the conversion of the building, that the plaintiffs had no such title in the building as to give them a right of action; that there was no evidence that A. took any part in the alleged trespass; and that there was no evidence of a conversion of the building by him. *Payne* v. *Davis*, 383.

See JUDGMENT, 2.

TROVER.

1. Where the violation of the terms of a lease or bailment of a chattel tends to show the assumption of dominion over, and ownership of, the chattel,

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by the lessee or bailee, this is evidence of a conversion of the chattel. *Goell* v. *Smith*, 238.

2. A., while in possession of land belonging to B., who had agreed to give him a deed upon certain terms, erected a building thereon under an agreement that it was not to be the property of B., but that A. should have the right to remove it at any time. Subsequently A., without the knowledge of B., sold the building by bill of sale, not recorded, to C. Afterwards B., at the request of A., conveyed the land to D. by a warranty deed, which made no mention of the building. At the same time, B.'s agreement to convey to A. was given up, and A. gave B. a release of the land "with all the privileges and appurtenances thereto belonging." C. then brought an action against B. for the conversion of the building. *Held*, that, as against B., the title to the building passed by the sale to C.; and that the action could be maintained. *Dolliver* v. *Ela*, 557.

See PLEADING, 3.

TRUST AND TRUSTEE.

1. An express trust in personal property may be created and proved by parol. *Davis* v. *Coburn*, 377.
2. An express trust to keep and invest the money of another involves the duty, on the part of the trustee, to pay over all income received, less a reasonable compensation for services; and, if a trustee mingles trust money with his own, he is liable for at least simple interest. *Ib.*
3. If the plaintiff, in an action to recover money alleged to have been received by the defendant in trust, puts in no direct evidence of any contract or conditions under which the money was received, but relies upon circumstances, the defendant may testify to the purpose for which he supposed the money was given him, and the understanding with which he received it. *Ib.*
4. A *cestui que trust* cannot maintain an action at law against a trustee while the trust is still open. *Ib.*
5. A single trustee appointed by the Probate Court, in the place of two trustees who have been removed, takes the title in the trust property, and the right to prosecute all necessary suits to recover the same. *Hammond* v. *Granger*, 272.
6. If a testator devises property to A. in trust, and also appoints A. his executor, the two offices are distinct; and if A. refuses or neglects to qualify as trustee and give bond, another person may be appointed trustee. *Daggett* v. *White*, 398.
7. If A. puts property in trust, the income to be paid to him for life, and after his death to his wife for life, and the principal after the death of both to his executor to be divided equally among his children, and A. retains no power of revocation or further disposition, it does not pass by his will, or by an assignment executed by one of his children by which he conveys, after his father's death, "all my interest of whatever name, nature or description in the estate real and personal of my father, and all my share thereof under the will of my father, together with all income, benefit and advantage thereof accrued or to accrue." *Belknap* v. *Belknap*, 14.

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8. A trustee under a will, who is directed therein to pay the entire income of a fund to A. for life, with an annuity to B. during the continuance of the trust, and who, after the death of B., pays the annuity to his legal representatives, by the direction of A., out of the income, may credit himself with it in his account, although, by the true construction of the will, the annuity terminated on the death of B. *Weston* v. *Jenkins*, 562.

9. In an action by the executor of A. against a savings bank to recover money deposited by A., it appeared that, after depositing in his own name and on his own account all that he was allowed to by the rules of the bank, A. made three other deposits as trustee, one of which was in trust for his only son by name, and the others in trust for his two grandchildren by name; that for these deposits he took separate bank books containing entries of the same, which after his death were found among his effects, having never been delivered to the persons named or to any one else for them; and that A. continued during his lifetime to collect, receipt for and use, as his own, all dividends declared upon these deposits. A by-law of the bank provided that "no person shall receive any part of the principal or interest, without producing the original books, in order that such payments may be entered thereon;" and another by-law provided that "any depositor, at the time of making his deposit, may designate the person for whose benefit the same is made, which shall be binding on his legal representatives." The son and grandchildren of A., who appeared as claimants of the money under the St. of 1876, *c.* 203, § 19, offered to prove, in addition to the facts above stated, that A. had said to each of them, at different times, "that he had put this money in the bank for them; that he wanted to draw the interest during his lifetime; and that after he was gone they were to have the money." *Held*, that the evidence offered was admissible; and that, upon all the evidence, a jury would be justified in finding that A. had fully constituted himself a trustee for the claimants. *Gerrish* v. *New Bedford Institution for Savings*, 159.

10. By a deed of trust, the donor gave to trustees a large sum of money, to be by them and their successors held in trust to found and maintain a museum of archæology and ethnology in connection with Harvard College. A portion of the sum was to be invested by the trustees, and the income applied to forming and preserving a collection of antiquities; the income of another portion was to be applied to the establishment and maintenance of a professorship of archæology and ethnology in the college; and the remaining portion was to be invested and accumulated until it reached a certain sum, when it might be employed in the erection, upon land of the college, of a museum building, which when completed should become the property of the college, for the uses of the trust. The trustees were directed to keep a record of their doings, and to annually make a report to the president and fellows of the college, setting forth the conditions of the trust, and the amount of income received and paid out. Provision was made for filling vacancies in the board of trustees, and permission was given to obtain an act of incorporation. The trustees were also authorized to appoint a treasurer, and to enter into any arrangements and agreements with the college, not inconsistent with the terms of the trust, which might,

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in their opinion, be expedient. An agreement was subsequently proposed to be made between the trustees and the college, by which the trust funds were to be invested and managed by the college as a part of its general fund, and a proportionate part of the entire income be annually credited to the two funds first mentioned, and be paid to the trustees or their treasurer, and the proportionate income of the third fund annually added by the college to the third fund until such time as the trustees should demand payment of the whole or any part of the principal or income, upon giving six months' notice; the management of the trust funds to be held by the college in perpetuity, subject only to the right of the trustees to demand and receive the income of the two funds first mentioned, and the whole of the third fund; and the college to invest the funds as it should see fit, and not to be responsible for any loss. *Held*, on a bill in equity by the trustees for instructions, that the proposed agreement as to the two funds first mentioned was inconsistent with the terms of the trust; and that the facts that the treasurer of the trustees, who had served without compensation, was about to resign, that by the plan proposed the funds would be managed without expense, and that another treasurer could not otherwise be secured without great expense, did not present a case of such exigency as to warrant the sanction of the court to the agreement. *Winthrop* v. *Attorney General*, 258.

See COMPROMISE; DEVISE AND LEGACY, 4, 7, 15, 16; ESTATES OF DECEASED PERSONS, 1; LIMITATIONS, STATUTE OF.

TRUSTEE PROCESS.

1. An insurance company, which, by the terms of a policy issued by it, has the right to rebuild instead of paying the amount of a loss insured against, is not chargeable in a trustee process as the trustee of the assured; and the fact, that, after service of process upon it, it makes an arrangement with the assured and a creditor of his, by which the insurance company pays the money to the creditor who erects a building on his own land, is immaterial. *Godfrey* v. *Macomber*, 188.
2. A writ, in which A. alone was the defendant, was served upon a bank as trustee, which answered that, at the time of service, it had standing on its books a certain sum to the credit of A. & Company. The writ was afterwards amended by joining B. as a defendant, and subsequently a special precept, under the St. of 1876, *c.* 167, was served on the trustee. The trustee still continued to hold the fund, and it was conceded that A. and B. composed the firm of A. & Company, and that the fund belonged to them. More than four months after the amendment, but within four months of the issuing of the special precept, A. and B. filed a petition in bankruptcy and were adjudged bankrupts, and an assignment of their joint and separate estate was made to C., who came in as a claimant of the fund in the hands of the trustee. *Held*, that the previous attachment became valid by the amendment, and the trustee was at once chargeable upon its original answer, independently of the subsequent attachment on the special precept; and that the assignment in bankruptcy did not discharge the attachment. *Sullivan* v. *Langley*, 235.

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3. A manufacturer employed workmen by the piece, and a tag was used to show the kind and value of the work done. From these tags each workman, on completing a piece of work, cut off a slip representing his work and the value thereof, and such slips were sometimes transferred by delivery by the workmen, and were paid on a certain day in each month by the manufacturer to any person presenting them. At the time of the service of a writ upon the manufacturer as trustee of a workman, the workman had in his possession a number of these slips representing the labor performed by him, and worth a certain sum. The Superior Court on these facts charged the trustee. *Held*, on appeal to this court, that no error appeared. *Fitzsimmons* v. *Carroll*, 401.

See Costs.

USAGE.

See Custom.

VERDICT.

1. In a case of felony, not capital, the jury may be authorized by the court, without express assent of the defendant, after the case has been finally committed to them, to separate upon signing and sealing up a form of verdict, and to deliver their verdict orally upon the next coming in of the court. *Commonwealth* v. *Costello*, 88.
2. In a criminal case, not capital, the jury were instructed that, if they agreed after the adjournment of the court, the foreman should sign and seal up a statement of the verdict agreed upon, and return their verdict in the morning. The jury agreed upon their verdict after the adjournment of the court, and separated. After the jury had returned into court the next morning, and the written form of verdict had been handed by the foreman to the clerk and read, the jury were asked by the clerk if they had agreed upon their verdict, to which the foreman answered that they had, and that they found the defendant guilty, and thereupon the verdict was affirmed in the usual form. *Held*, that the verdict was duly returned. *Ib.*
3. Upon the trial of an indictment charging the defendant in one count with the larceny of a chattel, and in another count with receiving the same chattel, knowing it to have been stolen, a verdict of guilty on both counts is inconsistent in law, and no judgment can be rendered upon it; and the subsequent entry of a *nolle prosequi* of the second count does not cure the defect. *Commonwealth* v. *Haskins*, 60.

WAIVER.

1. A formal defect in a declaration, which might have been cured by an amendment, is waived, if not objected to until after a trial upon the merits before an auditor. *Boston & Albany Railroad* v. *Pearson*, 445.
2. If the defendant files a declaration in set-off, appeals from a judgment against him, and enters into a recognizance to prosecute his appeal, the

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filing, by the plaintiff, after the entry of the appeal, of an answer to the declaration in set-off, is a waiver of any defect in the form of the recognizance. *Norris* v. *Munroe*, 386.

See PLEADING, 4; POOR DEBTOR, 2; SALE, 2; WAY, 13.

WAY.

1. The provisions of the St. of 1846, *c.* 203, reënacted in the Gen. Sts. *c.* 43. § 82, concerning the dedication of ways, do not apply to ways established by prescription. *Commonwealth* v. *Coupe*, 63.
2. At the trial of an indictment charging the defendant with erecting and maintaining a fence within the limits of a highway, witnesses over seventy years of age testified that the travelled track used by the public for more than fifty years, prior to 1878, and as long as they could remember, extended over the land enclosed by the defendant; and that a stone wall, which stood on a curved line where the corner of the highway intersected another road, and which was claimed by the government to be the boundary of the highway, about two feet distant from the travelled track, had been there for the same period, and until taken down by the defendant before he built the fence. *Held*, that this evidence was competent, and would justify the jury in finding a way by prescription, a portion of which the defendant had enclosed, and in returning a verdict of guilty. *Ib.*
3. The election by a town of road commissioners, under a proper warrant therefor, is not illegal because they are chosen at a special meeting called for that purpose, nor because the St. of 1871, *c.* 158, providing for the election of road commissioners, is accepted at the same meeting. *Walker* v. *West Boylston*, 550.
4. Under the St. of 1871, *c.* 158, as amended by the St. of 1873, *c.* 51, providing that the road commissioners of a town "in matters concerning streets, ways," &c., "shall exclusively have the powers, and be subject to the duties, liabilities and penalties of selectmen and surveyors of highways," the petition of a landowner for an assessment of damages occasioned by a change of grade in a highway, after the town has accepted the statute and elected road commissioners, should be presented to the commissioners, and not to the selectmen. *Ib.*
5. The owner of land taken for the laying out or altering of a highway is entitled to a jury under the Sts. of 1870, *c.* 75, and 1873, *c.* 261, although he has not claimed damages before the county commissioners. *Gilman* v. *Haverhill*, 36.
6. Under the Gen. Sts. *c.* 43, § 22, an application for a jury to revise the judgment of the county commissioners in the assessment of damages, caused by the laying out of a way, must be made within one year from the adoption of the final order of location, unless there has been a suit instituted in which the legal effect of the proceedings is drawn in question; and an order by the county commissioners to their clerk, to draw his warrant on the treasurer of the county for the payment of damages to the persons named in it, whose land has been taken by the commissioners in laying out a way, is not an order of location. *Childs* v. *Franklin*, 97.

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7. The St. of 1824, *c.* 16, providing that door-steps shall not project into a street of Charlestown for more than a given distance, is constitutional, and steps erected within that distance do not constitute a defect in the highway for which the city is liable. *Cushing* v. *Boston*, 330.

8. A town is bound to erect barriers or railings where a dangerous place is in such close proximity to a highway as to make travelling on the highway unsafe. *Harris* v. *Newbury*, 321.

9. A traveller, in a wagon, on a highway, after dark and in a snow-storm, came to a place where the travelled part of the road forked, one branch going down a hill and the other continuing on a level. The ground was covered with snow and there were no marks of other vehicles. Not knowing which was the true road, he walked his horse, keeping midway between the walls on the sides of the roads, and his wagon was overturned by the wheels on one side going off of the travelled part of the road into a gully about two feet deep, caused by the difference of grade in the two roads, and within the location of one of the roads. *Held*, that whether there was a defect in the highway, and whether the traveller was in the exercise of due care, were questions for the jury. *Ib.*

10. An action against a town for personal injuries caused by a defect in a highway, since the St. of 1877, *c.* 234, is not prematurely begun, although brought within thirty days after the injury and notice thereof to the town. *Ib.*

11. In an action against a city for personal injuries occasioned by a defect in a highway, evidence that, on the day after the injury, a police officer of the defendant called to see the plaintiff, who then informed him of the time, place, and cause of the injury, but did not indicate in any way that he made or intended to make any claim against the defendant for his injury, is not sufficient evidence of a notice under the St. of 1877, *c.* 234, §§ 3, 4. *Kenady* v. *Lawrence*, 318.

12. In an action against a town for personal injuries caused by a defect in a highway, evidence that, on the day after the accident, the plaintiff's son went to one of the defendant's selectmen, and, for and in behalf of his father, took the selectman to the place of the accident and told him all about it, and that the plaintiff's attorney, on the same day, wrote a letter to the selectmen, notifying them of the accident and asking for compensation, will warrant the jury in finding that sufficient notice of the accident, under the St. of 1877, *c.* 234, was given by the plaintiff to the defendant. *Harris* v. *Newbury*, 321.

13 The notice required by the St. of 1877, *c.* 234, to be given to a city or town by a person injured by a defect in a highway, is a condition precedent to the plaintiff's right to maintain an action therefor, and cannot be waived by the city or town. *Gay* v. *Cambridge*, 387.

14. A notice to a city that a person has been injured by a defect on a certain street does not sufficiently designate the place of the injury, under the St. of 1877, *c.* 234, § 3, if it appears that the street named is half a mile long. *Larkin* v. *Boston*, 521.

15. In an action against a town for injuries caused to the plaintiff's carriage by being overturned by a snow-drift in a highway, since the St. of 1877,

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c. 234, the surveyor of highways testified that, after the storm which caused the drift, he broke out the street where the accident happened, in the usual manner; and that, finding drifts badly driven across it, he cleared a track ten feet wide so as to be safe for travel, but, so far as possible, avoiding the drifts. The defendant then offered to show the actual cost of clearing the roads in that town after the storm, with the estimated cost of clearing them if a way for travel had been opened along the middle of the roadway regardless of drifts, together with the town valuation and the amount expended each year for the repair of roads. *Held*, that this evidence was admissible. *Rooney* v. *Randolph*, 580.

16. Two tenants in common of a large tract of land, fronting on a highway in a city, laid out over it a way running from the highway towards the rear of the tract, and then turning and running at a right angle and parallel with the highway. Fronting on this way they erected four houses, and one house whose front abutted partly on the way. They also purchased a parcel of land adjoining their other land in part, and on which was a private way called D. Court, running from the highway towards the rear of the land. Subsequently they divided both parcels among themselves by a deed of partition, excluding that part over which the way ran. In this deed one of the boundary lines was described as running "to land left and now used for a passage-way in C. Court;" other lines were described as running by "the way," or by "the way or court;" monuments were described as being at a certain distance from the houses in "said court;" the houses were described as being "in C. Court;" and the width of the way in different places was stated. The deed also provided that all of the land first bought, not therein conveyed, should "be left and always lie open as a way for the common use and benefit of both of said parties and their said respective estates;" and that the "court" should be continued over the land last bought to D. Court, and that each party should have a right of way over D. Court, "for the common use and benefit of themselves and of their respective estates;" that each party might make sidewalks "in the said court" in front of the lots assigned to him, and maintain steps in front of the houses, "so as the said sidewalk and steps shall never be extended or widened to obstruct the convenient passing of carriages in said court." On one of the lots conveyed by this deed was a house, the front of which abutted on C. Court for only a few feet, the rest of the front abutting on the grantee's land set off to him in the same deed. He subsequently conveyed this house by a deed which did not contain the usual clause, "with all privileges and appurtenances," and which described the house as being "No. 4 in C. Court," and conveyed it by metes and bounds, the front line being "on a line with the front of said house," together with the land in front of the house, under the stone steps "with a right to pass and repass on foot and with horses and carriages to said house and land through said C. Court at all times." *Held*, that the last-named grantee had not only a right of way over C. Court, but also a right to have the whole court kept open for light and air. *Salisbury* v. *Andrews*, 336.

See By-Law, 1; City, 2; Deed, 4; Equity, 7; Lease, 1; Lord's Day, 2; Railroad, 3; Surveyor of Highways.

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WIDOW.

See DOWER.

WILL.

See DEVISE AND LEGACY.

WITNESS.

The record of a criminal court, showing that a person was indicted for an offence to which he pleaded guilty, and that he was discharged on probation, is not admissible in evidence to impeach the credibility of such person as a witness, under the St. of 1870, *c.* 393, § 3. *Fay* v. *Harlan*, 244.

WORDS.

"Balustrade." See *Cushing* v. *Boston*, 330.
"Case." See *Missionary Society* v. *Chapman*, 265, 266.
"Contingency." See *Adams* v. *Bigelow*, 365, 366.
"Court." See *Greenwood* v. *Bradford*, 296.
"Descend." See *Dove* v. *Torr*, 38, 40.
"Family." See *Bates* v. *Dewson*, 334.
"Gift." See *Chapman* v. *Miller*, 269, 270.
"Heir." See *Dove* v. *Torr*, 38, 40.
"Justly due." See *Rogers* v. *Abbott*, 102; *Ames* v. *Ames*, 277.
"Personal." See *Johnson* v. *Goss*, 433, 434.
"Projection." See *Cushing* v. *Boston*, 330.
"Renew." See *Dwight* v. *Ludlow Manuf. Co.* 280.
"Repair." See *Dwight* v. *Ludlow Manuf. Co.* 280.
"Store." See *Hooper* v. *Farnsworth*, 487.
"Sufficient Ability." See *Templeton* v. *Stratton*, 137, 139.
"Then." See *Dove* v. *Torr*, 38, 40.
"Working Hours." See *Binney* v. *Phœnix Manuf. Co.* 496, 498.

WORK AND LABOR.

A person, who performs work for another under a special contract, which reserves to the latter the right to cancel the contract, is entitled, after such cancellation, to recover, upon a *quantum meruit*, the full value of his work up to that time, although the contract provides that the amount of the first month's work is to be retained as security for the faithful performance of the work. *Fitzgerald* v. *Allen*, 232.

See EVIDENCE, 22; MECHANIC'S LIEN.

WRIT.

A writ against A., "as he was the guardian of" B., is against A. personally, and the words "as he was the guardian," &c. may be rejected as surplusage. *Rollins* v. *Marsh*, 116.

See TRUSTEE PROCESS, 2.

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WRIT OF ENTRY.

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1. Easements and restrictions cannot be recovered or enforced in a writ of entry, and need not be set forth therein. *Provident Institution for Savings* v. *Burnham*, 458.
2. At the trial of a writ of entry, the judge instructed the jury, "that, as the tenant had shown no title other than naked possession, the demandant must show that his title is better than the naked possession of the tenant, and need show nothing more than such better title to entitle him to recover the possession." *Held*, that the tenant had no ground of exception. *Ib.*
3. Under the Gen. Sts. *c.* 134, §§ 13, 14, the demandant in a writ of entry is entitled to recover rents and profits, although not specifically demanded in the writ. *Ib.*
4. On a writ of entry to foreclose a mortgage, if neither party moves for conditional judgment, judgment is to be entered in the common form, under the Gen. Sts. *c.* 140, § 4, and the demandant cannot recover money paid for insurance. *Ib.*
5. A tenant in a writ of entry, who claims under a deed from a disseisee, and who is in possession of the land at the time the writ is brought, may set up such title in defence; and the fact that his deed is merely one of quitclaim with limited covenants of warranty does not affect the case. *Rawson* v. *Putnam*, 552.
6. At the trial of a writ of entry dated in 1878, it appeared that the tenant went into possession of the demanded premises in 1873, under an oral agreement with the demandant for a deed, upon payment of a certain sum with interest, and all taxes assessed thereon until the money was paid, but no time was named for the payment; that it was also agreed that the tenant should fence the land at his own expense; that the fence was built, a well was dug, and a house and barn erected by the tenant; that the house was afterwards mortgaged by the tenant as personal property, which mortgage was subsequently assigned to the demandant, who foreclosed the same, and the barn was afterwards removed; and that the tenant never paid or tendered any part of the principal and interest, nor did he pay the taxes assessed upon the land since the oral agreement was made. *Held*, that the tenant had no legal title to the premises, nor any title which he had reason to believe good, under the Gen. Sts. *c.* 134, § 19; and was not entitled to compensation for improvements made by him upon the premises. *Daggett* v. *Tracy*, 167.

See Execution, 5; Homestead; Married Woman, 3; Pleading, 6.

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